

RECEIVED

IOWA DEPARTMENT OF EDUCATION  
(Cite as 24 D o.E. App. Dec 193)

APR 02 2007

DEPARTMENT OF EDUCATION  
Bureau of CFCS

In re: Isabel L.,	)	
	)	
Douglas & Eva L., Appellants	)	Decision
	)	
v.	)	
	)	
The Waukee Community School	)	
District, and Heartland Area	)	
Education Agency 11,	)	Doc. # SE-320
	)	
Appellees	)	

The above entitled matter was heard by Administrative Law Judge Susan Etscheidt on November 28, 29, 30, December 1, 4, 5, 11, 12 13, 2006 and January 9, 2007 in Des Moines, Iowa. The hearing was held pursuant to Section 256B.6, Code of Iowa and 20 U.S.C. § 1415, and was conducted pursuant to 34 C.F.R. Part 300 and Chapter 281-41, Iowa Administrative Code (I.A.C.). The Appellants were present and represented by Curt L. Sytsma, Legal Director for The Legal Center for Special Education. Appellees from the Waukee Community School District (WCSD) were represented by Ron Peeler and Sue L. Seitz represented Heartland Area Education Agency (AEA)11. The hearing was not open to the public at the request of the Appellants.

Procedural History

On August 21, 2006, the Appellants requested a due process hearing. Two issues were identified:

1. The WCSD and Heartland AEA had violated the Individuals with Disabilities Education Act (IDEA) by failing to provide an education to Isabel L. in the least restrictive appropriate environment. The Appellants claimed several substantive and procedural reasons for the alleged violation: a) the Appellees failed to demonstrate that a satisfactory education could not be obtained in a less restrictive environment (LRE) through the use of supplemental aids and services, including more appropriate behavioral interventions; b) the Appellees failed to give serious consideration to less restrictive placements for Isabel and repeatedly failed to include general education teachers during that part of Individualized Education Program (IEP) team meetings that addressed the placement issue; and c) the Appellees placed Isabel in a more restrictive environment without giving the Appellants detailed prior written notice mandated by the IDEA.

2. The WCSD and Heartland AEA implemented seclusionary time-out and other intrusive behavioral interventions with Isabel that are inconsistent with substantive and procedural rights under the IDEA. The Appellants claimed several reasons for the alleged violation: a) the Appellees implemented intrusive behavioral interventions that were not consistent with the provision of her IEP; b) the Appellees implemented intrusive behavioral interventions that were excessive in length and otherwise inconsistent with

Isabel's individual educational needs; c) the Appellees implemented intrusive behavioral interventions that were not supported by an adequately documented functional behavioral analysis that was consistent with available information regarding the child's disabilities and educational needs; d) the Appellees implemented intrusive behavioral interventions that were not consistent with the provision of the positive behavioral supports mandated by the IDEA; e) the Appellees implemented intrusive behavioral interventions without providing the written prior notice mandated by the IDEA; and f) the Appellees violated the provisions of the IDEA mandating a partnership with parents by providing false and/or misleading and/or materially incomplete information to the Appellants regarding the use of intrusive behavioral interventions. The Appellants requested declaratory and compensatory relief.

On August 25, 2006, a resolution session was held, but no agreement was reached. On August 31, 2006, the Appellees filed a response to the request for a due process hearing as required by 20 U.S.C. § 1415(c)(2)(b), denying each and every allegation pertaining to both issues. They asserted that the Appellants had the burden of proving the failure to provide Isabel a free, appropriate public education (FAPE) in the LRE. They also confirmed the requirement of IDEA exhaustion prior to filing action under additional laws and stated that since the Appellants did not reject a proposal of the District, no additional prior written notice was required.

A pre-hearing conference call was held September 14, 2006 to clarify the issues for the hearing. In addition to Mr. Sytsma, Director of Student Services for WCSO, Roxanne Cumings, AEA representative Kathy Allison, Ms. Seitz, and Mr. Peeler participated. Mediator Greg Buntz was included in the conference call to offer additional opportunities for resolution of issues. By agreement of the parties, dates for the hearing were scheduled for November 28, 29, 30, December 1, 4, 5, 11, 12, and 13, 2006 to provide adequate preparation for the hearing. By agreement of the parties, a joint submission of documents was to be forwarded on November 20, 2006, including a list of exhibits and anticipated witnesses. The Appellees' Record was submitted, pages numbered 1 – 2241. The Appellants' Record was submitted, numbered 3000 – 5000. Mr. Sytsma confirmed that he was not requesting an additional copy of the parental rights brochure, as required under 34 C.F.R. § 300.504. On September 14, 2006, the attorney for the Appellants filed a request for guidance regarding the procedures governing the use of "behavioral literature and other academic articles" in the due process hearing. The following guidance was provided on October 3, 2006:

As evidence, the articles must be introduced into the record. The articles may be challenged by opposing counsel. Witnesses may provide testimony pertaining to the articles, and may be cross-examined by opposing counsel. The Administrative Law Judge may take official notice of literature or an article of credible status: Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decision or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced

unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts [Iowa Code § 17A.14(4)(2005)]. The credibility of an article or literature may be ascertained by the consideration of several factors including, but not limited to, the publisher or source journal, the credentials of the author(s), the methodological rigor, or citation indexing.

On November 20, 2006, Mary M. Richard entered her appearance as co-counsel for the Appellants. On December 13, 2006, the parties agreed to schedule an additional day of hearing for December 20, 2006. The evening before December 20, a witness scheduled to testify was notified of a death in her family. In a conference call held December 20, 2006, the parties agreed to reconvene the hearing on January 9, 2007. At the close of the hearing on January 9, 2007, the parties agreed to the following briefing schedule: Appellants' Brief postmarked on or before January 31, 2007; Appellees Brief postmarked on or before February 20, 2007; and Appellants' Reply Brief postmarked on or before February 28, 2007. On January 11, 2007, the Appellants filed a request for continuance to accommodate the briefing schedule established with full consent of all parties. No resistance to the motion was offered, and the matter was continued to March 30, 2007.

#### Rulings on Motions

On November 21, 2006, the counsel for the Appellees entered a motion to strike portions of the Appellants' designation of exhibits, stating that "observations" included in the Appellants filing of the Designation of Exhibits were misleading. The statements of concern were that "Appellees declined to share" research related to the challenged behavioral interventions. The Appellees moved to strike the final three sentences of the second paragraph of the Designation, beginning with the word "Second..." through the end of the paragraph. The motion was granted January 9, 2007, based on the undersigned ALJ's understanding of the arrangements pertaining to the exchange of documents and course of communication prior to the commencement of the hearing.

#### Findings of Fact

Isabel L. was born July 31, 1996 and currently resides with her parents, Douglas and Eva L., and sister, Victoria, in Urbandale, Iowa. Prior to the summer of 2004, Isabel and her family resided within the Douglas County School District in Castle Rock, Colorado. Isabel was referred to the Child Development Unit of Children's Hospital in Denver, Colorado on 12/13/2001 for a cognitive and emotional assessment. The report noted Isabel's difficulty with aggression since age 2 ½ which had continued through the kindergarten year. The psychologist administering the assessment recommended that a "clear behavior plan" should be implemented and timeout used for aggressive behavior [Appellants' Record at 3558-3559].

IEPs were developed for Isabel for the 2002-2004 school years at Buffalo Ridge Elementary in Castle Rock, Colorado. Isabel was identified as a student with multiple disabilities and cognitive impairment. Isabel's academic development was reported as very delayed and her communication skills were significantly below average. Goals for the 2002-2003 IEP were written for communication and language, reading, math, and

social interaction [Appellants' Record at 3082-3150]. Although the need for a behavior plan was identified on the 3/5/03 IEP, no copy of that plan was in the record.

The IEP developed for Isabel on May 5, 2004 prior to the family's move to Iowa identified significant social and emotional needs: "Isabel's inability to interact socially, and regulate her emotions can result in classroom disruption and/or removal from class (loss of instructional time)" [Appellants' Record at 3048]. A predictable daily routine, social skills development, peer relationships, and strategies for self-regulation were recommended. Goals were written for language arts, math, and peer interactions. A Behavior Intervention Plan identified numerous "Concerning Behaviors" including talking to self or inanimate objects, living in an "alternate world," difficulty relating to people, isolating self from peers, aggressive with extreme emotions, shutting down, and perseverating. Behavioral goals were developed for acceptable touch, tolerance of flexibility in routines, and coping with social demands. Several environmental and preventative strategies were included, as well as teaching strategies [Appellees' Record at 22 - 65a; Appellants' Record at 3069-3073]. Isabel was to be provided a one-to-one paraprofessional and also receive speech and occupational therapy services. Isabel's teacher at Buffalo Ridge, Ms. Ann Folan, testified by phone during the hearing that she provided direct instruction to Isabel when pulled-out of general education to the special education room, and also team taught with the regular class teachers in Isabel's general education class. In the morning, Ms. Folan pulled Isabel from general education to work on language and sensory activities for one-half hour each day, and worked one hour in the afternoon in math and additional sensory activities. She accompanied Isabel to general education for one hour each day, and provided social skill instruction for one hour each Friday. Two 10-15 minute sensory breaks were planned each day, and Isabel could ask for or be told to take a sensory break throughout the day [Transcript at 81-82]. Following these breaks, Isabel would return to either the special education or general education classroom. Ms. Folan described the sensory activities as necessary for Isabel [Transcript at 79], but that she was not familiar with the sensory integration research.<sup>1</sup> A timeout chair was used occasionally for silly or disruptive behavior, lasting three to five minutes. Ms. Folan testified that Isabel was never forced to timeout and was never held or restrained [Transcript at 94]. The Appellants gave permission for Isabel's Colorado school records to be forwarded to the Waukee Community School District [Appellees' Record at 18a-65a].

Following the family's move to Iowa, representatives from the Waukee Community School District met with the Appellants prior to the commencement of the school year to discuss Isabel's special education program. Although a second grader at the time of her departure from Colorado, the Appellants requested that Isabel repeat second grade. The Appellants met with special education teachers Patti Brinkmeyer and Heidi Tow, who shared a functional skills classroom at Waukee Elementary School with separate rosters of students. Isabel was to attend Heidi Tow's functional skills classroom, a decision made by Ms. Tow and Ms. Brinkmeyer, based on an examination of the forwarded Colorado IEP [Transcript at 1179; 1183][testimony of Ann Hilliard]. The Waukee teachers described to the Appellants what would be "typical" inclusion for the functional skills classroom, involving Daily Oral Language (DOL) and Daily Oral Math (DOM) in the

general education classroom, attending a science-discovery class, specials including art, music, PE, and library, lunch, and recess [Transcript at 1255-56][Testimony of Patti Brinkmeyer]. Isabel attended Ms. Tow's class for five days, after which time the two teachers talked with representatives from the AEA and decided that a more advanced program for children with higher academic skills was needed. Isabel was then transferred to Miranda Krohn's functional skills classroom. Ms. Krohn testified that she was following the Colorado IEP at that time and that the decision to place Isabel in her room was based on the Colorado IEP and phone contact with Isabel's teacher in Colorado [Transcript at 933-943]. Mrs. L. testified that she assumed Isabel would be integrated in a manner similar to her program in Colorado [Transcript at 677-678]. For the first two weeks of school, Isabel received services based on the Colorado IEP.

An interim IEP was developed for Isabel on 9/15/2004, pending the results of an evaluation of eligibility. In attendance was Mrs. L., LEA representative Randy Nemitz, general education teacher Brandon Schrauth, special education teacher Miranda Krohn, school psychologist Ann Hilliard, speech language pathologist Kari Turnis and occupational therapist Anne Elwood. The document noted that Mrs. L. had been concerned about behavior in Isabel's previous school in Colorado and that a behavior support plan might be needed. The team had also determined that a behavior plan was not necessary, due to Isabel's success so far at school. Goals were identified for reading, language, mathematics, written expression, speech, physical health, daily living skills, and social interactions. The social interaction goal was for Isabel to maintain eye contact, personal space, and physical presence in interactions as measured throughout the day on a 33-point rubric. Following directions and body basics were also monitored with this smiley face/sad face rubric. The description of special education services for the social behavior specified that "Isabel needs clear expectations, repetitive practice, small group and large group instruction, and verbal cueing and prompting to complete skills." Teacher Miranda Krohn testified that although a behavior plan was not developed, many of the behavioral supports used in Colorado were included in the IEP as accommodations [Transcript at 939-944]. The accommodations included "simple directions, visual cues, frequent checks for understanding, predictable routine, new materials presented visually, social stories/scripting, rehearsal for new situations, close supervision during unstructured time and encouragement and praise." Isabel was to be removed from the general education setting 61% of the time, since Isabel was "significantly below instructional level according to second grade standards and benchmarks" and needed small group instruction to make adequate progress [Appellants' Record at 83 - 129]. Written prior notice of these decisions was provided to the Appellants including the proposal to write an interim IEP until a reevaluation could be completed to determine Isabel's eligibility. Another option for consideration was the acceptance of the Colorado IEP as written, but that option was rejected because the information did not meet the standards for observable, measurable goals [Appellees' Record at 126].

During that fall, Isabel experienced significant behavioral difficulties. The data and anecdotal notes from the rubrics for social interaction revealed Isabel's aggression and non-compliance were increasing [Appellees' Record at 238-294]. A chart with weekly median scores for the rubric similarly displayed an increase in inappropriate behavior

[Appellees' Record at 117]. Several notations concerning pushing, difficulty keeping hands to self, hitting, yelling or screaming "no" and refusing to complete tasks were recorded in September and October. At the end of October and throughout November, numerous behavioral problems were recorded. Yelling, screaming, task refusal, and inappropriate teacher and peer interaction resulted in increased use of isolation and sensory breaks [Appellees' Record at 268 – 289]. Entries in the Home-School notebook confirmed this behavioral trend [Appellants' Record at 3178]. Mrs. L wrote "we have not seen prolonged yelling and screaming" before and suggested that an "obstacle course" with visual cues and "heavy activities" might be effective [Appellants' Record at 3179]. Isabel's teacher moved her desk to limit distractions, and Isabel spent much of her day at an isolated desk on November 23 [Appellants' Record at 3091], in a separate room on December 1 and 2 for "melt downs" [Appellants' Record at 3193, 3194], and received increasing "one-to-one" instruction [Appellants' Record at 3195]. Teacher Miranda Krohn testified that Isabel missed some of her general education integration due to the behavior problems in the special education room [Transcript at 1001-02]. In response to behavioral difficulties in the fall of 2004, Isabel frequently received one-to-one instruction in an isolated setting.

A functional behavioral assessment (FBA)<sup>2</sup> was conducted over three days in late October and early November. All observations were conducted in Isabel's special education classroom, and no data from the regular education teacher, special education teacher or parents are reported. Ann Hilliard testified that she was exploring possible functions for Isabel's non-compliance and aggression with peers, and observed prompts needed to complete one 20-minute work task (median = 6), maintaining personal space with peers (median = 71%), and following teacher directions (median = 50%). Ms. Hilliard concluded that non-compliance was maintained by an escape function and failure to maintain personal space with peers was maintained by an attention function [Appellees' Record at 140r – 140y]. Mr. L. testified that he was neither involved nor aware of the FBA [Transcript at 179-181].

A full and individual evaluation of eligibility<sup>3</sup> was conducted by Heartland AEA and reported on 11/8/2004. Isabel's educational progress, performance discrepancy, and instructional need were assessed for reading, math, written language, behavior, communication and occupational therapy. The section of the report addressing behavior noted that Isabel had difficulties with aggression, compliance, and redirection from adults. Discrepancy data indicated that Isabel followed directions 63% according to progress monitoring data and 75% according to classroom observations. Data on physical aggression indicated Isabel was not aggressive 63% and 71% according to progress monitoring and observational data respectively. Data also revealed that Isabel needed 6 prompts to complete a 20-minute independent work task. Many of the finalized recommendations appeared in the 2004-2005 IEP developed on 11/22/2004 [Appellees' Record at 130-140]. Consent was secured from the Appellants for the evaluation [Appellees' Record at 82], however

#### The 11/22/2004 IEP and Behavior Plan

In attendance at the November 11, 2004 meeting were Mr. and Mrs. L., Randy Nemitz as the LEA representative, special education teacher Miranda Krohn, school psychologist Ann Hilliard, speech pathologist Kari Turnis, school social worker Jennifer Downs, and administrator Peg Erke, in lieu of Isabel's general education teacher (Appellants Record at 142). Based on the full and individual evaluation, the IEP developed indicated that Isabel would be removed from general education 70.71% of the day and served in a "Level 3" special education program: "Isabel is significantly below instructional level according to second grade standards and benchmarks. She needs small group instruction in all academic areas, behavior, communication and fine motor skills to make adequate progress" [Appellees' Record at 142-143]. Ms. Hilliard testified that based on Isabel's performance data, she would not be able to meet the standards and benchmarks for second grade in reading, math or written expression, and that Isabel was "so far behind" second grade peers that modification of curriculum to facilitate inclusion was not possible. Ms. Hilliard testified that "to be considered integration, you need to have at least two general education peers working in that same group with that student" on instruction open to general education peers [Transcript at 1095-96]. Ms. Krohn testified that Isabel needed the prerequisites to the standards and benchmarks for reading, writing and written language and, therefore, could not meaningfully participate in the general education setting [Transcript at 949-950]. Ms. Brinkmeyer similarly testified that Isabel would have to be in a group that has 50% non-special education students to "count" as integration [Transcript at 1351-53]. Written prior notice provided to the Appellants on 11/22/2004 indicated that level 1 or 2 services had been rejected because of Isabel's need for a functional skills curriculum and a highly structured classroom environment [Appellees' Record at 184].

The IEP indicated that Isabel's parents were "really concerned about her behavior." In addition to reading, writing, communication, and math goals, a peer interaction goal was established and a new social/behavioral rubric was developed to monitor the goal. Baseline data from the FBA were reported as 43/70 on the new monitoring chart "Isabel's Peer Interaction Chart," and an annual goal was set for Isabel to score 70/70 on 3 consecutive days" [Appellees' Record at 144, 151]. The rubric "Isabel's Peer Interaction Chart" included four behaviors to be observed in both the general education and special education environments: Uses inappropriate touch to interact with peers, uses words to interact with peers with adult verbal prompt, uses words to interact with peers with visual prompts, and independently uses words to interact with peers. The peer interaction data were weighted so that scores for independent, appropriate social interactions resulted in higher scores out of a possible 70. However, Ann Hilliard testified that the "inappropriate touch" was a "typo" and should have been "appropriate touch," in order to calculate an appropriate score [Transcript at 1197]. Yet teacher Patti Brinkmeyer testified that she collected data on the "inappropriate touch" [Transcript at 1486], which would have resulted in a high rubric score even when Isabel was aggressive with peers. For compliance, baseline data from the FBA were reported, but no goals were established for Isabel's compliance and no methods were developed to monitor compliance [Transcript at 1200-01][Testimony of Ann Hilliard].

The Behavioral Support Plan (BSP) developed for the 2004-2005 school year is also critical to the issues of this due process hearing. Those responsible for its development and implementation testified at length, experts opined about the appropriateness of the plan, research concerning the efficacy of the strategies was offered into evidence, and numerous documents related to this plan have been included in the record. Two target behaviors were identified: touching peers in ways that may be harmful, and noncompliance when given a task or demand by an adult. The BSP developed on 11/22/2004 included the following five components. It is important to note that the "break time" antecedent strategy<sup>4</sup> and the "hand-over-hand"<sup>5</sup> reduction-oriented strategies are the controversial and contested components of this plan.

Antecedent/Setting Event Strategies: "Use of a picture schedule to help with transition from activity to activity; use visual cues to prompt behavior change and minimize attention for inappropriate behavior; use social stories to review social situations and appropriate behaviors prior to integration, *break time activity of listening center, jumping on trampoline, or walk around the building to calm her down when Isabel becomes non-compliant or will not keep her hands to herself*; on the bus she needs to be seated near the driver for close supervision; she needs to listen to a CD using head phones to keep her calm; coach peers to praise Isabel for using her words to interact with them; adult supervision during all integrated activities to monitor inappropriate behavior, ensure safety of peers, and provide immediate reinforcement for using words to interact with peers; keep work tasks short and provide both verbal and tangible reinforcement for completed work tasks; use of a work folder for independent work tasks; Isabel will be reinforced with a nickel if she completes the task without teacher prompts; check for understanding when given directions and use visual cues for multi-step directions."

Alternative Skills to be Taught: "Small group social skills instruction to teach compliance behaviors and how to interact with peers; social stories."

Skill Building Replacement Strategies: "Immediate praise and tangible reinforcement or preferred activity after she completes a task, demand, or interacts appropriately with peers."

Reduction Oriented Consequence Strategies: "Withhold praise and attention and tangible reinforcement or preferred activity when Isabel does not complete a task or demand or use good peer interaction skills; *Use repetitive task or hand over hand if Isabel refuses to complete a task or demand and a break activity does not change her behavior.*

Decision-Making Plan: "five data points are to be taken prior to a revision of intervention" [Appellees' Record at 142-187, emphasis added].

Dr. Vincent J. Carbone<sup>6</sup> was offered by the Appellants as an expert witness to testify about the behavior plan. He stated that interventions for target behaviors must correspond to the functions identified in the functional behavior assessment. He testified that providing Isabel a break of listening to a CD, jumping on trampoline, or walking around building when she becomes non-compliant was a consequence that would reinforce the problem behavior. Since Isabel's non-compliance was maintained by an escape function, providing a break after she refuses a task or directive would reinforce the problem behavior. While offering a break may temporarily calm Isabel, the long-term outcome would be to increase problem behavior through negative reinforcement. Dr. Carbone suggested that both the non-compliance which is maintained by an escape function and



the aggression which is maintained by an attention function should have separate antecedents and consequences planned. Non-contingent attention strategies, such as saying "You've been working hard; let's take a break" or antecedents to prevent the need for escaping the task or demand, such as errorless teaching, interspersal of easy demands and choices of materials/tasks, would be examples of antecedent planned with the specific escape functions in mind. In the Alternative Skills and Skill Building section, Dr. Carbone noted that the strategies to provide praise or tangible reinforcement were consequences rather than teaching a "functionally equivalent" response as an alternative appropriate behavior that will achieve the same function as the problem behavior. For example, teaching Isabel to ask for a break will permit an acceptable "escape" from a task, and teaching her how to play with peers will provide the attention she was seeking. Without a focus on the functionally equivalent alternatives, he testified that the plan was "doomed to failure." In the Consequence section, Mr. Carbone opined that both reinforcing consequences and extinction consequences should be included. By not permitting Isabel to escape a task and teaching peers and teachers to ignore inappropriate aggression, problem behavior would be decreased. Withholding praise and attention when she does not complete a task would be contraindicated, since the non-compliance is maintained by an escape function not an attention function. Further, the hand-over-hand "contingent effort" strategy was a highly intrusive punishment that provided Isabel attention (albeit negative) for both refusal or aggression. Dr. Carbone concluded that since the antecedent and replacement components of the behavior plan were limited, the need to use the reductive, hand-over-hand strategies would increase [Transcript at 800-927].

Dr. Keith Allen<sup>7</sup> was offered by the Appellees as an expert witness to testify about the adequacy of the behavior plan and the functional behavioral assessment conducted to inform that plan. He distinguished functional behavioral analysis procedures involving the experimental manipulation of variables hypothesized to influence targeted behavior with functional behavioral assessment procedures involving the development of hypotheses based on observation of environmental events contiguous with target behavior. He noted the difficulty and challenge of conducting functional behavioral assessments in school settings due to the inability to control variables affecting behavior. He concluded that Ann Hilliard's functional behavioral assessment was acceptable and concurred with the attention and escape hypotheses. Dr. Allen was impressed with Isabel's behavior support plan. Dr. Allen testified that the appropriateness of the "break" strategy would depend on how it was implemented. If breaks were arranged and provided contingent upon Isabel's task completion, they would serve to reinforce appropriate behavior. However, if provided contingent upon non-compliant behavior, the breaks would reinforce the inappropriate behavior which would be fortified by escape from a non-preferred task. When asked if such breaks might serve as a "temporary" escape from work when non-compliant behavior first appears, to "calm" Isabel and then later re-introduce her to the non-preferred task, Dr. Allen testified that such arrangements would generally not be advised and should be avoided. In response to the contested hand-over-hand reduction-oriented strategy, Dr. Allen testified that such interventions to extinguish escape-maintained behaviors are well-established in the research. The physical guidance prevents escape, and serves to "block" the inappropriate response. Dr. Allen stated that

the hand-over-hand must be brief, around 30 seconds to 4 minutes, and that durations in excess of that duration would limit the potential for behavior reduction. When the intervention is contraindicated and not decreasing the targeted behavior, additional functional behavioral assessment should be conducted and alternative interventions considered. He testified that physical guidance to avoid escape did not involve adults restraining, holding, or compelling action, and that guidance-induced aggression would be a serious concern. The implementation of physical guidance, or hand-over-hand assistance, with restraint as provided to Isabel would not conform with accepted practice of the intervention. Dr. Allen also testified that if the function of Isabel's aggression was attention, then following aggression with a hand-over-hand intervention designed for preventing an escape-maintained behavior would not be desirable. Dr. Allen testified that determining the appropriateness of an intervention for targeted behavior requires an analysis of data [Transcript at 1945-2065].

Ann Hilliard testified that the hand-over-hand was only to be implemented for escape-based behaviors, and to use it following peer aggression would be inconsistent with the behavioral plan [Transcript at 1223]. Barb Rankin, Coordinator of Autism and Challenging Behavior Services for Heartland, testified that the hand-over-hand "move into physical restraint" was not intended but "kind of evolved" [Transcript at 2202].

Anecdotal data indicated Isabel's behavior temporarily improved following the implementation of preventative strategies identified in the 11/22/2004 BSP. However, refusal and aggressive behavior soon escalated, as did the use of isolation and hand-over-hand procedures (Appellees' Record 290 -- 301). Following the implementation of the behavior plan, rubric data and entries in the home-school notebook confirm that both aggression towards peers and non-compliance were increasing. Ms. Krohn testified that she implemented the hand-over-hand intervention with Isabel on 11/30/2004 with assistance from her associate "Kendra holding her in chair" [Appellees' Record at 292]. She was taught the hand-over-hand procedure, which she described as a prompting hierarchy, by Heartland staff. On December 1, 2004, Isabel tore up items, and on December 2, 2004 she was removed from the classroom to work one-on-one [Appellees' Record at 296]. Ms. Krohn testified that "the behaviors were occurring more frequently, so oftentimes we would miss some of the general education activities because she wasn't able to have appropriate behavior to put into a larger group setting because she was not appropriately being successful in a small group setting at that time" [Transcript at 1001-1002]. While specific data concerning the amount of time is unavailable, Isabel's increasing non-compliance and aggression resulted in reduced integration.

A decision was made to transfer Isabel to a new program with teacher Patti Brinkmeyer on December 14, 2004. Ann Hilliard testified that the Appellants were informed of the change by the administrator, but no parental input was solicited. She described the students selected for the program as having "concerns with behavior and needed a very structured environment" [Transcript at 1230]. Ms. Brinkmeyer testified that the program provided more direct instruction with social skills with "typical" integration opportunities [Transcript at 1255]. Ms. Krohn confirmed the change was an attempt to "focus on

controlling her behaviors while focusing on her academics” [Transcript at 983-984] and testified that the functional skills team decided the change was necessary to get Isabel’s behavior under control, but that no IEP meeting was held since the change was only involved at the location of Isabel’s program [Transcript at 1006]. No documents appear in the record concerning this discussion or decision. The change in classrooms did not implicate the educational program or services described in Isabel’s IEP.

Progress monitoring data were collected for reading, math, writing, and peer interaction [Appellees’ Record at 211- 237]. Behavioral progress monitoring data specified on the IEP and shared with the Appellants indicated that “Isabel is averaging 70/70 on the rubric. She rarely touches others inappropriately” [Appellees’ Record at 172]. Yet the data from Isabel’s Peer Interaction Chart showed increasing behavioral difficulties and five applications of the of hand-over-hand interventions from December through February. Hand-over-hand procedures were recorded on 12/15/2004 involving “multiple H-O-H” and multiple “restraints” for hitting peers and later for unspecified reasons. Ms. Brinkmeyer testified that the restraints were Mandt<sup>8</sup> holds and that guidance counselor Jason Sanders was assisting with the holds on that day. Teacher Brinkmeyer explained to Mrs. L. that she had reverted to her earlier training in restraint [Appellees’ Record at 302-306]. Mrs. L. testified that she observed the final minutes of the intervention, and was shocked to find Isabel being restrained. She stated that Isabel’s eyes were glazed, she was screaming and yelling, and had urinated during the restraint [Transcript at 690-92]. Additional applications of hand-over-hand and restraint/hold were implemented on an unspecified date for unspecified reasons [Appellees’ Record at 307-308], on 1/14/2005 between 1:10 and 2:10 for unspecified reasons [Appellees’ Record at 311], and two entries into the new Break/H-O-H Documentation Log on 2/2 and 2/14 for “in personal space of others” and “refusing to choose work or break” without detailed specification of the procedures [Appellees’ Record at 312]. Ms. Brinkmeyer testified that if the hand-over-hand could not be safely implemented, Mandt holds were used [Transcript at 1447].

The Home School Notebook confirmed Isabel’s behavioral difficulties. There was no entry in the Home School Notebook concerning the 12/15/2004 hand-over-hand, or for the unspecified date, but the entry for 12/20/2004 noted “Had a good morning at 11:02, got aggressive and spitting. Took a short break and went back to work. Needed another break, but did not calm down, so did hand-over-hand” [Appellants’ Record at 3199]. The entry for 1/14/2005 was “Isabel had a rough day. She had a hard time keeping her hands to herself” [Appellants’ Record at 3204]. The entry for 2/2/2005 was that “Isabel had a pretty good day. She was a little silly, but possibly she’s not feeling her best” [Appellants’ Record at 3209] and “Isabel had a very silly day today. We did hand-over-hand coloring for about half an hour. She was able to calm down and finish out the afternoon” for 2/14/2005 [Appellants’ Record at 3210]. No data concerning restraints or holds were included in the Home-School Notebook.

In a letter to Waukee Elementary dated 12/20/2004, Mr. L. wrote that Isabel’s IEP “does not appear to be adequately addressing her behavioral needs as witnessed by a sharp downturn in her behavior over the past several months.” He requested assistance with sensory integration and greater integration and socialization opportunities in general

education. He advised that more sustained work periods be built into Isabel's schedule, that input from her Colorado school be considered, and that a greater variety of sensory breaks be included in her routine. Mr. L informed of an independent educational evaluation scheduled in Iowa City [Appellants' Record at 3585-3588]. According to testimony from Ms. Hilliard, a meeting was held around 12/20/2004 to discuss concerns and "explain" the BIP, but no notes, minutes, or e-mails concerning the meeting are included in the record.

#### Iowa City Evaluations

Isabel was seen at the Center for Disability and Development in Iowa City, Iowa on 1/26/2005 for a developmental assessment. The occupational therapy assessment, completed by Karen Younkin, recommended a sensory diet (providing sensory activities prior to or during transition activities) and a multi-sensory approach to improve visual motor and handwriting skills. The educational assessment, completed by Judy Jordan, diagnosed mild mental retardation and recommended that assistance with behavioral planning via the Iowa Department of Education be considered if "requested by the school staff and Isabel's parents" [Appellants' Records at 3006]. The psychological assessment, conducted by Malinda Allen, noted adaptive deficits and recommended picture schedules to assist transitioning, social skills training including social stories, attention strategies, and monitoring of self-injurious, disruptive, and aggressive behaviors. The speech assessment, completed by Nancy Almasi, recommended a "maximum amount" of speech services and accommodations [Appellants' Record at 3001-3009]. The evaluation results were shared with the Appellees on 5/30/2005.

From 2/15/2005 through the remainder of the semester, the home-school notebook records "great" days for Isabel [2/15, 2/16, 3/2, 3/3, 3/4, 3/8, 3/16, 3/18/ 3/31, 4/6, 4/21, 5/17 Appellant's Record]. There are also some references to taking breaks [for example, see Appellants' Record at 3231, 3234] and to "coloring" [Appellants' Record at 3236]. Instructions to staff for Isabel's breaks, dated 4/2005, directed "at any time during break she becomes aggressive toward staff, students, or self, she needs to come back to the room or go to the conference room by (general education teacher) Oldfield's classroom (call Patti if need assistance) to do hand-over-hand coloring." The directive for hand-over-hand indicated that staff should sit behind Isabel and assist her if necessary, until she says "I'm ready to color by myself." After completing the coloring, a social story about the arbitrary task is read. For timeout, three prompts to work or take a break are provided, followed by a choice between break and time-out. The door was to remain open if Isabel was calm [Appellees' Record at 929-931].

In an e-mail dated 5/3/2005, Mr. L. requested a meeting to discuss the Iowa City evaluation results. It was agreed that since Isabel would be transferring to the new Walnut Hills school the following year, that an August meeting would be best. In a May 30, 2005 letter to special educator Patti Brinkmeyer, the Appellants summarized the recommendations from the Iowa City report, including a sensory diet program, a revision of the behavior management plan to reduce hand-over-hand intervention and increase positive strategies including social skills training. In this May letter, the Appellants also added their own suggestions, including a special education placement with same-aged

peer with integration into general education as possible, a time on task goal, homework, and adaptive technology. This letter also indicated the Appellants were "pleased with the progress she [Isabel] has made this past semester and you are to be commended." The Appellants requested a meeting to discuss the recommendations [Appellees' Record at 323-325]. Ms. Brinkmeyer testified that she was not aware of parental concerns and felt criticized as Isabel's teacher [Transcript at 1525]. School psychologist Monica McKeivitt testified that she, Patti Brinkmeyer, Ann Hilliard, associate Kendra Sweeney, and the Appellants met on 8/19/2005 to discuss the Iowa City evaluation and Isabel's program. She recalled that the parents requested more integration in the morning opening in general education and a change in Isabel's locker to facilitate transitions [Transcript at 1675-1678]. Patti Brinkmeyer testified that the IEP team discussed continuing to include Isabel for those activities in which she could actively participate and why greater program modifications were not recommended: "it would be impossible for me to modify everything for her" [Transcript at 1352-53]. Mr. L. testified that during the meeting of 8/19/2005, the group also discussed a "customization" of the 3<sup>rd</sup> grade curriculum by Ms. Brinkmeyer and using 3<sup>rd</sup> grade students as peer support. He also testified that the general education teacher was not in attendance [Transcript at 225-226]. No notice of the meeting was documented.

Isabel's behavior problems were clearly evident throughout the fall of 2005. The use of hand-over-hand became increasingly difficult. The use of a time-out<sup>9</sup> procedure involving body basics and task compliance<sup>10</sup> began around this time, although the use of this intervention was not included in a behavior support plan until 11/18/2005. In a follow-up visit to Iowa City on 9/9/2005, Isabel's father reported that she had become more aggressive but that "the aggression has been improving as they institute a modified version of time-out. However, she gets "berserk" if things are not done according to plan" [Appellants' Record at 3010]. The evaluation, conducted by Nancy Beyer, M.D., concluded that a diagnosis of pervasive developmental disorder, not otherwise specified (PDD-NOS) was indicated. The recommended treatment plan was to optimize social and academic functioning, and to decrease aggression through behavior modification. The speech evaluation, conducted by Becky Vilda, supported the "excellent augmentation activities that are listed on the behavioral support plan" [Appellants' Record at 3016] and recommended additional social skills training programs. Mr. L. shared the PDD-NOS diagnosis with teacher Patti Brinkmeyer in e-mail correspondence dated 9/19/2005. School Psychologist Monica McKeivitt testified that she invited Heartland Autism Resource Team specialist John Drinnin to observe Isabel following the PDD-NOS diagnosis [Transcript at 1691].

On 9/20/2005, a hand-over-hand intervention was reported: "Patti has Isabel in a one arm hold" and the associate "attempting to put color in hand." Ms. Brinkmeyer later restrained Isabel at her waist. The struggle which followed described Isabel hitting, screaming throwing, pushing, grabbing, and "fighting to get lose" from 2:50 until 3:44, when Mrs. L. entered and used a hold with Isabel [Appellees' Record at 440-445]. Ms. Brinkmeyer testified that she implemented the hold according to her Mandt training, which included adjusting holds, releasing, and cross talking.<sup>11</sup>

On 9/26/2005, a time-out with body basics and the arbitrary socks compliance task was attempted from 2:57 until 3:22 in the conference room, and similarly described hitting, throwing, scratching and knocking over the mat surrounding her [Appellees' Record at 446]. Ms. Brinkmeyer testified that socks, not coloring, was used for the hand-over-hand compliance task since they would not be harmful if thrown. On 9/27/2005, the mat-surrounding, physical restraining, body basics followed by compliance task procedure was again used from 2:10 – 2:40, with Ms. Brinkmeyer “holding arms” and Isabel kicking, throwing chairs, and jumping off desks [Appellees' Record at 447]. Ms. Brinkmeyer testified that the mats were used to block the view of other students and that holds were used since much of Isabel's aggression was directed toward the teachers and associates. Associate Kendra Sweeny testified that the use of surrounding mats required several people to implement, but was done to provide safety to Isabel and staff [Transcript at 1651]. On 9/27/2005 Mr. L. informed Ms. Brinkmeyer that in June and July Isabel began “really acting out” and tried “holding her down into a timeout” which “actually worked.” Ms. Brinkmeyer replied on 9/28/2005 that “we could put the holds that you do with her into her behavior plan” since she was concerned about her safety and the safety of others: “She is so strong, and she was making very unsafe choices today while we were waiting for her to calm down – trying to grab at outlets, jumping off of tables, trying to rip a phone out of the wall, etc” [Appellees' Record at 668].

On 10/4/2005 Isabel was “not taking a break safely” and hit an associate. Isabel was escorted to a timeout room at 9:30, by an associate using a two arm hold. Mrs. L. joined them and escorted Isabel to the calming room holding her hand. Mrs. L. used a hold with Isabel, who eventually calmed at 9:50. That same day, the time-out with body basics and compliance task was again employed from 1:50 to 3:15. Isabel was described as screaming, hitting and yelling. She also asked to change her pants, since she had urinated in them. A notation on the time-out record indicated that Isabel was directed to “first work then we can change.” When returned to the classroom, Isabel refused to sit down and was told “you chose more time-out.” More aggression was noted, and more references to changing pants. The timeout ended one hour and 25 minutes later [Appellees' Record at 451-465].

On 10/5/2005, Isabel was first escorted by Kendra in a two hand hold to the calming room, where she urinated. The time-out, body basic, compliance task intervention took from 9:50 to 11:00 [Appellees' Record at 466-47]. Later that day, a hand-over-hand intervention was attempted from 12:05 – 12:46 [Appellees' Record at 562b-f] and again on 10/7/2005 from 1:54-2:19. Monica McKevitt sent a guidance document from the Department of Education entitled *Using Timeout in an Effective and Ethical Manner*<sup>12</sup> on 10/6/2005 and advised to “hold off” on having the parents sign a consent form until she had more information about timeout. She also advised “we will probably also want to look at her data on which method of consequence (hand-over-hand or timeout) is causing her fewer escalations and quicker return to work” [Appellants' Record at 673].

On 11/2/2005 from 12:10 to 12:18 the hand-over-hand intervention involved Ms. Brinkmeyer holding Isabel at her waist, an associate holding Isabel's legs, and teacher Heidi Tow holding Isabel's hand to color [Appellees' Record at 476]. On 11/3/2005, the

hand-over-hand was attempted from 9:52 to 10:00 with associate Kendra Sweeney holding one arm with another arm on top of Isabel's leg while Ms. Brinkmeyer performing the hand-over-hand. Isabel offered several times to color by herself [Appellees' Record at 478-479]. On 11/10/2005, an extensive application of the hand-over-hand intervention occurred from 10:22-11:45 and again from 3:15-3:52. Both teachers and the associate switched responsibilities of restraint and hand-over-hand coloring throughout the session [Appellees' Record at 480-487]. Similar hand-over-hand procedures, with Isabel insisting throughout that she could color by herself, were recorded for 11/15/2005 from 10:53-11:52, 11/22/2005 from 10:26 to 10:58, 11:01-12:05, and from 1:15 to 3:40, 11/23 from 10:15-11:45, with the three adults holding and providing hand-over-hand coloring [Appellees' Record at 498-502]. Mrs. L. observed the interventions on 9/20/05, 10/4/05, and 11/10/05 [School Record at 444;415;488]. The Home School Notebook confirmed the behavioral escalation and increased use of timeout and hand-over-hand procedures.

On 11/15/2005, Ms. Brinkmeyer asked school psychologist Monica McKeivitt about using a hold with Isabel, explaining "I really think that we should do the hold that they do at home. It is working for them, it would not take an army of people, and then we would be consistent. Plus - we would not need to MOVE her - just clear the room....when I spoke to mom, she is very comfortable with us doing the same hold that they do." Monica McKeivitt then consulted with Student Services Director Roxanne Cumings who advised that the hold option was discussed with AEA administration. Regional coordinator Kathy Pitzen advised on 11/16/2005 that: "the consensus was no" and that "Mandt does not support the hold as ....described." Ms. McKeivitt shared the information with Ms. Brinkmeyer on 11/17/2005 and proposed "restricting her integration and making her earn it back" and "having her receive all of her instruction in the calming room and just taking the materials out when she escalates. This could occur in the calming room or in your conference room" [Appellees' Record at 686-693]. Ms. McKeivitt testified that she was not comfortable with the hand-over-hand [Appellees' Record 685-86] and since a "hold" could not be written into the BIP, the proposal was to pull Isabel out of integration until her behaviors were under control and providing Isabel's instruction in her "office" so that timeout, if necessary, could be implemented in that setting [Transcript at 1882-88].

#### Reevaluation/IEP Developed 11/18/2005

The persons participating in this review included the Appellants, principal Deb Snider, special education teacher Patti Brinkmeyer, school psychologist Monica McKeivitt, and occupational therapist Heidi DiLocker. Speech language pathologist Kari Turnis was excused from the meeting but provided written input. Mrs. L. testified that general education teacher Scott Oldfield left before the proposed plan was presented [Transcript at 712]. The Present Level of Academic Achievement and Function Performance section of the IEP includes data concerning Isabel's needs: "Isabel requires 1:1 or small group instruction in all areas in order to learn and maintain skills. She requires frequent reinforcement for completing work tasks and a quiet break area available to her when she is frustrated. These are not available in the general education setting." This IEP indicated that Isabel would be removed from general education 55% of the school day. Goal areas included letter formation, reading, mathematics, and social behavior. The social goal was

to decrease Isabel's non-compliance and disruptive behaviors from 120 to 30 minutes per week over 3 consecutive data collection days. School psychologist Monica McKeivitt testified that she was unaware of the scoring difficulties from the peer interaction rubric [Transcript at 1838] and no goals or monitoring methods were developed for Isabel's aggression. Although Isabel's behavioral difficulties involved compliance with adult directives [Transcript at 1865], no methods for progress monitoring Isabel's compliance were developed.

The description of services included several accommodations. For social/behavior, the IEP proposed that "Isabel needs direct, 1:1 and small group social skills instruction embedded throughout her school day. She requires modeling, verbal prompts, visual cues, teaching interactions, social stories, and positive behavior support. Isabel will have an adult with her during all parts of the school day to assist with transitions and provide continuous positive reinforcement" [Appellants' Record at 3497].

#### The Behavioral Support Plan for the 11/18/2005 IEP

The plan was based on a functional assessment conducted 11/14/2005 and a summary of the assessment was provided at the IEP meeting [Appellees' Record at 427a & 1136]. The behavioral support plan included several modifications from the previous BSP. The Problem Behavior was described as non-compliance "when given a task or a demand by an adult in the school setting," hypothesized as initial escape maintained by adult attention. Peer aggression was not identified as a target behavior. The planned Replacement Behavior was to "teach Isabel how to appropriately take break from tasks and how to appropriately gain attention by using words." In the Antecedent/Setting Events Strategies, several previous strategies were omitted, including peer coaching. Monica McKeivitt testified that this strategy was removed since it had not been implemented to date [Transcript at 1872]. New strategies included small motor break time activities (listening to CD's, bubbles, doll or animal from home), picture choices for each work task she has to complete during the day, use of a timer to alternate work tasks and breaks. Isabel could choose independent work rather than group work and was to be provided heavy objects to carry to her work area. The Alternative Skills omitted group social skill instruction, replaced with integrated social skills instruction to teach Isabel how to ask for help and to teach Isabel to take a break when she needs one. For days that Isabel was not participating in specials, she was to practice appropriate behavior in the special classroom with an adult at a time when no children are present. In the Skill Building Reinforcement Strategies section, use of a preferred activity (free choice time) was to be provided after she completed a work session, followed directions, or interacted appropriately with peers as well as provided the opportunity to earn stickers throughout the day if she did not have a time-out during that time period. The stickers were to be turned in for activities or tangibles. The most significant changes were to the Reduction Oriented Consequence Strategies section. Withholding praise, attention, reinforcement and preferred activities was removed as was the hand-over-hand strategy. The most significant change, and without dispute the most controversial, was the timeout, body basics, and arbitrary compliance intervention:

*Timer stops during work sessions when Isabel is not working to complete tasks and using appropriate interaction skills; Isabel will have a choice between work and break. She will*



*get three prompts to take a break. If she does not choose she will have a time-out. She will have three chances to choose work or break before the timeout; any aggressive acts will result in immediate time-out; timeout will occur in the time-out room. The door to the timeout room will be kept open as long as Isabel is not escalated. When Isabel escalates, the adult will remove any materials in the room and shut the door. Isabel will be prompted once per minute by opening the door and telling her that she needs to sit in body basics; Isabel will be expected to sit in body basics for five minutes; Isabel will do an arbitrary compliance task prior to going back to the initial task (ex: pull apart socks). Compliance tasks will be done in bean bag chair; After the compliance task, Isabel will be expected to complete the original task; Isabel will be instructed in a 1:1 setting (away from other students) until she is able to work through each portion of the day. If Isabel is not compliant or is aggressive during a segment of her day, she will work in the 1:1 teaching room during that period on the next day to practice appropriate behavior. Isabel will start the program by continuing to go to her general education classroom in the morning and her specials; If Isabel is in a setting with other students and escalates, she will return to the 1:1 setting for instruction the next day so she can practice appropriate behaviors including how to take a break; If Isabel is able to work to the timeout room independently, the door will not need to be shut.*

Decision Making Plan: A graph was planned to summarize data, with five data points required prior to a decision to revise the intervention (School Record at 3512 – 3514, emphasis added). Mrs. L. signed a consent form to include the time-out intervention [Appellees' Record at 694]. A decision to add a one-to one associate for Isabel was documented, and written prior notice of the change was provided on 12/2/2005. The school district proposed adding a one-to-one associate to help implement Isabel's behavior plan. Although the team discussed the continued use of the program associate, it was determined that Isabel required continual adult interactions to implement all components of the behavior plan [Appellants' Record at 3494].

Dr. Carbone testified that although this behavior plan incorporated some desirable changes, such as break times built into schedule, choice of activities, and sensory activities as antecedents, most of his concerns remained. Separate plans for problem behaviors and their functions had not been differentiated, and the use of timeout for behaviors that were escape-based was undesirable and contraindicated. Dr. Carbone testified that if contingent release was included as a component of timeout, the duration of contingency delay should be short (10 second – 2 minutes). The five-minute duration in Isabel's plan would inappropriately lengthen the amount of time she is in timeout, and would minimize the opportunities for release [Transcript at 800-927].

Dr. Allen testified that employing time-out for both attention and escape-maintained behaviors would limit attention but will also permit escape from requested work. He stated that the duration of time-out should be short (5 – 10 minutes) since the critical element of effectiveness is the contrast between a desirable environment and the time-out location. That contrast, and therefore the effectiveness, would be decreased after the first five minutes. Dr. Allen opined that the determination of effectiveness depends on the evidence and in his research has advised the monitoring of behavioral outcomes. Dr. Allen testified that the effects of contingent release are equivocal in the research, but

stressed the importance of short release contingencies if release is part of the intervention. He clarified that the purpose is to gradually shape the student's calming prior to release from time-out. The child should be released at the first, albeit small, evidence of compliance [Transcript at 2022-23].

Ms. McKeivitt testified that the decision between hand-over-hand and timeout had not been finalized prior to the meeting, nor had decisions concerning duration of body basics or the number of days of compliance prior to a return to integration. On 11/21/2005 Mr. L. described an "ambush" at the IEP meeting concerning the team's desire to keep Isabel isolated for "basically the entire day." He described that the members of the IEP team wanted to switch her placement, and that Isabel would have to "earn" timeout of the special education room. He noted that this proposal was not included in a draft provided to them [Appellants' Record at 3626-3632]. Mr. L. testified that he expected the 11/18/2005 meeting to be a review of this progress and an incorporation of the recommendations of the 8/19/2004 meeting. Mrs. L. testified that she was worried about using the room for Isabel's "office" since Isabel had been restrained there [Transcript at 713].

On November 21, 2005 the Appellants wrote a letter to principal Deb Snider and special educator Patti Brinkmeyer expressing concern over the discussion and proposals of the IEP meeting of 11/18/2005. The isolation proposed was inconsistent with data they had received to date, they received no written or advanced notice of this proposed change, Isabel's behavioral progress had been documented, and the procedures included in the behavioral support plan were inappropriate. They stated that they had agreed to timeout for only "age-appropriate durations" and requested that none of the proposed changes be implemented. [Appellees' Record at 720-724]. Ms. McKeivitt began making arrangements for another IEP meeting since "parents are not happy with the behavior plan we came up with on Friday" [Appellees' Record at 726] and the Appellants requested a "small meeting" to discuss the proposed changes. Special educator Patti Brinkmeyer responded that the previous IEP and behavior plan of November 2004 would continue to be implemented until the concerns were resolved [Appellees' Record at 730]. The hand-over-hand intervention was utilized 11/23/2005 from 10:15 to 11:57, following the last-agreed upon behavior plan [Appellees' Record at 498-517], December 1, 2005 for nearly one hour [Appellees' Record at 543-547] and December 2, 2005 for over an hour [Appellees' Record at 549-555]. The expressed parental concern resulted in Ms. McKeivitt's efforts to set up meetings [Appellees' Record at 726-740], to get a representative of the local autism team involved [Appellees' Record at 763], to get a finalized BIP to the Appellants [Appellants' Record at 3638], and to arrange consultation with the Iowa City and Heartland's Autism Team [Appellees' Record 772-776].

A 12/2/2005 meeting was scheduled to discuss the proposed BIP, with the Appellants, principal Deb Snyder, assistant principal Amy Shaw, special educators Heidi Tow and Patti Brinkmeyer, and school psychologist Monica McKeivitt in attendance. Prior to the meeting, Mr. L. had written that he would agree to the proposed plan if the hand-over-hand coloring would be stopped, isolation would be only one day at a time as opposed to the three day proposal, and that specialists be secured to assist with behavioral

programming [School Record at 3642-3645]. The Appellants requested involvement of outside resources, removing Isabel from subsequent specials if inappropriate behavior occurs, and providing free choice in the special education classroom since the isolated environment was not reinforcing [Appellees' Record at 750b]. A copy of the finalized plan was provided to the Appellants [Appellees' Record at 713-715].

Both Appellants testified that they reluctantly agreed to the modified IEP. The modifications included changing the calming area to Ms. Brinkmeyer's room instead of the timeout room, providing Isabel three prompts instead of one to take a break, and only one day of compliance required prior to resuming integration instead of five days. Both stated that they were not aware of the highly intrusive nature of the intended behavior management plans. Mr. L. testified that his interpretation of time-out was a quiet place where Isabel could calm herself and not a place of punishment. He was unaware that a more elongated version of timeout was being utilized [Transcript at 244-45; 248-49].

Two new monitoring forms were introduced around this time. One form recorded Isabel's engagement, break time and time-out durations throughout the day. Data from 12/5 - 12/21/2005 are included in the record [Appellees' Record at 559-529]. A second form specified the antecedent to, time duration, and interactions involved in the time-out intervention. Data from 12/20 - 12/21/2005 are included in the record [Appellees' Record at 616-629]. Both these records and a videotape introduced into evidence depict the time-out intervention used 12/7/2005.

At 10:15 on December 7, 2005, Isabel refused to complete her reading packet after returning to her "office" from a free choice activity. The furniture and materials were immediately removed from the room (now called Isabel's office), and the door was closed. Isabel was prompted every minute to sit in body basics. The timer was set and reset until 1:45 - a total duration of 3 ½ hours. Throughout this period, Isabel's behavior was not significantly aggressive or destructive but she did lie on the floor, move about the room, and, therefore, not achieve "body basics." Visual reminders of the number of minutes remaining for body basics were provided through the door window. Mrs. L. witnessed the end of this intervention [Transcript at 708]. Isabel was returned to timeout the next morning to "finish" her timeout and to complete her reading packet before attending Mr. Oldfield's general education class. The timer was again started and stopped as staff waited for a 2 or 3-minute display of body basics, which occurred 25 minutes later. Isabel was then required to "do socks," to which she complied [Appellees' Record at 565-571].

Isabel was again seen at the Center for Disabilities and Development on December 8, 2005 for a biobehavioral evaluation and follow-up. The occupational assessment, completed by Karen Younkin, recommended a regular schedule of sensory activities at school as well as a Calming Corner for agitation. This Corner "should not be used as a timeout area" since disruptive behaviors might be displayed to avoid non-preferred activities" (Appellants' Record at 3022). The psychological assessment, completed by David Wacker and Todd Kopelman, reviewed the Behavioral Support Plan. A brief functional analysis was conducted, and confirmed the disruptive behaviors were likely

maintained by negative reinforcement of escaping demands and access to attention. Drs. Wacker and Kopelman noted that the reductive procedures outlined in the Behavior Support Plan “do not appear to be reducing her problem behavior and thus warrant further consideration given the level (duration and intensity) of the reductive procedures” [Appellants’ Record at 3024]. The evaluators recommended that Isabel participate in the Challenging Behaviors Project between the Center at Iowa City and the Iowa Department of Education. Compliance training strategies were also outlined, as well as the “reasonable” use of timeout for disruptive behavior. Review of the nature of the compliance task and the length of the required body basics was suggested [Appellants’ Record at 3025]. After viewing the videotape, Dr. Wacker e-mailed that the time-out procedures were “extreme but certainly within the acceptable range.” He noted that the procedures should only be used for severe problem behavior and only after less restrictive plans had been tried. Dr. Wacker requested an explanation of why these procedures were necessary at this time, and details of a “fading” plan of how the more aversive aspects of the timeout plan would be addressed in the future [Appellants’ Record at 3660].

The time-out intervention was again used on 12/12/2005 when Isabel refused to give Ms. Brinkmeyer a book. The time-out began at 1:08 with Ms. Brinkmeyer providing prompts to sit in body basics every minute. Isabel was recorded as kicking, screaming, spitting, rolling on the floor, and picking at her fingers and pulling her hair. The timeout ended at 3:18 -- a total duration of 2 hours and 10 minutes [Appellees’ Record at 576]. On 12/13/2005, the time-out intervention was used again when Isabel refused to choose a picture or break. The duration of this intervention was 5 hours and 10 minutes. The body basics timer was set for one minute, with prompts provided every two minutes with the door open. The door was closed for screaming or aggression. Isabel’s behavior included kicking, hitting, and screaming [Appellees’ Record at 583-586b]. On 12/14/2005 Isabel was in time-out for a total of one hour and 16 minutes for first refusing to take a break and later for hitting two students. Isabel’s behavior is reported to be kicking the door and lying on the floor. She was also “trying to escape” [Appellees’ Record at 590-591].

The time-out intervention was used again on 12/15/2005 for one hour and 4 minutes for hitting and pushing a passing student and later that same day for 42 minutes pushing a box of activities toward the associates. That same day she also had her lunch taken away for not complying with the request to keep food “in her mouth or on the desk” in addition to 6 minutes of timeout for the food behavior. Immediately following lunch Isabel hit another student on her way back to her “office,” resulting in 6 minutes of timeout. Later, also heading back towards her office, Isabel pushed the activity box into the associate, and the time-out intervention was implemented for 16 minutes. At afternoon recess, Isabel pushed a student and the associate who removed her from the playground. The timeout intervention lasted 41 minutes [Appellees’ Record at 594-604]. On 12/16/2005 when directed to go to her office, Isabel pushed a student in the hall, resulting in 17 minutes of time-out. During the time-out, Isabel’s behavior included physical aggression and spitting [Appellees’ Record at 606]. On 12/19/2005 Isabel refused to “show how you can carry break box safely down hall or take a break” and received time-out for nearly 2 hours (1 hour and 50 minutes). Minute prompts for body basics were given, and Isabel’s behavior was recorded as climbing around and verbal aggression [Appellees’ Record at

609-613]. On 12/20/2005 Isabel was reading with her associate at 8:52 in Mr. Oldfield's classroom when another student sat down beside her. Isabel pushed the student twice, which resulted in a "room clear" and a 33-minute time-out. Isabel responded aggressively, as evidenced in pictures of the room following the intervention [Appellees' Record at 1540-1544]. She also urinated in the timeout room. Isabel was given a directive at 10:00 to handle a disc safely or take a break and threw the disc, resulting in a 3-minute time-out. At 10:34, she was asked to "sit up straight in chair or take a break" and pushed the desk towards the teacher, resulting in a 2 minute time-out. Pulling on her teacher's shirt resulted in both a directive "let go of my shirt or take a break," Isabel's refusal, and a 6 minute time-out. At 1:29 Isabel was asked to choose the number of times to jump over the ball or take a break, but refused, climbed on a desk and hit her teacher. This behavior resulted in a 3 minute timeout. At 2:49 she was directed to pick up her break box or take a break, and Isabel ran down the hallway into the kindergarten classroom. This behavior resulted in a 3 minute timeout [Appellees' Record at 616-621]. On her last day of school at Walnut Ridge on 12/21/2005, Isabel was directed to go to her office to do work on the computer or a free choice, and she said "free choice" but then ran after a peer. She was taken to time-out at 8:47 and for the next 33 minutes was recorded to be physically and verbally aggressive, climbing on the door and mat, and spitting. Later that same day at morning recess, Isabel pushed and threatened students, resulting in a 44 minute time-out. Another 4-minute time-out was given at 12:36 for refusing to let go of a crate, and an 8-minute time-out was given for hitting the teacher while waiting for free choice toys. That was the last day Isabel was in school [Appellees' Record at 624-629]. The Home School Notebook also confirmed the behavioral difficulties [Appellees' Record at 649-654a], but did not specify the durations of either hand-over-hand or time out with one exception on 12/16/2005.

Although the use of the break room was also documented for over 100 incidents between 9/16/2005 and 12/2/2005 (Appellees' Record at 631-637a), school psychologist Monica McKevitt testified that a goal was not developed for taking or giving breaks [Transcript at 1844] and that she did not analyze the reasons break was offered or provided [Transcript at 1843]. The duration spent in break time is charted [Appellees' Record at 638; chart mislabeled as minutes escalated]. Although break time was recorded through 12/2/2005, the chart provides data only from 9/16 through 10/18/2005. Ms. McKevitt testified that she attempted to estimate escalation duration without including the actual time spent taking the break. Her interpretation was that the time in escalation decreased in special education but increased in general education. A chart of Isabel's escalations [Appellees' Record at 639, 841] included the statement "The trend line indicates that the plan (using hand-over-hand for timeout) was not effective in decreasing the amount of time spent escalated." She testified that an estimate of escalation was determined, using data from break sheets as well as anecdotal notes which were cross-referenced [Transcript at 1718]. Dr. Allen testified that these data were an "indirect monitoring of compliance" [Transcript at 2028-29]. A data composite prepared by AEA representatives Stacy Volmer and Barb Rankin on 11/7/2006 showed a slightly increasing trend in escalations from 11/2 through 11/30/2005, but a decreasing trend in minutes in timeout based on the timeout log and anecdotal data [Appellees' Record at 1520-1521]. These data were not available to the IEP team prior to the 11/18/2005 IEP meeting. Data from the ABC charts

show Isabel's non-compliance was not decreasing in the four-week period from 11/22/2005 through 12/21/2005, and that her verbal and physical aggression were increasing.

An ICN session between the school district, AEA Behavior Team, and the Center for Developmental Disabilities was scheduled for January 12, 2006 [Appellants' Record at 3654-3662]. During the ICN conference, the video of Isabel in timeout for 3 hours and 20 minutes was viewed. Following the ICN conference, Mr. L. wrote to Roxanne Cumings, Director of Student Services for Waukee Community Schools, outlining numerous concerns [Appellees' Record at 3074-3078]. Mrs. L. testified that she was "appalled" upon viewing the videotape and threatened to leave the state [Transcript at 729-30]. Teacher Patti Brinkmeyer e-mailed Roxanne Cumings following the ICN conference, expressing that she was "very upset," "frustrated" and that she had "done everything I know how to do" in responding to Isabel's behavior in "proactive and sensitive" ways. She describes miscommunication, misunderstanding and reservation concerning how to now communicate with the Appellants [Appellees' Record at 857-858].

Mr. L. e-mailed Drs. Wacker and Kopelman on January 13, 2006 following a school meeting in which Dr. Barbara Rankin participated. While confirming that the hand-over-hand procedure was ineffective, Dr. Rankin had suggested that isolation with immediate time-outs would be appropriate. Mr. L expressed objection to that plan and his intent to remove Isabel from school with outside support at Waukee's expense (School Record at 3679-3680). Revisions to the plan were proposed on 1/23/2006. Mr. L was present during the meeting to revise the BSP, but the document indicated that "this plan still requires parental approval." The target behavior was identified as non-compliance. Peer aggression was not targeted. The revised components to the Antecedent section of the plan include additional sensory activities, the use of precision requests,<sup>13</sup> cued prompts for praise every minute, scheduled bathroom breaks, and behavioral momentum<sup>14</sup> strategies. The strategy to "use visual cues to prompt behavior change and minimize attention for inappropriate behavior" was removed from this section in the revised version. The strategy "For days that Isabel is not participating in specials, she will practice appropriate behavior in the special classroom with an adult at a time when no children are present" was removed from the Alternative Skills section of the plan, and an additional strategy "Isabel will be able to take a break when she asks for one appropriately (get drink, bubbles)" was added to the Skill Building section. In the Reduction section, timeout was still proposed for escalation, using mats in general education settings and the timeout room for escalation in special education. The originally refused task, rather than an arbitrary task, was to be used for contingent release. The body basic requirement was removed, as was the requirement to continue timeout the following day if Isabel was still in timeout at the end of the day. The words "work room" and "calm down" were to be used instead of "timeout" and "timeout room." A graph was planned to summarize data, and five data points were to be required prior to a decision to revise the intervention (School Record at 3516 - 3519). On January 24, 2006, the Appellants requested a Preappeal Conference with the Iowa Department of Education [Appellees' Record at 906-908]. The Appellants requested support in establishing a home program until the issues were resolved.

## Conclusions of Law

### ISSUE 1: LEAST RESTRICTIVE ENVIRONMENT

The Appellants allege that Waukee CSD and Heartland AEA have violated the LRE provision of the IDEA by failing to demonstrate that a satisfactory education could not be obtained in a less restrictive environment through the use of supplemental aids and services, including more appropriate behavioral interventions. In support of this claim, the Appellants argue that Isabel was removed from a less restrictive classroom without demonstrating that a satisfactory education could not have been obtained through the use of supplemental aids and services. They also claim that placement decisions restricting Isabel's inclusion were made without giving serious consideration to an inclusive placement, that no general education teacher was involved in the decision, and that written prior notice was not provided in response to the Appellants' request for greater inclusion.

In *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535 (2005), the Supreme Court held that the burden of persuasion in a due process action under the IDEA lies with the party seeking relief. This burden will affect the outcome of such action only when a case is in evidentiary equipoise and the party bringing action must bear the risk of failure or proof of persuasion. Prior to the decision, the Eighth Circuit placed the burden on the school district [*Blackmon ex. Rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8<sup>th</sup> Cir. 1999); *E.S. v. Indep. Sch. Dist., No. 196*, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998)]. Subsequent to the decision, the Eighth Circuit has similarly allocated to burden to the party challenging an IEP [*School Board of Independent School District No. 11 v. Renollett ex rel. Renollett*, 440 F.3d 1007, 1011 n.3 (8<sup>th</sup> Cir. 2006)] and held that placing the burden of proof on the incorrect party is reversible error [*West Platte R-II Sch. Dist. v. Wilson*, 439 F.3d 782, 785 (8<sup>th</sup> Cir. 2006)].

The burden of persuasion requires that the party bringing action must prove their claim by a preponderance of evidence. The preponderance is established by the greater weight of reliable, probative and substantial evidence. The Appellants argue that while introducing testimony and other evidence to satisfy their burden of persuasion, IDEAs statutory presumption for mainstreaming creates a burden of production for the district and AEA seeking to justify the removal of the child from a less restrictive environment. They propose that the district or AEA cannot prevail by asserting lack of data and may not be relieved of their evidentiary burden to rebut or meet IDEAs presumption for mainstreaming. They cite *A. W. ex rel. N. W. v. Northwest R-1 School District*, 813 F.2d 158 (8<sup>th</sup> Cir. 1987) as establishing the statutory presumption. Appellees respond that the Eight Circuit decisions only apply a "presumption" to education in regular public schools as opposed to segregated schools [*T. F. v. Special Sch. Dist.*, 449 F.3d 816, 820 (8<sup>th</sup> Cir. 2006) citing *Independent Sch. Dist No. 283 v. S.D.*, 88 F.3d 556, 561 (8<sup>th</sup> Cir. 1996) for preference in regular classes and presumption of public school placement; *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648 (8<sup>th</sup> Cir. 1999) citing *Rowley* for mainstreaming preference and *Independent School District* for presumption for public

schools; *C. J. N. v. Minneapolis Public Schools*, 323 F.3d 630, 641 (8<sup>th</sup> Cir. 2003) for meeting IDEA's objective when disabled students are with nondisabled in the same school; *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8<sup>th</sup> Cir. 1986) for rejection that mainstreaming is only met when children with disabilities are in the same classes as nondisabled)] or address a "preference" for mainstreaming [*A. W. ex rel. N. W. v. Northwest R-1 School District*, 813 F.2d 158 (8<sup>th</sup> Cir. 1987); *Pachl v. School Board of Anoka-Hennepin Independent School District No. 11*, 453 F.3d, 1064 (8<sup>th</sup> Cir. 2006); *Gill v. Columbia 93 School Dist.*, 217 F.3d 1027, 1038 (8<sup>th</sup> Cir. 2000); *Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607, 612 (8<sup>th</sup> Cir. 1997); *Light v. Parkway C-2 School Dist.*, 41 F.3d 1223 (8<sup>th</sup> Cir. 1994); and *Evans v. District No. 17 of Douglas County*, 841 F.2d 824 (8<sup>th</sup> Cir. 1988)]. Appellees conclude that the full burden of proof falls upon the Appellants to show that Isabel should have been included to a greater extent into regular education.

The Appellants also suggest *Schaffer* imposes a burden of production upon the LEA in its discussion of procedural protections to "ensure that the school bears no unique informational advantage" [126 S. Ct. at 537]. However, *Schaffer* addressed only the burden of persuasion, and clarified that the procedural rights afforded to parents ensure that schools bear no unique informational advantage. The Court would not confirm the proposition "that every IEP is invalid until the school district demonstrates that it is not" since the "Act does not support this conclusion" [*Id.*]. While there is a presumption in favor of mainstreaming -- which may not be interpreted as applicable only to a segregated school analysis -- the Appellants may not lighten their burden of proving their claims by reliance on this presumption. The presumption requires the school district and AEA to forward a response to the claims, which they have done. The Appellants bear the burden of proof.

The IDEA requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are 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)(5)(A)]. Supplementary aids and services are defined as "aids, services, and other supports that are provided in regular education classes or other education-related setting to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate" [20 U.S.C. § 1401(33)].

The Iowa Rules of Special Education also include this mandate [Iowa Administrative Rules of Special Education, 281—41.3(5) I.A.C.]. The Rules also require that each agency ensure and maintain adequate documentation that eligible individuals are educated with individuals who are nondisabled and "whenever possible, hindrances to learning and to the normal functioning of eligible individuals within the general school environment shall be overcome by the provision of special aids and services rather than by separate programs" [*Id.* at 281—41.37(2)]. In selecting the LRE, consideration must be given to any potential harmful effect on the eligible individual or on the quality of



services that the individual needs [*Id.* at 281—41.3(5)]. Further, an eligible individual may not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum [*Id.* at 281—41.39(5)].

The Iowa Rules require IEP teams to consider the following questions regarding the provision of special education and related services:

- a. What accommodations, modifications, and adaptations does the individual require to be successful in a general education environment?
- b. Why can't these accommodations, modifications and adaptations be provided within the general education environment?
- c. What supports are needed to assist the teacher and other personnel in providing these accommodations, modifications and adaptations?
- d. How will providing special education services and activities in the general education environment impact this individual?
- e. How will providing special education services and activities in the general education environment impact other students? [*Id.* at 281—41.67(6)].

In considering educational placement, the potential harmful effect on the child or on the quality of services she needs is to be considered, however, that child may not be removed from regular education solely because of needed modifications in the general education curriculum [34 C.F.R. § 300.116(d)(e)].

Inquiries which guide an LRE analysis have been articulated by several U.S. Courts of Appeal, including the Eighth Circuit. In *Roncker v. Walter*, 700 F.2d 1058 (6<sup>th</sup> Cir. 1983), the inquiry focused on whether the services that would make a segregated placement superior could feasibly be provided in a more inclusive environment. The Court observed that mainstreaming is not required in all cases despite a "very strong congressional preference" and that elevating the academic superiority of a segregated placement for a child may be incongruent with the mainstreaming concept [700 F.2d at 1063]. In *Daniel R. R. v. State Board of Education*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989), the Fifth Circuit articulated a two-part test for determining whether a school is in compliance with the LRE requirement. First, consideration must be given to "whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily" [*Id.* at 1048]. Those efforts to provide supplementary aids and services must be sufficient: "The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad" [*Id.*]. The possible deleterious effect on the education of other students must also be considered. Second, if placement in regular education cannot be achieved, determination of "whether the school has mainstreamed the child to the maximum extent appropriate" must be made [*Id.*]. Importantly, the court noted that satisfactory education in regular education does not require performance commensurate with same-age peers: "we cannot predicate access to regular education on a child's ability to perform on par with nonhandicapped children" [*Id.* at 1047]. In *Oberti v. Board of Education of Clemenson School District*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993) the court first considered whether the school district has made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services, then compared the

educational benefits available in a regular class to the benefits provided in a special education class, and also considered the possible negative effects of inclusion on the other students in the class. The court determined no reasonable effort had been undertaken since the school district had access to information and expertise about specific methods and services to enable children with disabilities to be included in a regular classroom but did not provide such supplementary aids and services. The behavioral disruption clearly evident in the regular education classroom was "exacerbated and remained uncontained due to the inadequate level of services provided there" [*Id.* at 1222-23] whereas the behavioral problems were diminished in settings where an adequate level of supplementary aids and services were provided. The court concluded that the school district improperly justified an exclusion from least restrictive environments based on those behavior problems. The court observed that the Act would be "turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom" [*Id.* at 1219]. In the district court decision in *Oberti* [*Oberti v. Board of Education of Clemenson School District*, 801 F. Supp. 1392, 1404 (DC NJ 1992)], the court noted that the student "should not have to earn his way into an integrated school setting by first functioning successfully in a segregated setting. Inclusion is a right, not a privilege for a select few." The Ninth Circuit has adopted LRE inquires which include a determination of nonacademic benefits [*Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398 (9<sup>th</sup> Cir. 1994)] of inclusive placements.

The Eighth Circuit has adopted the standards from *Roncker* in LRE inquires. The court has emphasized the "maximum extent appropriate" qualification in the LRE requirement and has suggested that the mandate is "inapplicable" when education in a mainstream environment cannot be achieved satisfactorily [*A. W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8<sup>th</sup> Cir. 1987)]. The Court has been persuaded by language from the Sixth Circuit comparing benefits in inclusive placements to benefits in segregated settings and the potential for disruption [*Roncker v. Walter*, 700 F.2d 1058, 1063 (6<sup>th</sup> Cir. 1983)]. In *Evans v. District No. 17 of Douglas County*, 841 F.2d 824 (8<sup>th</sup> Cir. 1988), the Court held that LRE must be "thoroughly considered" and that "children who can be mainstreamed should be mainstreamed" [*Id.* at 832].

In *Light v. Parkway C-2 School Dist.*, 41 F.3d 1223 (8<sup>th</sup> Cir. 1994) the Court specified that the IDEA "seeks to guarantee the educational rights of disabled children by requiring policies of inclusion" and prefers "integrating children with disabilities in regular classrooms" [*Id.* at 1227]. While the Eighth Circuit in *Light* upheld an injunction removing the child from the public school setting due to aggressive behavior, that conclusion was based on a finding that the school district had "done all it reasonably can to minimize the risk of resulting injury through the use of 'supplementary aids and services'" [*Id.*] These supplementary aids and services included two-on-one staff support from a fully certified teacher and aid, special training for school staff in contact with the student including behavior management, inclusion, and crisis prevention and intervention. A special consultant was also retained by the school district to assist with the student's programming.

In *Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607, 612 (8<sup>th</sup> Cir. 1997) the Court highlighted the importance of interaction with non-disabled students while providing an educationally-beneficial program. Noting that placement of disabled students in segregated environments was appropriate "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," the Court held that a segregated placement was not appropriate even though the student's behavior may have been affected by his interaction with non-disabled peers. The Court concluded that since the student's behavioral problems were due to difficulty in regular classes and not to his association with nondisabled peers, segregating the child from those peers would be inappropriate.

The Eighth Circuit has confirmed deference to placement decisions of IEP teams "so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible" [*Gill v. Columbia 93 School Dist.*, 217 F.3d 1027; 1038 (8<sup>th</sup> Cir. 2000)]. In *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648 (8<sup>th</sup> Cir. 1999) the Court held that while a child should be "educated alongside his non-disabled classmates to the maximum extent possible"....the statute does not "mandate placement with non-disabled children when a child is so severely disabled that such placement would not provide an educational benefit" [*Id.* at 661].

For example, in *Pachl v. School Board of Anoka-Hennepin Independent School District No. 11*, 453 F.3d, 1064 (8<sup>th</sup> Cir. 2006), the court upheld the school district's decision to place a middle school student with autism in a segregated class for two hours a day and the rest of the day in general education. The Appellees rely on this case to emphasize that mainstreaming is not required where education in a mainstream environment cannot be achieved satisfactorily and that the LRE analysis involves the impact of the child's presence on other students. Although the parents in *Pachl* argued that the combined program did not offer education in the LRE, the court adopted standards from *Roncker*, emphasizing that if necessary services may not be provided in non-segregating settings, removing a child from the mainstream is permissible. The Court noted the considerable effort and discussion concerning the feasibility of an inclusive placement with supplementary aids and services. The district court and Eighth Circuit concluded that even if the curriculum had been modified and accommodated to an extreme, the student would not receive educational benefit. This case is factually distinguishable, as the Appellants are not requesting full inclusion nor disputing the need for intensive services in order for Isabel to benefit from her educational program. They argue that Isabel was removed from the less restrictive general education classroom absent consideration of supplementary aids and services. They claim that placement in the functional skills classroom and consequent removal from the general education classrooms for a substantial part of her day was a violation of the LRE mandate.

The Appellees also present *Pachl* as the Eighth Circuit's rejection of "parallel instruction" and to support a conclusion that inclusion is not required if the work of other students has no relevance to the work the student is capable of doing. However, the Court's support in *Pachl* of a program involving two hours per day of instruction in a

segregated class instead of full inclusion was influenced by evidence that the team considered a range of supplemental services and concluded that even with supplementary aids and services the student would not benefit from inclusion. She would be alongside peers without disabilities but not learning with them. Due to the discrepancy between the regular curriculum and the student's functional needs, the Court determined that even with the provision of supplemental aids and services, the student would not benefit. While described as "parallel instruction" by the Appellees, the supplementary aids considered by the school district were recommendations from the parent's expert which included multi-level curriculum and materials, individualized instruction, and collaboration between special education personnel and the classroom teacher. The only reference to parallel curriculum is from the district's expert, who opined that fact-based courses might be appropriate with a parallel curriculum, but that additional mainstreaming would not benefit the student. To conclude that this Eighth Circuit decision rejected parallel instruction or confirmed an "on par" standard for inclusion would be an inaccurate proposition.

Clearly, the provision of adequate supplementary aids and services is critical to Eighth Circuit LRE analyses. While inclusion may not be appropriate in all settings, the Eighth Circuit requires considerable effort and discussion concerning the feasibility of an inclusive placement with supplementary aids and services [*Pachel*]. The Appellees argue that Isabel was educated in her neighborhood school and included with non-disabled peers to the extent appropriate. However, the record supports a conclusion that insufficient consideration was given to the supplementary aids and services which may have promoted a less restrictive placement for Isabel, in violation of federal and state mandates.

Both Appellants and Appellees discuss Isabel's Colorado IEP within the LRE claim. The Appellants argue that the level of integration was less in Waukee than Colorado, a reduction from integration 75% of Isabel's day in Colorado to 29% after 11/22/2004. The Appellees insist that Isabel was integrated into regular education classes at the same percentage of her Colorado IEP and received services in a specialized setting that did not isolate her from all of her peers. While previous programs and services may be a consideration for IEP teams, a school district need not inherit inclusion decisions. The responsibilities of school districts concerning transfer students have been addressed in both statute and regulations. Prior to the 2004 reauthorization, only transfers within states were addressed [64 *Fed. Reg.* 12476 (March 12, 1999)(Appendix A, Question 17)]. The IDEA 2004 required school districts to provide comparable services for students transferring within and outside states during a school year. These requirements were effective July, 2005. Comparable services were to be provided until the new agency conducted an evaluation and developed, adopted, and implement a new IEP, if appropriate [34 C.F.R. § 300.323(f)]. Comments to federal regulations added that an IEP for a summer transfer could be adopted unless the new public agency decided an evaluation was needed [71 *Fed. Reg.* 46682 (August 14, 2006)]. That is what happened here. The WCSD and AEA chose to conduct their own evaluation and develop an interim IEP since "additional information is needed before a final decision can be made regarding the specific special education and related services that are needed" [Iowa Administrative

Rules of Special Education, 281—41.70(4) I.A.C.]. The record shows that this interim IEP incorporated aspects of the Colorado IEP. The record also shows that the Appellants agreed with the interim IEP [*Id.* at 41.70(4)(b)]. The IEP team met on 11/22/2004 “at the end of the trial period in order to finalize the individual’s IEP” [*Id.* at 41.70(4)(d)]. Therefore, the critical issue regarding the LRE issue is not whether the inclusion offered to Isabel comported with the Colorado program, but rather whether or not the school district met the requirements of 20 U.S.C. § 1412(a)(5)(A) and Iowa Administrative Rules of Special Education, 281—41.3(5) I.A.C.

Based on the evaluation data, the IEP team determined that Isabel needed a functional skills curriculum and a highly structured classroom environment. Although the Appellees note that the parents agreed and did not object to this decision, disagreement is not the trigger for the district to fulfill its obligations under 20 U.S.C. § 1412(a)(5) and the Iowa Administrative Rules of Special Education, 281-41.3(5) I.A.C.. The IEP team was required to consider supplementary aids and services to meet Isabel’s academic needs: an eligible individual may not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum [Iowa Administrative Rules of Special Education, 281—41.39(5) I.A.C.].

The Appellees correctly argue that written documentation of compliance with 281—41.67(6) I.A.C. is not required as IEP teams discuss accommodations, modifications, and adaptations a student would require to be successful in a general education environment. However, in their discussions, Isabel’s IEP team clearly relied upon a standard of inclusion that required Isabel to perform “on par” with her peers. Her team members testified that Isabel’s academic discrepancies with classroom peers was the basis for recommending “Level III” services since she would not be able to meet standards and benchmarks for reading, math or written expression, was working on “prerequisites,” and was “so far behind” that modification of curriculum was not feasible. Reliance on a standard whereby academic discrepancy so great in second grade would not “count” as inclusion is a violation of federal and state mandates to educate students with disabilities in the least restrictive environment and of responsibility to overcome hindrances to learning within the general school environment by the provision of special aids and services rather than by separate programs. Isabel may not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. As noted in *Daniel R. R.* [*Id.* at 1047], access to general education cannot be predicated on a child’s ability to perform on par with non-disabled peers.

The Appellees argue that greater integration would increase the risk of frustration with work above her abilities or class disruption, and that the Appellants have failed to establish that Isabel was not included with nondisabled peers to the extent appropriate. The Appellees cite several advantages to Isabel’s placement in the special education classroom, including academic instruction at her individual level, peer friendships, ability to respond to behavioral concerns, shorter work tasks, and social skill instruction. However, the Iowa Administrative Rules of Special Education, 281-41.67(6) I.A.C. require teams to consider what supports Isabel would need to achieve those benefits in general education, and why the supplementary aids and supports cannot be provided.

The IEP team was also required to consider supplementary aids and service to meet Isabel's behavioral needs to facilitate education in the least restrictive environment.

Commentary in the federal regulations addresses LRE and behavioral concerns:

The courts have generally concluded that, if a child with a disability has behavioral problems that are so disruptive in a regular classroom that the education of other children is significantly impaired, the needs of the child with a disability generally cannot be met in that environment. However, before making such a determination, LEAs must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the child in the regular educational environment to accommodate the unique needs of the child with a disability [71 Fed. Reg. 46540, 46589 (August 14, 2006)].

Isabel's integration decreased in the Fall of 2004 in response to behavioral problems. Appellees argue that the record fails to establish that the missed integration was sufficient to constitute a denial of FAPE. However, the behavior plan of 11/18/2005, finalized on 12/2/2005, proposed that Isabel be instructed in a one-to-one setting until her behavioral improvement earned back her "typical" integration. As the District Court in *Oberti* concluded, a student "should not have to earn his way into an integrated school setting by first functioning successfully in a segregated setting."

While significant behavioral issues may result in removal from general education, consideration to supplementary aids and services to address those behavioral issues must be undertaken prior to a decision to provide an educational program somewhere other than general education. The record supports a conclusion that insufficient effort was given to the consideration of supplemental aids and services to support Isabel's inclusion in regular education. Isabel's placement in the functional skills classroom since she would not "count" in general education and her consequent removal from her "typical" integration due to behavioral difficulties was a violation of the LRE mandate.

#### Procedural Errors

The Appellants argue that two procedural violations impacted the provision of a FAPE to Isabel. First, placement decisions made by the IEP teams which restricted Isabel's inclusion were made without including the general education teacher on the team.

The Iowa Administrative Rules of Special Education, 281—41.50(5) I.A.C. require that placement decisions be made "by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." Both federal law and Iowa Rules require that the IEP team be composed of "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)" [20 U.S.C. § 1414(d)(1)(B)(ii); Iowa Administrative Rules of Special Education, 281—41.62(1)(b) I.A.C. Both federal and state law require the general education teacher to "as appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school

personnel” [20 U.S.C. § 1414(d)(3)(C); Iowa Administrative Rules of Special Education, 281--41.62(1)(b) I.A.C.].

Since these are procedural protections, Appellants must show that these 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” [*Independent School Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8<sup>th</sup> Cir. 1996) citing *Roland M. v. The Concord Sch. Comm.*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990)]. IDEA 2004 requires that a hearing officer may find denial of FAPE only if procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits [20 U.S.C. § 1415(f)(3)(E)(i) & (ii)].

The Appellants claim the regular educator was not included in the discussion of a program for Isabel when first arriving in Iowa in the fall 2004, but Appellees note that the teacher was present for the development of the interim IEP shortly after that on September 15, 2004. The general education teacher was not present for the November 22, 2005 IEP meeting to finalize Isabel’s IEP. Appellees stated that decisions regarding Isabel’s level of inclusion involved input from the general education teacher, that the parents never objected to the absence nor made any inquiry as to his absence, that the administrator present “counted” as the regular education teacher, and that the level of integration remained the same from the interim IEP to the finalized IEP for 2004-2005. They note that the regular educator need not be present through an entire IEP meeting [64 *Fed. Reg.* 124 (March 12, 1999)] and that data from the regular educator were gathered during the evaluation for eligibility. However, Isabel experienced significant behavioral problems in the interim, and a behavior support plan was added to the November IEP. The attendance of the regular educator to discuss the behavioral concerns and to plan appropriate behavioral supports for integration would be critically important.

The record is inconclusive in regard to the regular educator’s attendance at the August 19, 2005 meeting, but he was present for part of the meeting on November 18, 2005. The regular educator was not present for the continuation meeting December 2, 2005, to discuss modifications to the behavior support plan. Since the teacher had reported to Mrs. L that Isabel had been “out of control” and since the behavior plan addressed consequences for inappropriate behavior during integration in regular education, the attendance of the regular educator would be important.

The Appellants presented a decision from the Ninth Circuit pertaining to IEP team composition and potential for prejudice:

The statutory requirement ... is not merely technical. A regular education teacher may have insights or perspectives that aid the process of IEP formation. We need not say that error in composition of an IEP team is always prejudicial and invariably results in the denial of a FAPE. Rather, we should assess the circumstances of each case [*M. L. ex rel. S. L. v. Federal Way School District*, 394 F.2d 634, 656 (9<sup>th</sup> Cir. 2005)].

Other circuits have confirmed the importance of the regular educator in planning and providing a free, appropriate public education [*Deal v. Hamilton Board of Education*, 392 F 3d 840 (6<sup>th</sup> Cir. 2004)].

The involvement of regular educators in IEP and placement decisions and in the determination of appropriate positive behavioral interventions and supports is critical to ensuring appropriate placements and services. In this case, the absence or limited involvement of the regular educator cannot be dismissed as harmless error. The absence was a violation of 20 U.S.C. § 1414(d)(3)(C) and Iowa Administrative Rules of Special Education, 281--41.62(1)(b) I.A.C.

The second procedural violation was that parental requests for greater inclusion were denied without providing detailed written prior notice found at 20 U.S.C. § 1415(b)(3) and Iowa Administrative Rules of Special Education, 281—41.104(1) I.A.C. Both require that the notice be given when the agency proposes or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a FAPE. The notice must include 1) a description of the action proposed or refused by the agency, 2) an explanation of why the agency proposes or refuses to take the action, 3) a description of any options the agency considered and the reasons why those options were rejected, 4) a description of each evaluation procedure, test, record or report the agency uses as a basis for the proposal or refused action, 5) a description of any other factors that are relevant to the agency's proposal or refusal, 6) a statement of procedural protections, and 7) sources for parents to obtain assistance [*Id.* at 41.104(1)].

The Appellants argue that no written notice was provided prior to “removing” her from the general education classroom experiences she was receiving in Colorado when first arriving in Iowa, or when one week later she was transferred to another classroom. The notice provided at the 9/15/2004 meeting to develop an interim IEP, indicating that “accepting the (Colorado) IEP as written was rejected” [Appellants’ Record at 126], was insufficient in addressing the required components of notice and not in “language understandable to the general public [Iowa Administrative Rules of Special Education, 281—41.104(2)(a) I.A.C.]. The Appellees argue that until the interim IEP meeting was held, no notice was required and that the required system data entries indicating amount of time in general education was clearly presented to the parents at all IEP meetings.

Other than the two-week period when Isabel first arrived from Colorado in August 2004, she was receiving services under the interim IEP developed 9/15/2004, which specified she would be removed from general education 61% of the time. The Appellants agreed to the interim IEP and written prior notice was provided. The Appellants claim that no notice was provided for the original two-week placement, and that the content of the subsequent notices did not meet the requirements of federal or state law. Appellees suggest that no notice was required for the initial two weeks since they were implementing a program comparable to her last proposed Colorado IEP, not proposing or refusing any action. They also convincingly argue that the Appellants may not assert surprise or prejudice since representatives from the district discussed Isabel’s program before school started, and that the parents were aware of and agreed to the programs



proposed by the district. Neither omission of notice nor delay of specifying the required system data in the IEP seriously hampered the parents' opportunity to participate in IEP decision-making nor prejudiced Isabel's right to FAPE. Similarly, the transfer from Ms. Krohn's to Ms. Brinkmeyer's classroom in December of 2004 did not require notice, since no change to Isabel's educational program, services, or level of integration resulted. A change in location only would not require convening of an IEP meeting or written prior notice [*See White v. Ascension Parish Sch. Board*, 343 F.3d 373 (5<sup>th</sup> Cir. 2003)].

When the Appellants specifically requested greater integration in a letter dated May 30, 2005 and when no change was made to the level of integration when discussed August 19, 2005, no notice was provided. The Appellees argue that that meeting was productive and cooperative, that the parents did not continue "to insist" on more inclusion, and therefore "refusal" notice was not required. The purpose of the notice is to inform parents of why action is proposed or refused and of the procedural safeguards afforded them. One such safeguard pertains to action parents may take if they disagree with the consensus of the IEP team. However, the Appellees argue convincingly that documentation of extensive communication with the Appellants regarding Isabel's program renders such a failure as harmless error. The omission did not impede the parents' opportunity to participate in the decision-making process.

For the LRE issue, the Appellants have met their burden of showing that insufficient effort was given to the consideration of supplemental aids and services to support Isabel's inclusion in regular education. She had the "typical" inclusion for all students in the functional skills classroom, which she eventually lost due to behavioral difficulties and was required to "earn" back. Isabel's placement in the functional skills classroom since she would not "count" in general education and her consequent removal from her "typical" integration due to behavioral difficulties was a violation of the LRE mandate at 20 U.S.C. § 1412(a)(5)(A) and the Iowa Administrative Rules of Special Education, 281—41.3(5) I.A.C.

#### ISSUE #2: IMPLEMENTATION OF BEHAVIORAL INTERVENTIONS

The second issue of this hearing concerns the behavioral interventions utilized by the school district and AEA. At the heart of this issue is the requirement that IEP teams to consider factors including "in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior" [20 U.S.C. § 1414(d)(3)(B)(i); Iowa Administrative Rules of Special Education, 281—41.67(5)(b)(1) I.A.C.]. Iowa law requires that special education programs "be consistent with research findings and appropriate educational practices" [Iowa Administrative Rules of Special Education, 281—41.3(6)(b) I.A.C.]. In the absence of empirical evidence on the efficacy of any one intervention strategy, "the LEA and AEA personnel and parent responsible for developing the individual's IEP shall outline a program of education which meets the educational needs of the individual" [*Id.*].

Provisions in the IDEA 2004 require research-based interventions.<sup>15</sup> The IDEA requires that individualized education programs include “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research<sup>16</sup> to the extent practicable, to be provided to the child [20 U.S.C. § 1414(d)(1)(A)(i)(IV)]. The legislative history of this language reveals that the selection of educational approaches must reflect sound educational practices which have been validated empirically whenever possible.<sup>17</sup> These approaches would include behavioral supports and strategies. The inclusion of these provisions has invited debate and discussion concerning how evidence of effective practices might be established<sup>18</sup> and the value of social science empiricism to legal analysis.<sup>19</sup>

The Appellants assert that the WCSD and Heartland AEA implemented seclusionary time-out and other intrusive behavioral interventions with Isabel that were inconsistent with substantive and procedural rights under the IDEA. Specifically, the Appellants argue that the behavioral interventions planned for Isabel were not consistent with Isabel’s IEP, that the interventions were excessive in length and inconsistent with Isabel’s individual needs, that the interventions were not supported by functional assessments, and that the interventions were inconsistent with the positive behavioral supports mandated by the IDEA. The Appellants also contend that the interventions were implemented without prior written notice and/or false or misleading notice.

The Appellees assert that behavioral interventions utilized with Isabel were authorized by Iowa law, were within the bounds of professional judgment, and - though not required by law - are supported by peer-reviewed research. They argue that all behavioral interventions need not be included in a behavior plan, and that no legal requirements exist that the behavioral plan be in writing.

#### Interventions not Supported by Functional Assessments

The Appellants claim that the behavior support plans developed for Isabel were not consistent with the functional assessments conducted.<sup>20</sup> While citing concerns regarding the conduct of the assessment, the failure to select and utilize interventions consistent with the assessment data is the chief complaint. No challenge to the hypothesized functions of attention for peer aggression and escape for non-compliance has been raised. No challenge to the conduct of the FBA has been raised. In fact, Dr. Allen testified that the functional assessment conducted by Ann Hilliard was acceptable. He also testified that although protocols for conducting functional behavioral analyses are reported in the literature, the application of the school-based functional behavioral assessment methodology is challenging – an argument emphasized by the Appellees.<sup>21</sup> The Appellants argue that two strategies included in the behavior support plan of 11/18/2005 were contraindicated based on the assessment hypotheses: 1) offering Isabel a choice when non-compliant and 2) using hand-over-hand guidance in response to aggression.

Both Dr. Carbone and Dr. Allen testified that offering Isabel breaks following non-compliance would permit escape from a non-preferred task and would reinforce the undesirable non-compliant behavior. This result is described as negative reinforcement. The empirical research offered by the Appellants confirms that access to activities as an

escape from demands may reinforce and increase undesirable or inappropriate behavior<sup>22</sup> and that when negative reinforcement was effective, it was in combination with other, positive interventions such as differential reinforcement.<sup>23</sup> The offered research also includes alternative interventions efficacious in reducing escaped-maintained behavior.<sup>24</sup> The hand-over-hand strategy to prevent escape is supported in the research [*Supra* Note 5] as an extinction procedure, but both experts testified that the guidance must be brief and would not involve restraining, holding, or compelling student action.

The selection of “break time... to calm her down when Isabel becomes non-compliant” would be contraindicated for the escape-based non-compliance. Given the testimony of both experts and the empirical literature, the break time would serve to reinforce non-compliance and hand-over-hand guidance would not be appropriate for attention-based peer aggression. Karen Younkin, the occupational therapist at the Center for Disabilities and Development in Iowa City also opined that sensory breaks following misbehaviors would reinforce Isabel’s negative behavior.

While hand-over-hand guidance would serve to prevent escape from a task, this intervention was also implemented in response to Isabel’s aggression toward peers, hitting peers, not keeping her hands to herself, and “in personal space of others”. The record also shows that the hand-over-hand strategy was used for inappropriate peer contact, an attention-based behavior. While Appellees defend that this aggression was non-compliance to a teacher demand to “stop hitting another student” [Brief at 72], peer aggression is distinct from non-compliance with adult demands and was hypothesized to be attention-based. Both experts testified that presenting hand-over-hand for behaviors assessed to be attention-based would be contraindicated. The Appellants offered empirical research showing that the hand-over-hand would be ineffective for behaviors maintained by non-escape functions.<sup>25</sup>

While the Appellees point to the difficulties conducting functional assessments in school settings [*Supra* Note 21] and the parents’ own recommendation to use breaks when Isabel became silly or aggressive, professionals must select interventions based on assessment data and recommended for professional practice. The implementation of these two reduction-oriented strategies identified in the 2004 behavior support plan would be inconsistent with hypothesized function from the functional assessment data, inconsistent with research findings and appropriate educational practices [Iowa Administrative Rules of Special Education, 281—41.3(6)(b) I.A.C.], and contraindicated by the empirical research offered by the parties.

#### Conformity with the IEP

The Appellees point to testimony by Dr. Allen and the commendation by experts from Iowa City as confirming the appropriateness of Isabel’s behavior support plans. Indeed, the format leads IEP teams to explore a variety of preventive, supportive, and corrective intervention options. However, the Appellant’s claim is not in the prescription of interventions but rather in the implementation of those plans.

The IDEA requires that an individual's educational program be "provided in conformity with the individualized education program [20 U.S.C. § 1402(9)(D)] and Iowa law requires that special education and related services be "in accord with the individual's IEP" [Iowa Administrative Rules of Special Education, 281—41.3(6)(d) I.A.C.]. While a "perfect" implementation is not required [*Bradley ex rel. Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965, 975 (8<sup>th</sup> Cir. 2006)], those persons responsible for implementing the IEP must make "every effort to provide the services called for" [*Id.*].

The Appellants argue that substantial deviations from Isabel's IEP led to intrusive and inappropriate behavioral interventions. According to testimony, preventive or antecedent strategies which were included in the 2004-2005 behavior support plan were not implemented. For example, that testimony revealed that the planned peer coaching was not implemented. Clearly, the most controversial conformity issue concerns the use of the hand-over-hand intervention prescribed in the behavior support plan.

While the Appellants were aware of the plan to use hand-over-hand in response to non-compliance, the implementation led to extended durations involving force and restraint. Although witnesses from the LEA and AEA testified that physical restraint was never intended to be a component of hand-over-hand guidance, the record reveals repeated applications of extensive duration. Instead of hand-over-hand guidance to prevent escape, one or more adults forced, held or restrained Isabel first to complete a task and later in response to her aggression. While the initial applications planned 11/22/2004 and implemented throughout the Spring of 2005 may have been the intended guidance in classroom setting, the seventeen recorded applications of hand-over-hand interventions throughout the Fall of 2005 were for 54 minutes, 25 minutes, 30 minutes, 20 minutes, 1 hour 25 minutes, 1 hour 10 minutes, 40 minutes, 25 minutes, 8 minutes, 7 minutes, 1 hour 23 minutes, 37 minutes, 59 minutes, 32 minutes, 1 hours 4 minutes, 2 hours 30 minutes, and 1 hour 30 minutes, often involving several adults to implement the intervention.

The Appellees' claim that physically restraining Isabel was only done to protect her and that such restraint is within the standards of professional judgment and supported by peer-reviewed research. They cite *School Board of Independent School Dist. No. 11 v. ex rel Renollett*, Civ. No. 02-3698, 2004 WL 2457810, to propose that restraint is not prohibited by federal or state law, that the IDEA does not require a written behavior plan, and that the use of restraint does not constitute a denial of FAPE. The District Court noted that while the absence of a written plan was a procedural error, appropriate behavioral interventions were implemented and the student's right to FAPE was not compromised. However, in *Renollett*, the parents were fully informed and the student's behavioral improvement was "dramatic" [*Id.* at \*6]. Further, the student's plan specified and permitted restraint and timeout with an array of other interventions to redirect or de-escalate behavior.

The record establishes that the hand-over-hand strategy as implemented was inconsistent with Isabel's behavior support plan. Testimony from both school psychologists and the behavioral specialist confirmed that physical force was inconsistent with the intended intervention. The inconsistency resulted in applications which were neither effective in

reducing non-compliance nor beneficial to Isabel. The IDEA requires that an individual's educational program be "provided in conformity with the individualized education program [20 U.S.C. § 1402(9)(D)] and Iowa law requires that special education and related services be "in accord with the individual's IEP" [Iowa Administrative Rules of Special Education, 281—41.3(6)(d) I.A.C.]. The behavioral interventions provided to Isabel were not in conformity with the IEP and were in violation of these requirements.

#### Interventions Excessive and Inconsistent with Isabel's Needs

This claim is related to the conformity issue. The Appellants are not challenging the use of hand-over-hand as a prompt to assist Isabel in completing an adult directive. Nor are they challenging the use of timeout for aggressive behavior. They are challenging the evolution of hand-over-hand that resulted in extended durations of restraint and the excessive length of the time-out procedures. The Appellees argue that no federal law provides guidance on the use of restraint or timeout, that Isabel was restrained only for protection, and that the use of time out was not in contravention with Iowa law. The Appellants argue that strategies in both the 11/22/2004 and 11/18/2005 behavior support plans were not implemented in a manner consistent with applicable research and appropriate educational practices, were not individualized to address the behaviors of concern, were not adequately monitored, and were inconsistent with the positive behavioral supports mandated by the IDEA. The Appellants' claim that the WCSD and Heartland AEA failed to consider the potential harmful effect of the interventions, and that as a result of that oversight, Isabel was diagnosed with Post-Traumatic Stress Disorder – a claim discussed in a subsequent section.

The empirical literature describes hand-over-hand guidance as an option for prompting student responses when less-intrusive methods, such as visual or verbal prompts, are ineffective [*Supra* Note 5]. However, the prompting would not require excessive force, holding, or restraint. The Appellants argue that restraint used with Isabel is inconsistent with Mandt training and contraindicated for Isabel. The Appellants offered Dr. Wanda K. Mohr<sup>26</sup> as an expert witness concerning the use or restraint. Dr. Mohr testified children who were restrained often describe feelings of helplessness, powerlessness, and alienation and that the continued use of restraint destroyed the therapeutic alliance necessary for successful intervention. Dr. Mohr stated that such procedures are thoughtlessly assumed to be part of the "therapeutic tool kit" and mindlessly applied to children as "interventions." Dr. Mohr describes her research as an attempt to "stop normalizing and routinizing" the use of restraint and to invite an examination of the assumptions and efficacy of restraint. Such interventions may subsequently increase a child's negative behavior and decrease positive responses [Transcript at 742-788]. The Appellants offered empirical research from both Dr. Mohr and others to support their claim that the holding and restraining interventions implemented with Isabel were excessive and inconsistent with Isabel's needs.<sup>27</sup> The Appellees argue that Dr. Mohr's research does not apply to children in school settings and that she failed to describe alternatives to restraint. They also note that behavior may get worse as escape is prevented, consistent with the empirical research.<sup>28</sup> and that "you must not cease blocking the escape if you hope to have success" [Appellees Brief at 58]. However, hand-over-hand guidance or blocking supported in the research was not the intervention provided to

Isabel. She was physically forced and restrained in response to non-compliance -- an escape-maintained behavior.

The hand-over-hand strategy was replaced in the 11/18/2005 behavior support plan with a timeout intervention. The timeout intervention was implemented almost daily through December with durations of 3 hours 30 minutes, 25 minutes, 2 hours 10 minutes, 5 hours 10 minutes, 1 hour 16 minutes, 2 hours 49 minutes, 17 minutes, 1 hour 50 minutes, 50 minutes, and 1 hour 30 minutes. The empirical literature describes timeout as an option for reducing inappropriate behavior, but consistently indicates that timeout durations should be short,<sup>29</sup> and involve a contrast between the timeout and time-in environments.<sup>30</sup> The child's perception of the distinction between the time-in and timeout environments provides the conceptual basis and accounts for the effectiveness of the intervention. Timeout procedures should be used infrequently to avoid overuse, misuse, and abuse<sup>31</sup> and carefully monitored.<sup>32</sup> The research confirms that seclusionary timeout should be used as a last resort option, reserved for extremely disruptive or dangerous behavior.<sup>33</sup>

The addition of a contingent release requirement to timeout procedures is controversial<sup>34</sup> and many scholars call for further comparative investigations.<sup>35</sup> The Appellees offered research demonstrating the effectiveness of a contingent release component to timeout.<sup>36</sup> This research confirms that if contingent release is incorporated as part of the timeout procedure, the required duration for compliance should be short. No literature was offered by the Appellees to support the rationale for or efficacy of two contingent tasks prior to release.

While the Appellees note that an expert at Iowa City found the timeout intervention extreme but within an acceptable range, that expert also noted that such procedures should be reserved for severe problem behavior and only after less intrusive procedures have been attempted. Most importantly, the experts at Iowa City noted that the reductive procedures were not reducing her problem behavior and warranted "further consideration given the level (duration and intensity) of the reductive procedures." Both experts testified that the duration of timeout should be short. If contingent release is included as part of the timeout intervention, the duration should also be brief. Indeed, Dr. Allen testified that the child should be released at the first sign of compliant behavior. The Appellees argue that courts have never ruled that school must hold an IEP meeting to adopt a behavior plan before removing an aggressive child from a classroom to a timeout or calming area for safety reasons, and that state law permits restraint for protection or in accordance with an IEP. However, while temporary removals may be necessary and appropriate, the consistent and continued use of such measures as an intervention to manage behavior would require consensus of the IEP team, including the parents.

The record reveals the prolonged use of highly intrusive interventions with Isabel. The hand-over-hand intervention was incongruent with acceptable practice and not beneficial to Isabel. The record further supports that the time-out intervention with the arbitrary compliance tasks was similarly not implemented in a manner supported in the peer-reviewed research literature or consistent with prescribed practice. A preponderance of

evidence reveals that the excessive durations of the timeout interventions were “not consistent with applicable research findings and appropriate educational practices” [Iowa Administrative Rules of Special Education, 281—41.3(6)(b) I.A.C.] or “based on peer-reviewed research to the extent practicable” [20 U.S.C. § 1414(d)(1)(A)(i)(IV)].

The evidence similarly revealed that these interventions were not adequately monitored. Three administrative hearings in Iowa have clarified the need for adequate progress monitoring of behavioral interventions and services.<sup>37</sup> Absent such monitoring, the IEP team will not be able to ascertain if the planned program is achieving the desired outcomes and is beneficial to the child.

Adequate progress monitoring may have revealed the ineffectiveness of these contested interventions for Isabel. Data documenting the increase in frequency and duration of these interventions would have clearly indicated their ineffectiveness and the need to explore alternative interventions. Indeed, the collection and analysis of the “five data points” in the Decision-Making Plan would have confirmed that Isabel’s behavior was not improving and that alternative approaches were warranted. The record contains no direct method for monitoring Isabel’s compliance to adult directives and no accurate method for monitoring aggression toward peers in 2004-2005, and no direct method for monitoring either compliance to adult directives or Isabel’s aggression towards peers in the 2005-2006 IEP or behavior plan. Data on the frequency of Isabel’s aggression towards peers and the contextual factors associated with that aggression would have assisted the IEP team in decision-making. The data available to the team were of limited assistance in decision-making. Appellees contend that data were collected on the 2004 social goal, however, the confusion concerning the scoring of the peer interaction rubric would impact the validity of those data, as would the inconsistency between IEP data indicating Isabel was averaging 70/70 on the rubric and home-school communication revealing increasing non-compliance and aggression. The Appellees themselves extract entries of peer aggression in November and December of 2004 from the Home-School Notebook to illustrate that not all aggression resulted in hand-over-hand or restraint [Appellees’ Brief at 64-65]. These data confirm the escalation of peer aggression.

Appellees argue that data were collected on Isabel’s general compliance via the “break charts” data as an “indirect monitoring of compliance.” Yet nowhere in the record are data pertaining to Isabel’s rate of compliance or the setting events associated with Isabel’s non-compliance. Even a cursory review of Isabel’s non-compliance reveals occurrence following requests to return to her isolated “office” following a break. Had the IEP team acquired and analyzed data concerning the antecedents of her noncompliance, additional preventive strategies could have been developed. Although data were collected on the Structured ABC Analysis Form after November 22, 2005 to assist in determining behavioral antecedents and occurrences of noncompliance, the two month data reveal an increase in non-compliance and aggression and, therefore, the need to modify the behavioral interventions. Adequate data collection and monitoring may have assisted decision-making and invited consideration of alternative interventions to assist Isabel.<sup>38</sup> Heartland’s newly published guidelines for time-out highlight the importance of data collection and advise that if data show timeout is not decreasing

behavior within a reasonable period of time – “a two-week period” – alternatives should be explored.

Appellees present *Heidemann v. Rother*, 84 F.3d 1021, 1029 (8<sup>th</sup> Cir. 1996) to claim that behavioral interventions for students will be left to school personnel unless the selection of the intervention is “a substantial departure from accepted professional judgment, practice or standards.” However, in *Heidemann*, the Court’s conclusion was in response to a claim of violation under Section 504 of the Vocational Rehabilitation Act and did not “reach the merits of plaintiffs’ assertions that defendants failed to comply with the procedures set forth in the IDEA” in denying FAPE. The Court found the defendants were entitled to qualified immunity since “defendants did not depart grossly from acceptable standards among qualified professionals.” *Heidemann* adopted a standard set by the United States Supreme Court in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982), in deciding whether residents with mental disabilities in state hospitals have the constitutional right to be free from undue bodily restraint. The Appellants’ claim here is that the interventions provided to Isabel did not conform to IDEA requirements. While the *Heidemann* nor *Youngberg* standard would be appropriate for determination of civil liability in other forum, neither addressed the appropriateness of interventions based on IDEA requirements.

Nothing in this decision should be interpreted as minimizing the challenges IEP teams face in addressing the behavioral needs of students with autism and other disabilities. Yet the IDEA requires that those efforts focus on positive behavioral supports and not punitive techniques such as restraint, extended isolation, or time out. Isabel’s IEP team did develop positive behavioral supports such as pictures schedules, social stories, peer coaching, and verbal or tangible reinforcement. However, the reliance on the reductive strategies of isolation, restraint, and extended time out interfered with the implementation of the preventive strategies. While the one-to-one instruction in isolation has serious LRE implications, the extended restraint and time out durations clearly implicate the provision of FAPE. The opportunity for educational benefit, academic or behavioral, would be significantly limited. The federal and state provisions for positive supports direct IEP teams to develop “proactive” approaches to prevent challenging behaviors and “improve the educational results for students with disabilities.”<sup>39</sup> The emphasis on consequent, reactive interventions for Isabel was neither proactive nor effective.

The record supports the conclusion that the 11/22/2004 behavior support plan was not adequately monitored and inconsistent with the positive behavioral supports mandated by the IDEA. The record also supports the conclusion that the 11/18/2005 behavior support plan was not implemented in a manner consistent with applicable research and appropriate educational practices [Iowa Administrative Rules of Special Education, 281—41.3(6)(b) I.A.C.], was not individualized to address the behaviors of concern, was not adequately monitored, and was inconsistent with the positive behavioral supports mandated by the IDEA in violation of 20 U.S.C. § 1414(d)(3)(B)(i) and Iowa law [Iowa Administrative Rules of Special Education, 281—41.67(5)(b)(1) I.A.C.].

#### Standard of Care and Potential for Harm



The Appellants also claim that these interventions resulted in harm to Isabel and failed to meet a standard of care implicit in offering appropriate educational programs. School districts and area education agencies are guided by professional standards enunciated by professional organizations and professional literature<sup>40</sup>.

The Appellants claim that the district and AEA failure to adhere to a standard of care in the implementation of intrusive interventions resulted in Isabel's diagnosis of Post Traumatic Stress Disorder. This claim is not supported in the record. The Appellants offered Ms. Grace Percival<sup>41</sup> as an expert witness to provide testimony concerning Isabel's diagnosis of Post Traumatic Stress Disorder. According to Ms. Percival's notes, an evaluation was conducted 1/13/2006 and 2/14/2006 due to adjustment difficulties that began at school and escalated to her removal from school for home schooling. Behavioral concerns reported by Isabel's parents included noncompliance, aggression, self-injury, and stress. Based on the outline of "intervention strategies" used by the school district, Ms. Percival opined that Isabel could have viewed the interventions as a "a threat of injury" and responded with "intense fear" (School Record at 3421). Ms. Percival diagnosed Isabel with Post Traumatic Stress Disorder, and concluded that she displayed behaviors consistent with a diagnoses of mental retardation and autism spectrum disorder, although no formal assessments were completed.

The Appellees offered Dr. Kevin Took,<sup>42</sup> Medical Director for Child and Adolescent Psychiatry at Blank Children's Hospital, as an expert witness to contest Ms. Percival's diagnosis of Post Traumatic Stress Disorder (PTSD) for Isabel. Dr. Took convincingly testified that the intake information - history of the present illness, medical and psychiatric history, medication, family history, developmental history, mental status - was inadequate and that the assessment utilized by Ms. Percival was invalid as a parental report instrument. He testified that Isabel would not meet the Diagnosis and Statistical Manual (DSM) criteria for PTSD [Appellees' Record at 1614-1619]. The opinion of Dr. Took, the insufficiency of Ms. Percival's diagnosis, and the results of recent, comprehensive medical and psychological examinations finding "no apparent distress" [Appellees' Record at 3029] invalidate the Appellants' claim that the interventions used by the Appellees have seriously injured Isabel as evidenced by her diagnosis of PTSD.

The Appellants have failed to show that Isabel has Post Traumatic Stress Disorder or that the behavioral interventions caused or contributed to a diagnosis of Post Traumatic Stress Disorder.

#### Procedural Errors

The Appellants claim that the behavioral interventions used with Isabel were implemented without written prior notice and/or false or misleading notice to the parents. The Appellees correctly argue the parental consent is not required by federal or Iowa law except for initial evaluations, re-evaluations, and initial provision of special education services [20 U.S.C. § 1414(a)(1)(D); § 1414(c)(3); Iowa Administrative Rules of Special Education, 281—41.103(2) I.A.C.]. While the guidance document from the Iowa Department of Education [*Supra* Note 12] and the professional literature [*Supra* Note 9] recommend parental consent, no legal requirement exists. However, the Appellees also

argue that written prior notice is not required for the use of restraint or time out, and that the Appellants were "well aware" of the proposed district action, and that such a procedural deficit would not deny FAPE. The record supports a conclusion that the Appellants were not provided notice regarding the implementation of the restraint that accompanied the hand-over-hand intervention, nor were they aware or supportive of the extended durations of timeout. As such, these procedural inadequacies may not be dismissed as harmless error.

For Issue #2, the Appellants have met their burden of showing that WCSD and Heartland AEA implemented behavioral interventions with Isabel that were inconsistent with substantive and procedural rights under the IDEA. The behavior support plan was not implemented in a manner consistent with applicable research and appropriate educational practices, was not individualized to address the behaviors of concern, was not adequately monitored, and was inconsistent with the positive behavioral supports mandated by the IDEA in violation of 20 U.S.C. § 1414(d)(3)(B)(i) and the Iowa Administrative Rules of Special Education, 281—41.67(5)(b)(1) I.A.C.

#### Decision

The Appellants have prevailed on the two issues of this appeal: failure to provide an education to Isabel L. in the least restrictive appropriate environment and implementation of behavioral interventions with Isabel which were inconsistent with substantive and procedural rights under the IDEA. Isabel's IEP team is hereby directed to reconvene within four weeks of this hearing decision to develop a new IEP and behavior support plan for Isabel. The LEA is directed to convene the IEP meeting and to insure that Isabel's regular education teacher will be present at the meeting. The AEA is directed to obtain assistance from an outside consultant with expertise in autism and/or challenging behavior to work collaboratively with agency experts, Dr. Rankin and Mr. Drinnin, in developing Isabel's IEP and behavior support plan. Isabel is to be provided extended school year services as compensatory education.

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

Any party who is aggrieved by the findings and decision can bring civil action [20 U.S.C. § 1415(i) 2)(A)]. A party initiating civil action in federal court shall provide an informational copy of the petition or complaint to the department within 14 days of filing the action. The action may be brought in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy [Iowa Administrative Rules of Special Education, 281—41.124(2) I.A.C.].

SUSAN ETSCHIEDT  
Susan Etscheidt, Ph.D.  
Administrative Law Judge

MAY 29, 2007  
Date

Footnotes

<sup>1</sup> Sensory integration training is one of several interventions designed to address the atypical reactions to sensory stimuli experienced by many children with autism. Unusual reaction to auditory, visual, or kinesthetic stimuli and repetitive, rigid, ritualistic or stereotypic behavior are hypothesized to be due to suboptimal arousal or modulation of the central nervous system. Dysfunction of the subcortical functions interferes with the integration of sensory input. Therapeutic approaches have been developed to provide sensory stimulation to children in an effort to facilitate or inhibit influences on the central nervous system, which purportedly result in behavior change. These approaches include sensory integration therapy involving stimulation to the skin or vestibular system through swinging, balance activities or brushing the skin [A. J. Ayers, *SENSORY INTEGRATION AND THE CHILD* (1979)(describing auditory integration training as stimulation to the reticular or vestibular systems through presentation of electronically modulated auditory input of music or voice); G. Berard, *HEARING EQUALS BEHAVIOR* (1993); S. Bettison, *The Long-term Effects of Auditory Training on Children with Autism*, 26 *J. AUTISM & DEV. DISORD.* 361 (1996)], visual therapy involving modulation of visual processing and visual spatial perception through oculomotor exercises or prescription of prism lenses [Melvin Kaplan, *SEEING THROUGH NEW EYES: CHANGING THE LIVES OF CHILDREN WITH AUTISM, ASPERGER SYNDROME AND OTHER DEVELOPMENTAL DISABILITIES THROUGH VISION THERAPY* (2005)(describing therapy approaches for spatial organization and orientation)], and motor integration therapy involving neurological reorganization through passive sensorimotor patterning or physical movement and exercise [American Academy of Pediatrics, *TREATMENT OF NEUROLOGICALLY IMPAIRED CHILDREN USING PATTERNING* (1999)(describing a lack of efficacy for this approach which is based on an oversimplified and unsupported theory of neurological development)].

In a comprehensive review of the efficacy of sensory or motor integration approaches for students with autism, Grace T. Baranek concluded that the scientific/neurological assumptions providing the basis for the interventions to improve perceptual schemas were questionable, refuted, or disproved. The efficacy of these approaches for children with autism was absent for sensory integration training, including variations such as sensory diets and pressured stimulation via weighted vests. Efficacy results for other approaches were described as weak or mixed, due to methodological limitations. Baranek recommended a comprehensive assessment to guide the selection of conservative, short-term sensory interventions, with progress monitoring to ascertain the effectiveness. Grace T. Baranek, *Efficacy of Sensory and Motor Interventions for Children with Autism*, 32 *J. AUTISM & DEV. DISORD.* 397 (2002). See also Geraldine Dawson and Renee Watling, *Interventions to Facilitate Auditory, Visual, and Motor Integration in Autism: A Review of the Evidence*, 30 *J. AUTISM & DEV. DISORD.* 415 (2000)(finding sensory interventions have not been well validated); Frank M. Gresham, Margaret E. Beebe-Frankenberger, and Donald L. MacMillan, *A Selective Review of Treatments for Children with Autism: Description and Methodological Considerations*, 28 *SCH. PSYCH. REV.* 559 (1999)(describing sensory integration therapy and other controversial treatments as having little or no empirical support).

<sup>2</sup> Since 1997, the IDEA has required local educational agencies to conduct a functional behavioral assessment (FBA) and implement a behavioral intervention plan (BIP) prior to disciplinary action that would result in a change of placement [20 U.S.C. § 1415(k)(1)(b)(i-ii)]. Since the introduction of these provisions, many IEP teams conduct FBAs to guide the development of BIPs in response to the past and current requirement to “consider, when appropriate, strategies, including positive behavioral intervention strategies and supports” for a student whose behavior impedes his/her learning or that of others [20 U.S.C. § 1414(d)(3)(B)(i)]. The peer-reviewed literature has consistently identified the effectiveness of behavioral support plans derived from FBAs [Rachel Freeman, et. al., *Building Inclusive School Cultures Using School-Wide Positive Behavior Support*, 31 *RES. & PRAC. SEV. DIS.* 4 (2006)]. The functional assessment process typically involves defining a target behavior, interviewing knowledgeable adults and often the students themselves about occurrences and nonoccurrences of the target behavior, conducting observations of the occurrences and nonoccurrences of the behavior, developing a hypothesis about the potential function of, and effects of context on, the target behavior, and verifying the hypotheses through the manipulation of environmental variables. [John W. Maag, *BEHAVIOR MANAGEMENT: FROM THEORETICAL IMPLICATIONS TO PRACTICAL APPLICATIONS* (2<sup>nd</sup> ed. 2004)]. The function of a behavior is the purpose or motivation for the student engaging in the problem behavior. The purpose, or

motivation, for the behavior may be to gain something such as teacher attention, peer attention or sensory stimulation or to escape or avoid something, such as undesirable tasks or individuals. *See generally* Joe Reichle & David P. Wacker, *COMMUNICATIVE ALTERNATIVES TO CHALLENGING BEHAVIOR: INTEGRATING FUNCTIONAL ASSESSMENT AND INTERVENTION STRATEGIES* (1993); Edward G. Carr, Len Levin, Gene McConnachie, James I. Carlson, Duane D. Kepm, & Christopher E. Smith, *COMMUNICATION-BASED INTERVENTION FOR PROBLEM BEHAVIOR* (1995); Lynette K. Chandler & Carol M. Dahlquist, *FUNCTIONAL ASSESSMENT: STRATEGIES TO PREVENT AND REMEDIATE CHALLENGING BEHAVIOR IN SCHOOL SETTINGS* (2002).

The Heartland procedures for conducting a functional behavioral assessment are described in a guidance document disseminated by the Iowa Department of Education and recommend behavioral intervention plans be based on a functional behavioral assessment which includes a variety of data, including information solicited from the parents. The steps included in the process are to specify the problem behavior in observable and measurable terms, to interview teachers and parents and the child, to structure observations in settings where the problem behavior does and does not occur, to hypothesize the function of the problem behavior, and to select a replacement behavior efficient in gaining the same function as the problem behavior. Sarah A. Bloxham, Suana Wessendorf Knau, and Carl R. Smith, *ASSESSMENT AND DECISION-MAKING FOR STUDENTS WITH BEHAVIORAL NEEDS* (2001)[Appellants' Record at 3904-3023].

<sup>3</sup> The procedures for conducting a full and individual evaluation are contained in a standards document disseminated by the Iowa Department of Education in 2006. An individual's rate of progress is compared to the expected rate of progress, the difference between the individual's level of performance is compared to peers' level of performances, and the individual's need for special education services are considered in eligibility decisions. This document is available at: <http://www.iowa.gov/educate/content/view/619/592/1/1/>

<sup>4</sup> The sensory break strategy refers to the sensory diet activities incorporated from Isabel's Colorado IEP [*Supra* note 1].

<sup>5</sup> Hand-over-hand intervention is a type of physical prompt generally used to initiate and teach a behavior. The prompt hierarchy involves verbal prompts, visual prompts, demonstration or modeling prompts, and physical guidance. Once the behavioral response is established in the individual's repertoire, physical prompting or guidance is faded to less intrusive prompts or reminders. *See* N. Gayle Massey & John J. Wheeler, *Acquisition and Generalization of Activity Schedules and their Effects on Task Engagement in a Young Child with Autism in an Inclusive Pre-School Classroom*, 35 *EDUC. TRAIN. MEN. RET. & DEV. DIS.* 326 (2000)(fading physical guidance to verbal and visual prompts to assist child with daily schedule); John W. Maag, *BEHAVIOR MANAGEMENT: FROM THEORETICAL IMPLICATIONS TO PRACTICAL APPLICATIONS* (2<sup>nd</sup> ed. 2004)(finding physically guiding students is intrusive and should be used only when other types of prompts have failed to elicit the target behavior. Danger includes reinforcement of noncompliance through physical contact and students may become embarrassed or angry when an adult physically aids them); Garry Martin & Joseph Pear, *BEHAVIOR MODIFICATION: WHAT IT IS AND HOW TO DO IT* (8<sup>th</sup> ed. 2007)(finding the use of physical guidance when an individual resists raises ethical issues regarding intrusion and restriction).

<sup>6</sup> Vincent J. Carbone earned his Ed.D. in Education from Nova-Southeastern University in Florida, an M.A. in Applied Behavioral Analysis from Drake University in Iowa, and M.A. in Special Education with an emphasis in Behavioral Disorders from the University of South Florida, and B. A. in Psychology from Marietta College in Ohio. He is currently the director of the Carbone Clinic in New York, providing on-site educational services to children with autism and developmental disabilities. He is a board-certified behavioral analyst and teaches courses in applied behavioral analysis to individuals seeking certification. Although primarily a practitioner, Dr. Carbone has published peer-reviewed research.

<sup>7</sup> Dr. Keith Allen is a professor of pediatrics and psychology at the University of Nebraska Medical Center. He received his Ph.D. from West Virginia University in Child Clinical Psychology and Applied Behavioral Analysis. He received board certification in behavioral analysis, provides consultation to school districts,

and supervises medical student interns. Two prominent areas of his research are stress-related disorders and the implementation of empirically-supported treatments for children. He has authored numerous peer-reviewed journal articles.

<sup>8</sup> Mandt training courses are based on a philosophy of dignity and respect for individuals, including those with challenging or aggressive behavior. Three levels of training are offered: basic, intermediate and advanced. The basic level training is designed for individuals who may infrequently encounter uncooperative or aggressive behavior and stresses prevention and relationship building. The intermediate level training is for those who will encounter challenging behavior on a daily basis, and the advanced level is for those interacting with people with a history and high level of physically aggressive behavior. The training involves modules of building healthy relationships, building communication, building conflict resolution, developing positive behavioral interventions and supports, assisting (physical interaction), separating (release from aggression), and restraint. Individuals are taught to recognize the triggers of aggressive behavior and to remove the individual or the trigger causing the stress. During the escalation of aggressive behavior, individuals are taught to offer options and set limits to deescalate. During the crisis, individuals are encouraged to use the least amount of interaction necessary to ensure safety, which might include restraint. Following the crisis, a cool-off and stabilization period is structured. Restraint is only used to protect a person from harming himself/herself or from harming others.

<sup>9</sup> Timeout is an intervention based on behavioral theory requiring removal of the child from opportunity for reinforcement for a specific period of time following the occurrence of inappropriate behavior. *See generally* Paul A. Alberto & Anne C. Troutman, *APPLIED BEHAVIOR ANALYSIS FOR TEACHERS* (7<sup>th</sup> ed. 2006)(defining timeout as the removal of desirable stimuli to decrease behavior); Alan E. Kazdin, *BEHAVIOR MODIFICATION IN APPLIED SETTINGS* (6<sup>th</sup> ed. 2001)(discussing timeout as the withdrawal of positive consequences or reinforcement to reduce behavior). Several variations of timeout are arranged on a continuum of least to most intensive applications. In non-exclusionary timeout, the sources of reinforcement are temporarily removed from the child's environment as a consequence to inappropriate behavior. For example, adult attention is withheld, enjoyable activities cease, and preferred toys are removed for a short period of time following inappropriate behavior. In exclusionary timeout, the child is removed from the reinforcing environment following inappropriate behavior. The child might be removed to the perimeter of the classroom, described as contingent observation timeout. Isolation timeout involves movement to an area designated within the classroom where the child cannot access reinforcement. Seclusionary timeout involves moving the child to an area away from or outside of the classroom. *See* Thomas J. Zirpoli, *BEHAVIOR MANAGEMENT: APPLICATIONS FOR TEACHERS* (4<sup>th</sup> ed. 2005)(noting that if the initial environment or activity is not reinforcing to the child, any of the variations on the continuum would not be considered timeout).

<sup>10</sup> The appropriateness of this intervention, placing Isabel in timeout and requiring both body basics and the completion of an arbitrary compliance task prior to release, is a central issue of this hearing. Although not documented as a component of a behavioral plan until 11/18/2005, the intervention was used repeatedly throughout September, October, and November. Isabel was removed to timeout for failing to comply with directives and then failing to ask for a break. She was prompted to show "body basics" as an indication that she was ready to return to instruction. Once body basics were complete, she was then requested to complete a task (coloring and later pulling socks) as a measure intended to prevent escape from the task directive to which she originally did not comply. This intervention involves a combination of timeout [*Supra* Note 9] and contingent release.

Contingent release – also described as contingent delay – has been used as a component of timeout procedures. A contingency establishes the conditions under which certain consequences will occur. Contingent release with timeout is to assure that the child understands that appropriate behavior is required prior to release. If a child had been aggressive in timeout and then released, the child might associate the release with the aggression, thereby reinforcing aggression. Conversely, if a child is required to exhibit appropriate behavior prior to release, such as quiet time, the appropriate behavior will be reinforced with release. Three options for contingent release are release contingent on a specified period of appropriate behavior (for example, 2 minutes), release contingent on a minimum duration of time-out, with an extension until all inappropriate behavior has terminated, and release contingent on a minimum durations of

time-out, with a specified extensions (such as 15 seconds) during which no inappropriate responses are exhibited [Paul A. Alberto & Anne C. Troutman, *APPLIED BEHAVIOR ANALYSIS FOR TEACHERS* (7<sup>th</sup> ed. 2006)]. The conditions under which Isabel would be released from timeout involved her sitting in body basics for five minutes and completing or complying with a direction from a teacher to complete a task of coloring or pulling apart socks.

<sup>11</sup> The Appellants offered Dr. Karen M. Heller as an expert witness. Dr. Heller earned her Ed.D. in Organizational Leadership from Nova Southeastern University in Florida, and M.A. in Deafness Rehabilitation from New York University, and a B.A. in Psychology from the University of Michigan. She is a certified trainer for Mandt and has provided professional development training in Mandt for Clark County School District in Las Vegas, Nevada. She testified that completion of a training module is required for certification, and that certification must be renewed annually. The goal of the training is to increase interpersonal and relational skills so that physical intervention is not required. Individuals working with aggressive persons must manage their own feelings so that anger does not escalate the situation. The Mandt approach is designed to teach self-management and not to gain compliance or control others. Physical restraint is only used if non-physical interventions have been unsuccessful in deescalating the aggression. Dr. Heller described a side body hug-type of restraint used with children, and the release of the child at an observed point of transfer. The possible use of restraint must be included in an IEP or BIP. Documentation should include the date, time, people involved, behavior description, non-physical intervention attempts with student reactions, type of restraint with rationale, release, clock time, injury/medical check, and name of person reporting. Dr. Heller stated that immobilization would be inconsistent with the Mandt approach, and that agitated persons would be deescalated prior to moving them. If a deescalated person remains agitated, escorting with body positioning to minimize injury may be used. Active listening is required throughout the crisis period; agitated persons will often not be able to hear, understand or respond to verbal input. Neither time-out or compliance procedures are included in the Mandt approach [Transcript at 742-788].

<sup>12</sup> The guidance document from the Iowa Department of Education entitled *Using Timeout in an Effective and Ethical Manner* was authored by Tim Knoster, Tricia Wells, and Kevin C. McDowell. Iowa Department of Education consultant Suana Wessendorf edited the document. The document provides a description of the levels or continuum of timeout options: planned ignoring, withdrawal of materials, contingent observation, exclusionary timeout, and seclusionary timeout. Seclusionary timeout is recommended only for serious and/or dangerous behavior, and should "be used sparingly and cautiously and never be used as the primary form of a behavior intervention plan" [Appellants' Record at 3796]. Additional guidance suggested that the length of effective timeout be "swift and brief... no more than 5 to 15 minutes" since longer durations prevent the student from "practicing desired behavior" and result in students becoming "restless and agitated":

Timeouts that exceed 30 minutes have questionable value. If a child is not responsive to repeated timeouts of 20-30 minute duration, then other procedures should be considered" [Appellants' Record at 3805].

Contingent release is discussed: "while extending the length of time for misbehavior during timeout is counterproductive, it is wise to expect that the student should be quiet for a short period of time prior to being released (30 seconds)[Appellants' Record at 3809]. The importance of data collection for decision-making is also highlighted. If data indicate that timeout is "not decreasing the behavior within a reasonable period of time (a two-week period)," alternatives should be explored. For students refusing to go to timeout, an additional guideline is offered: avoid at all times any use of aversive physical touch or control" [Appellants' Record at 3812]. A similar document from the Kentucky Department of Education [Appellants' Record at 3889-3903] recommended avoiding power struggles with students, avoiding excessive use of timeout, and assessing when timeout is not working according to the data collection. If timeout interventions exceed fifteen minutes, alternative interventions must be implemented. The time-in environment must be sufficiently reinforcing. Data collection and progress monitoring are also required.

<sup>13</sup> Precision requests involve a tiered system of directives to students. The teacher uses a firm but quiet tone, establishes eye contact with the student, and stands in close proximity to deliver each request. The first request is introduced with "please," and if the student complies, the teacher reinforces the child. If the child does not comply, a second request is introduced five seconds later with "You need to." If compliant,

the child is reinforced. If non-compliant, a reductive consequence is given, often time-out. [See Erinn H. Musser, Melinda A. Bray, Thomas J. Kehle, & William R. Jenson, *Reducing Disruptive Behavior in Students with Serious Emotional Disturbance*, 30 SCH. PSYCH. REV. 294 (2001); Diane De Martini-Scully, Melissa a. Bray, & Thomas J. Kehle, *A Packaged Intervention to Reduce Disruptive Behaviors in General Education Students*, 37 SCH. PSYCH. REV. 149 (2000)].

<sup>14</sup> Behavioral momentum is a behavioral strategy to improve compliance by first directing a child to complete a high probability task, followed by a request to complete a task less preferred by the child. Compliance with the first preferred task increases the likelihood of compliance with the less-preferred directive. See Carol Ann Davis, Michael P. Brady, Robert E. Williams, and Richard Hamilton, *Effects of High-Probability Requests on the Acquisition and Generalization of Responses to Requests in Young Children with Behavior Disorders*, 25 J. APP. BEH. ANAL. 905 (1992)(finding that failure to respond was decreased by the antecedent intervention of interspersal of high probability requests or behavioral momentum)[Appellants' Record at 4189-4200]; Joseph M. Ducharme & David E. Worling (1994). *Behavioral Momentum and Stimulus Fading in the Acquisition and Maintenance of Child Compliance in the Home*, 27 J. APP. BEH. ANAL. 639 (1992)(finding a reduction in the number of high probability request continued to produce desirable responses)[Appellants' Record at 4293-4306]; F. Charles Mace & Phillip Belfiore, *Behavioral Momentum in the Treatment of Escape-Motivated Stereotypy*, 23 J. APP. BEH. ANAL. 507 (1990) (finding high probability demands issued immediately prior to task demands decreased non-compliance)[Appellants' Records at 4638-4645]; F. Charles Mace, Michael I. Hock, Joseph S. Lalli, Barbara J. West, Phillip Belfiore, Elizabeth Pinter & D. Kirby Brown, *Behavioral Momentum in the Treatment of Non-Compliance*, J. APP. BEH. ANAL. 123 (1988)(finding that the sequence of high-probability commands resulted in a "momentum of compliance" [Appellants' Record at 4646-4664].

<sup>15</sup> The evidence-based provisions of both the No Child Left Behind and IDEA legislation attempt to address concerns that effective, proven practices are not being implemented in schools. This research-to-practice gap has been identified in the empirical literature for decades. [See T. Chris Riley-Tillman, Sandra M. Chafouleas, Tanya L. Eckert, and Constance Kelleher, *Bridging the Gap Between Research and Practice: A Framework for Building Research Agendas in School Psychology*, 42 PSYCH. SCHS. 459 (2005); C. R. Greenwood and M. Abbott, *The Research to Practice Gap in Special Education*, 24 TCHR. ED. SPEC. ED. 276 (2001); R. Gersten and J. Smith-Jones, *Reflections on the Research to Practice Gap*, 24 TCHR. ED. SPEC. ED. 356 (2001)].

<sup>16</sup> The criterion for research to be peer-reviewed is generally considered necessary to fortify the credibility and validity of research. Yet, peer-reviewed research may serve to confirm certain methodological or ideological biases of research or publisher [See Ann C. Weller, *Editorial Peer Review: Its Strengths and Weaknesses*, 322 INFO. TD (2001) (arguing that peer review is messy but is essential to the integrity of scientific and scholarly communication). *But see* Frank B. Cross, *The Naïve Environmentalist*, 53 CASE W. RES. L. REW. 477 (2002)(arguing that peer review may be unreliable at screening research for validity due to infection by ideological biases and replication of editorial preferences).

<sup>17</sup> The legislative history of the phrase "based on peer-reviewed research to the extent practicable" begins with The House Committee on Education and the Workforce hearings prior to the reauthorization of the 2004 IDEA, where recommendations for developing and implementing effective research-based practices were highlighted [See *Congressional Record, House*, April 30, 2003 at H3460 (remarks of Rep. Castle)]. When the H.R. 1350 bill to reauthorize the IDEA was introduced on March 19, 2003, the phrase "based on peer reviewed research" was included [See <http://www.gpoaccess.gov/bills/index.html>]. On August 14, 2006, the Department of Education promulgated final regulations for IDEA 2004. The phrase was defined as: "'Peer-reviewed research' generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. However, there is no single definition of 'peer reviewed research' because the review process varies depending on the type of information to be reviewed. We believe it is beyond the scope of these regulations to include a specific definition of 'peer-reviewed research' and the various processes used for peer reviews" [71 Fed. Reg. 46664 (Aug. 14, 2006)]. The phrase "to the extent practicable" was described to mean "services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research.... States, school districts, and school personnel must,

therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs" [71 Fed. Reg. 46665 (Aug. 14, 2006)]. IEP team requirements regarding this provision were also discussed: "We decline to require all IEP Team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refused to provide documentation of research-based methods, as we believe such requirements are necessary and would be overly burdensome" [71 Fed. Reg. 46665 (Aug. 14, 2006)]. The Department noted that "Special education and related services, and supplementary aids and services based on peer-reviewed research are only required 'to the extent practicable.' If no such research exists, the service may still be provided, if the IEP Team determines that such services are appropriate. A child with a disability is entitled to the services that are in his or her IEP whether or not they are based on peer-reviewed research. The IEP Team, which includes the child's parent, determines the special education and related services, and supplementary aids and services that are needed by the child to receive FAPE ... While the Act clearly places an emphasis on practices that are based on scientific research, there is nothing in the Act that requires all programs provided to children with disabilities to be research-based with demonstrated effectiveness in addressing the particular needs of a child where not practicable ... ultimately, it is the child's IEP Team that determines the special education and related services that are needed by the child in order for the child to receive FAPE" [71 Fed. Reg. 46540, 46665 (Aug. 14, 2006)].

<sup>18</sup> This discussion includes the credibility of proposed efficacy criteria, the acceptability of various research methodologies, and the utility or feasibility of establishing proven practices for complex educational contexts [See Samuel L. Odom, Ellen Brantlinger, Russell Gertsen, Robert H. Horner, Bruce Thompson, and Karen R. Harris, *Research in Special Education: Scientific Methods and Evidence-Based Practices*, 71 EXC. CHILD. 137 (2005) (suggesting that the variability of the population and complexity of the educational contexts make the determination of effective practices in special education difficult)]. Other authors propose that certain practices in special education are valued-based rather than evidence based [See Diane M. Browder and Karena Cooper-Duffy, *Evidence-Based Practices for Students with Severe Disabilities and the Requirement for Accountability in "No Child Left Behind,"* 37 J. SP. EDUC. 157 (2003)] and that components of effective practice in special education interact with a variety of factors influencing outcome, including the nature of the general education program [Frederick J. Brigham, William E. Gustashaw, Andrew L. Wiley and Michele St. Peter Brigham, *Research in the Wake of the No Child Left Behind Act: Why the Controversies will Continue and Some Suggestions for Controversial Research*, 29 BEH. DISOR. 300, 308 (2004) (suggesting that this interaction will render a consensus regarding validated practices elusive at best, "even with the soundest of scientific evidence": "Although the call to use scientifically validated practices appears straightforward and within our grasp given the extant body of research, several factors suggest that it will be a more difficult and demanding task than many educators and policy makers believe"). The adoption of evidence-based practices in school will require an understanding of theories of change and innovation, organizational and individual factors [See Thomas R. Kratochwill, *Theories of Change and Adoption of Innovation: The Evolving Evidence-Based Intervention and Practice Movement in School Psychology*, 42 PSYCH. SCHS. 475 (2005); Susan G. Forman, Diane L. Smallwood, and Richard J. Nagle, *Organizational and Individual Factors in Bringing Research to Practice: What We Know, Where We Need to Go*, 42 PSYCH. SCHS. 569 (2005); Margaret Eisenhart and Lisa Towne, *Contestation and Change in National Policy on "Scientifically Based" Education Research*, ED RESEARCH. 331 (2003); Cindy M. Schaeffer, Eric Bruns, Mark Weist, Sharon Hoover Stephan, Julie Goldstein and Yolanda Simpson, *Overcoming Challenges to Using Evidence-Based Interventions in Schools*, 34 J. YIH. ADOLC. 15 (2005)].

<sup>19</sup> Larry Cata Backer argues for a positive engagement of "outsider" scholarship in legal analysis. Larry Cata Backer, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law: Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement*, 33 U.C. DAVIS J. INT'L L. & POL'Y 1173 (2000). Deborah L. Rhode proposes infusing social science data into legal proposition and analysis to strengthen the validity of argument. She discusses an interdisciplinary



approach to legal analysis will connect law to life by assessing the real world consequences of analytic frameworks. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327 (2002). Legal scholars propose that empirical social science scholarship may reveal the effect of law and lead to reflective decision making. [See Julius G. Getman, *Contributions of Empirical Data to Legal Research*, 35 J. LEG. EDUC. 489 (1985)(suggesting empirical data may serve to illuminate the effect of law); Craig Allen Nard, *Toward a Cautious Approach to Obedience: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence*, 39 HOUS. L. REV. 667, 667-692 (2002)(concluding that "consideration of empirical work and social science scholarship can lead to decision making that is more reflective of facts on the ground"); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 655-657 (1988)(concluding "when justice is blind to the fruits of scientific and social scientific research, and to the demonstrable effects of a statute in operation, rules of law are divorced from the empirical world. Courts are thus rendered impotent in the exercise of their duty to safeguard fundamental constitutional guarantees for rights may be violated in innumerable ways not apparent by speculation") (cited in Gerogeoral Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 38 N. C. L. REV. (2004). However, scholars argue that an uncritical acceptance of empiricism may lead to unsupported conclusions. Brian G. Garth warns that while empirical research is crucial in "civilizing" unsettling debates, the research must be credible, legitimate, and free of ideological bias that would limit utility. Brian G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedures and Empirical Research*. 49 ALA. L. REV. 103, 131 (1997). David L. Faigman proposed that the legal relevance of social science research must be judged by both the admissibility and weight. The threshold admissibility standard is based on the validity of the proffered research to answer questions of fact. The probative value of empirical research should depend on the scientific credibility as well as the assistance in determining a fact in issue. David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L. J. (1989).

<sup>20</sup> The Appellants offered literature describing the importance of matching interventions to the hypothesized function of behaviors from a functional behavioral assessment. R. E. O'Neill, R. H. Horner, R. W. Albin, J. R. Sprague, K. Storey, and J. S. Newton, FUNCTIONAL ASSESSMENT AND PROGRAM DEVELOPMENT FOR PROBLEM BEHAVIOR: A PRACTICAL HANDBOOK (2<sup>nd</sup> ed. 1997)(describing functional behavioral assessment as a process to define the events in an environment that may predict and maintain problem behavior); G. Roy Mayer, *Why Must Behavior Intervention Plans be based on Functional Assessment?* (1997) available at <http://www.shapingbehavior.com>. (emphasizing the need for an analysis to determine either an escape or attention function for problem behavior) [Appellants' Record at 3924-3932]; Gena P. Barnhill, *Functional Behavioral Assessment in Schools*, 40 INTERV. SCH. & CLIN. 131 (describing the purpose of FBA is to both identify the antecedents and the consequences maintaining problem behavior)[Appellants' Record at 4038-4050]; Rehabilitative Research and Training Center on Positive Behavioral Supports (2006) available at <http://rrtcpbs.fmhi.usf.edu>. [Appellants' Record at 3975-3994] (discussing the relationship of FBA to replacement behaviors); Rose Iovannone, Glen Dunlap, Heather Huber, and Don Kincade, *Effective Educational Practices for Students with Autism Spectrum Disorders*, 18 FOCUS AUTISM & OTHER DEV. DISAB. 150, 153 (2003)(finding a functional approach to problem behavior a "core" element of comprehensive instructional programs for students with autism)[Appellants' Record at 4412-4427]; K. Mark Derby, David P. Wacker, Gary Sasso, Mark Steege, John Northrup, Karla Cigrand, and Jennifer Asmus, *Brief Functional Assessment Techniques to Evaluate Aberrant Behavior in an Outpatient Setting: A Summary of 79 Cases*, 25 J. APP. BEH. ANAL. 713 (1992)(finding a brief experimental manipulation of hypothesized variables sufficient to analyze maintaining conditions for inappropriate behavior)[Appellants' Record at 4272-4280]; Gregory P. Hanley, Brian A. Iwata & Brandon E. McCord, *Functional Analysis of Problem-Behavior: A Review*, 36 J. APP. BEH. ANAL. 147 (2003)(summarizing the best practices for conducting functional analysis across populations, behavior, and settings)[Appellants' Record at 4339-4377]; Brian A. Iwata, Michael F. Dorsey, Keith J. Slifer, Kenneth E. Bauman, and Gina S. Richman, *Toward a Functional Analysis of Self-Injury*, 27 J. APP. BEH. ANAL. 197 (1994)(proposing a functional assessment methodology for examining the effects of environment on self-injury)[Appellants' Record at 4436-4448]; David M. Richman, David P. Wacker, Jennifer M. Asmus, and Sean D. Casey, *Functional Analysis and Extinction of Different Behavior Problems Exhibited by the Same Individual*, 31 J. APP. BEH. ANAL. 475 (1998)(emphasizing importance of matching extinction procedures to the function of the behavior)[Appellants' Record at 4860-63]; Richard G. Smith & Brian A. Iwata, *Antecedent Influences on Behavior Disorders*, 30 J. APP. BEH. ANAL. 343

(1997)(suggesting applied behavioral analysis of antecedent variables is relatively unstudied)[Appellants' Record at 4914-4946].

<sup>21</sup> Certain authors have expressed reservations concerning the validity of the FBA approach in school settings [See Terrance M. Scott, Julianna McIntyre, Carl Liaupsin, C. Michael Nelson, & Maureen Conroy, M. *An Examination of Functional Behavior Assessment in Public School Settings: Collaborative Teams, Experts, and Methodology*, *Behavioral Disorders*, 29 BEH. DISOR. 382 (2004); Robert A. Gable, *Functional Assessment in School Settings*, 24 BEH. DISOR. 246 (1999); Stephen W. Armstrong & James, M. Kauffman, *Functional Behavioral Assessment: Introduction to the Series*, 24 BEH. DISOR. 167 (1999); J. Ron Nelson, Maura L. Roberts, Sarup R. Mathur, & Robert B. Rutherford, *Has Public Policy Exceeded Our Knowledge Base? A Review of the Functional Behavioral Assessment Literature*, 24 BEH. DISOR. 169 (1999)]. Other authors have discussed the utility and logic of endorsing such an approach [See John W. Maag & Pamela J. Larson, *Training a General Education Teacher to Apply Functional Assessment*, 27 ED. TREAT. CHILD. 26 (2004); George Sugai, Robert H. Horner, & Jeffrey R. Sprague, *Functional-Assessment-based Behavior Support Planning: Research to Practice*, 24 BEH. DISOR. 253 (1999)] and the promise of continued demonstration of efficacy [See Terrance M. Scott et. al., *Using Functional Behavior Assessment in General Education Settings: Making a Case for Effectiveness and Efficiency*, 29 BEH. DISOR. 189 (2004)].

<sup>22</sup> R. Matthew Reese, David M. Richman, Jennifer Zarccone, & Troy Zarccone, *Individualizing Functional Assessments for Children with Autism: The Contributions of Perseverative Behavior and Sensory Disturbances to Disruptive Behavior*, 18 FOCUS AUT. DEV. DIS. 87 (2003) (finding gaining access to perseverative activities and escaping demands while engaged in these activities frequently contributed to disruptive behavior [Appellants' Record at 4854-4859]; Edward G. Carr, Creighton D. Newsom, & Jody A. Binkoff, *Escape as a Factor in the Aggressive Behavior of Two Retarded Children*, 13 J. APP. BEH. ANAL. 101 (1980)(finding aggression may be maintained by an escape function and that strengthening an alternative escape option would reduce aggression)[Appellants' Record at 4136-4152]. The study cited by Appellees by Steege et. al.(1990) would be an example of negative reinforcement combined with differential reinforcement.

<sup>23</sup> John M. Hintze & Tanya L. Eckert, *The Use of Functional Assessment and Analysis Strategies to Reduce the Noncompliant Behavior of a Child with Autism*, 3 PROV. PRAC. 9 (2000)(finding escape extinction and differential reinforcement of alternative behavior (DRA) successful in reducing noncompliance in a 12-year-old girl with autism. The plan involved physical redirection back to task. She was also taught the manual sign for break with physical prompting and provided a 10 second break. The rationale was to teach a behavior that was the functional equivalent of problem behavior and allowed prosocial communication with the teacher. The time for break was eventually reduced to a brief moment of escape)[Appellees' Record at 2133-2139]; Bethany A. Marcus and Timothy R. Vollmer, *Effects of Differential Negative Reinforcement on Disruption and Compliance*, J. APP. BEH. ANAL. 229 (1995)finding that differential reinforcement of compliance more effective than differential reinforcement of communication in both reducing disruptive behavior and increasing compliance)[Appellees' Record at 2170-2171];

<sup>24</sup> Jennifer M. Asmus, David P. Wacker, Jay Harding, Wendy K. Berg, K. Mark Derby, and Elizabeth Kocis, *Evaluation of Antecedent Stimulus Parameters for the Treatment of Escape-Maintained Aberrant Behavior*, 32 J. APP. BEH. ANAL. 495 (1999)(describing a methodology to identify antecedents for escape-maintained behavior)[Appellants Record at 4004-4022], Iser G. DeLeon, Pamela L. Neidert, Bonita M. Anders, and Vanessa Rodriguez-Catter, *Choices Between Positive and Negative Reinforcement During Treatment of Escape-Maintained Behavior*, 34 J. APP. BEH. ANAL. 521 (2001)(finding positive reinforcement for task completion decreased escape-maintained problem behavior)[Appellants' Record at 4267-4279]; Zbigniew Golonka, David Wacker, Wendy Berg, K. Mark Derby, Jay Harding, & Stephanie Peck, *Effects of Escape to Alone Versus Escape to Enriched Environments on Adaptive and Aberrant Behavior*, 33 J. APP. BEH. ANAL. 243 (2000)(finding a break consisting of preferred activities was more efficacious than a solitary break in decreasing inappropriate behavior)[Appellants' Record at 4331-4334]; Joseph S. Lalli, Timothy R. Vollmer, Patrick R. Progar, Carrie Wright, John Borrero, Dency Daniel, Christine Hoffner Barthold, Kathy Tocco, and William May, *Competition Between Positive and Negative*

*Reinforcement in the Treatment of Escape Behavior*, 32 J. APP. BEH. ANAL. 285 (1999) (finding edible positive reinforcement reduced non-compliance more efficaciously than negative reinforcement of a break)[Appellants' Record at 4502-4512]; Joseph S. Lalli, Sean Casey, Han Goh, & Joann Merlino, *Treatment of Escape-Maintained Aberrant Behavior with Escape Extinction and Predictable Routines*, 27 J. APP. BEH. ANAL. 705 (1994)(finding the use of printed activity schedules reduced non-compliant behavior)[Appellants' Record at 4514-4523]; Cathleen C. Pizaaz, Doug R. Moes, & Wayne W. Fisher, *Differential Reinforcement of Alternative Behavior and Demand Fading in the Treatment of Escape-Maintained Destructive Behavior*, 29 J. APP. BEH. ANAL. 569 (1996)(finding destructive behavior of young child with autism was reduced with differential reinforcement for compliance, escape extinction without physical guidance (continual verbal requests to complete demand), and demand fading)[Appellants' Record at 4825-4828]; Iser, G. DeLeon, Pamela L. Neidert, Bonita M. Anders, and Vanessa Rodriguez-Carter, *Choices Between Positive and Negative Reinforcement During Treatment for Escape-Maintained Behavior*, 34 J. APP. BEH. ANAL. 521 (2001)(finding positive reinforcement more effective than negative reinforcement in promoting compliance for a young girl with autism)[Appellees' Record at 2101-2105];

<sup>25</sup> The Appellants offered empirical research showing that hand-over-hand guidance used for behaviors maintained by non-escape functions increased inappropriate behavior. Lee Kern, Beth A. Delaney, Alexandra Hilt, Deborah E. Bailin, & Christina Elliot, *An Analysis of Physical Guidance as Reinforcement for Noncompliance*, 26 BEH. MOD. 516 (2002)(finding that physical guidance for an escape-maintained behavior decreased non-compliance, but increased compliance for attention-maintained non-compliance)[Appellants' Record at 4477-4497]; see also Dorothea C. Lerman, Brian A. Iwata, Richard G. Smith, Jennifer R. Zarcone, & Timothy Vollmer, *Transfer of Behavioral Function as a Contributing Factor in Treatment Relapse*, 27 J. APP. BEH. ANAL. 357 (1994)(recommending that on-going analysis be conducted to determine if the original hypothesized function continues to maintain the problem behavior) [Appellants' Record at 4606-4619].

<sup>26</sup> Dr. Mohr earned her Ph.D. in nursing and an M.A. in Behavioral Science from the University of Texas. She currently is on the faculty of the CDC Injury Control Center, School of Public Health in New Jersey and an Associate Professor of Psychiatric Mental Health Nursing at the University of Medicine and Dentistry of New Jersey.

<sup>27</sup> Sheila S. Kennedy & Wanda K. Mohr, *A Prolegomenon on Restraint of Children: Implicating Constitutional Rights*, AM. J. ORTHO. 26 (2001) (arguing restraints are non-therapeutic)[Appellants' Record at 4465-4476]; Wanda K. Mohr, Theodore A. Petti, & Brian D. Mohr, *Adverse Effects Associated with Physical Restraint*, CAN. J. PSYCH. 333 (2003)(clinicians must be provided with data on risk factors and adverse effects prior to selecting a restraint intervention)[Appellants' Record at 4724-4731]; Wanda K. Mohr & Jeffrey A. Anderson, *Faulty Assumptions Associated with the use of Restraints with Children*, 14 J. CHILD. ADOL. PSYCH. NURS. 141 (2001)(finding a lack of research on the therapeutic effects and the use of faulty assumptions to support the continued use of restraint in children)[Appellants' Record at 4732-4742]; Wanda K. Mohr, Margaret M. Mahon & Megan J. Noone, *A Restraint on Restraints: The Need to Reconsider the Use of Restrictive Interventions*, 12 ARCH. PSYCH. NURS. 95 (1998)(finding the inappropriate use of power and force during restraint contributed to traumatic experiences of hospitalized children)[Appellants' Record at 4743-4754]; Theodore A. Petti, Wanda K. Mohr, John W. Somers, & Linda Sims, *Perceptions of Seclusion and Restraint by Patients and Staff in an Intermediate-Term Care Facility*, J. CHILD. ADOL. PSYCH. NURS. 115 (2001)(comparing perceptions of patients and staff with restraint interventions)[Appellants' Record at 4812-4824]; See David M. Day, *Examining the Therapeutic Utility of Restraint and Seclusion with Children and Youth: The Role of Theory and Research in Practice*, 72 AM. J. ORTHO. 266 (2002)(presenting conflicting perspectives from proponents (highlighting positive, therapeutic effects) and opponents (demonstrating lack of benefit and the tendency for staff with limited treatment options to legitimized and routinized the use of such procedures) concerning seclusion and restraints in residential settings. He highlights literature pertaining to negative perception by children, and the "consensus" that these procedures should only be used "if every available option is exhausted" (the least restrictive measure)[Appellants' Record at 4201-4213]; Sandy K. Magee and Janet Ellis, *The Detrimental Effects of Physical Restraint as a Consequence for Inappropriate Classroom Behavior*, 34 J. APP. BEH. ANAL. 501 (2001)(finding that restraint resulted in increased problem behavior for two

students with developmental disabilities and that function of behavior must be determined prior to application of intervention)[Appellants' Record at 4665-4668]; Nirbhay N. Singh, Subhashni d. Singh, Charles M. Davis, Larry L. Latham, & James G. Ayers, *Reconsidering the Use of Seclusion and Restraints in Inpatient Child and Adult Psychiatry*, 8 J. CHILD. FAM. STUD. 243 (1999)(finding applications should be reserved to emergency situations)[Appellants' Record at 4904-4913] (concluding the extent of the use of restraint in schools is unknown, physical restraint has not been researched as an educational intervention and data concerning efficacy or negative effects do not exist, and restraints have been long-considered a behavior management technique for teachers dealing with crisis behaviors including aggression and destruction); William A. Fisher, *Restraint and Seclusion: A Review of the Literature*, 115 AM. J. PSYCH. 1584 (1994)(concluding procedures are efficacious in preventing injury, deleterious physical and psychological effects may occur, and training in prediction and prevention should reduce use)[Appellants' Record 4307-4314]; Wayne W. Fisher, Cathleen C. Piazza, Lynn G. Bowman, Gregory P. Hanley, and John D. Adelinis, *Direct and Collateral Effects of Restraints and Restraint Fading*, 30 J. APP. BEH. ANAL. 105 (1997)(supporting fading of restraint due to risks associated with use)[Appellants' Record at 4315-4329]; Brennan L. Wilcox, H. Rutherford Turnbull, and Ann P. Turnbull (1999-2000). *Behavioral Issues and IDEA: Positive Behavioral Interventions and Supports and the Functional Behavioral Assessment in Disciplinary Context*, 8 EXCEP 172 (1999-2000)(advising that physical restraint should not be used unless required to prevent self-injury or promote normal body positioning or physical functioning. If necessary, restraint should be used only long enough to eliminate the clear and present danger and never as a regular substitute for positive behavioral intervention. A full range of positive interventions should be available and used to ensure adequate less restrictive alternatives to restraint [Appellants' Record at 5011].

<sup>28</sup> Brian A. Iwata, Gary M. Pace, Glynnis Edwards Cowdery, and Raymond g. Miltenberger, *What Makes Extinction Work: An Analysis of Procedural Form and Function*, 27 J. APP. BEH. ANAL. 131 (1994)(describing the application of extinction to self-injurious behavior)[Appellants' Record at 4449-4462]; Dorothea C. Lerman & Brian A. Iwata, *Developing a Technology for the Use of Operant Extinction in Clinical Settings: An Examination of Basic and Applied Research*, 29 J. APP. BEH. ANAL. 345 (1996)(providing guidelines on the use of extinction in applied setting, emphasizing the extinction may be more effective than more restrictive interventions such as timeout)[Appellants' Record at 4566-4603]; Dorothea C. Lerman & Brian Iwata, *A Methodology for Distinguishing Between Extinction and Punishment Effects Associated with Response Blocking*, 29 J. APP. BEH. ANAL. 231 (1996)(finding response blocking extinguished target behavior)[Appellants' Record at 2153-2155]; Dorothea C. Lerman, Brian A. Iwata & Michele D. Wallace, *Side Effects of Extinction; Prevalence of Bursting and Aggression During the Treatment of Self-Injurious Behavior*, 32 J. APP. BEH. ANAL. 1 (1999)(finding extinction bursting and extinction-induced aggression occurred less frequently when extinction used as part of a multi-component treatment package)[Appellees' Record at 2156-2163]; Melissa J. Shirley, Brian A. Iwata, SungWoo Kahng, Jody L. Mazaleski & Dorothea C. Lerman, *Does Functional Communication Training Compete with Ongoing Contingencies of Reinforcement? An Analysis During Response Acquisition and Maintenance*, 30 J. APP. BEH. ANAL. 93 (1997)(finding functional communication training without extinction procedures less effective than interventions added to reduce inappropriate behavior)[Appellees' Record at 2194-2205]; Dorothea C. Lerman, Brian A. Iwata, & Michele D. Wallace, *Side Effects of Extinction: Prevalence of Bursting and Aggression During the Treatment of Self-Injurious Behavior*, 32 J. APP. BEH. ANAL. 1 (1999)(finding that bursting and extinction-induced aggression were common side effects in over 50% of individuals treated via extinction procedures)[Appellants' Record at 4558 - 4564].

<sup>29</sup> David L. Gast & C. Michael Nelson, *Legal and Ethical Considerations for the Use of Timeout in Special Education Setting*, 11 J. SP EDUC. 457 (2001)(warning that although timeout is effectively, if used improperly could be highly aversive. While the duration of timeout has varied from 2 minutes to 3 hours, excessive timeout periods should be avoided since the student's opportunity to learn is decreased by absence, long timeout may result in emotional behaviors increasing the rate of inappropriate behavior, and prolonged timeout exposes the pupil to unnecessary aversive experiences) [Appellees' Record at 2112-2122]; Karen R. Harris (1985). *Definitional, Parametric, and Procedural Considerations in Timeout Interventions and Research*, 51 EX. CHILD. 279, 284 (1985)(finding durations that are too long are "both ethically and practically questionable, since they remove the subject from the learning environment, may actually increase the rate of undesirable behavior, and may be unnecessarily aversive"[Appellees' Record at 2123-2132]; Kazdin, supra note 9, at 214 ("very brief timeout, for several seconds or a few minutes, has

been effective”); *See also* Tera L. Wolf, I F. McLaughlin and Randy Lee Williams *Timeout Interventions and Strategies: A Brief Review and Recommendations*, 21 INTER. J. SPEC. EDUC. 21, 5033 (2006)(“intended only as a temporary measure, timeout quickly becomes ineffective, even dangerous, when children are placed in small, isolated places for long periods of time” [Appellants’ Record at 5026-5033]; Darrel E. Bostow and J. B. Bailey, *Modification of Severe Disruptive and Aggressive Behavior Using Brief Timeout and Reinforcement Procedures*, 2 J. APP. BEH. ANAL. (1969)(finding brief, two-minute periods of timeout reduce disruptive and aggressive behavior in individual with mental disabilities in residential settings)[Appellants’ Record at 4058-4064]; Robert Benjamin, Harold Mazzarins, and Joel Kupfersmid, *The Effect of Time-out (TO) Duration on Assaultiveness in Psychiatrically Hospitalized Children*, 9 AGG. BEH. (1983)(looking at timeout durations from 15-90 minutes and finding the longer the time-out given, the longer the time needed to become calm)[Appellees’ Record at 2093-2100]; Steven A. Hobbs, Rex Forehand, and Rhonda G. Murray, *Effects of Various Durations of Timeout on the Noncompliant Behavior of Children*, 9 BEH. THER. 652 (1978)(finding a four-minute timeout more effective in suppressing target behavior compared to 10-second and 1-minute versions, however all durations manipulated were less than four minutes)[Appellees’ Record at 2148-2152];

<sup>30</sup> Jay V. Solnick, Arnold Rincover, & Christa P. Peterson, *Some Determinants of the Reinforcing and Punishing Effect of Timeout*, 10 J. APP. BEH. ANAL. 415 (1977)(finding that an “enriched” time-in environment rendered time-out as punishing)[Appellants’ Record at 4947-4957]; Christine A. Readdick & Pauline L. Chapman, *Young Children’s Perception of Time-Out*, 15 J. RES. CHILD. ED. 81 (finding children had negative self-attributions such as disliked by teacher and ignored by peers, as well as feeling of sadness and fear. Children could not describe why they were in timeout, limiting the inhibition of future problem behavior. Children perceive timeout as a punishment)[Appellants’ Record at 4846-4853]; M. Eugene Scarboro and Rex Forehand, *Effects of Two Types of Response-Contingent Time-Out on Compliance and Oppositional Behavior of Children*, 19 J. EXP. CHILD. PSYCH. 252 (1975)(finding both in-room and out-of-room timeouts effective in reducing target behaviors, but within room requiring more administrations of the timeout procedure ) [Appellees’ Record at 2181-2193].

<sup>31</sup> Hewitt B. Clark, Trudylee Rowbury, Ann M. Baer, and Donald M. Baer, *Timeout as a Punishing Stimulus in Continuous and Intermittent Schedules*, 6 J. APP. BEH. ANAL. 443 (1973)(finding less frequent applications of timeout were effective and desirable because removal interrupts and reduces the available instructional time)[Appellants’ Record at 4160-4172]; Virginia Costenbader & Margery Reading-Brown, *Isolation Timeout Used with Students with Emotional Disorders*, 61 EXCEP. CHILD 353, (1995)(finding an “extraordinary” number of timeout interventions utilized and a “remarkable” amount of time spent in stimulus-deprived environments)[Appellants’ Record at 4173-4188]; Kathleen Delaney, *Time-out: An Overused and Misunderstood Milieu Intervention*, 5 J. CHIL. & ADOL. PSY. NURS. 15, (1999)(finding timeout to be an automatic response to behavioral infractions, leading to extended and overuse of the procedure. She notes that when timeout becomes aversive to length or location, the nature of the intervention is altered)[Appellants’ Record at 4255-4266].

<sup>32</sup> The effectiveness of timeout may only be determined based on data. Zirpoli, *supra* note 9, *Id.* at 304 (“time-out continues to be used despite data indicating its ineffectiveness in reducing special inappropriate behavior in individual students”); Stacy L. Carter & John J. Wheeler, *Considering the Intrusiveness of Intervention*, 20 INT’L J. SP. EDUC. (2005)(finding that intrusive intervention should involve precise methods of monitoring and assessing the effectiveness of the interventions so that progress may be determined quickly and modifications are made in a reasonable amount of time)[Appellants’ Record at 4153- 4159]; David L. Gast & C. Michael Nelson, *Supra* Note 29 (advising that objective data determine if timeout is remediating problem behavior); *See* Karen R. Harris, *Supra* Note 29 (noting that one abuse of timeout is continued use of the procedures without sufficient data to affirm its effectiveness or ineffectiveness); Alberto & Troutman, *supra* note 9, at 371 (noting that the results of timeout must be monitored to determine a decrease in the target behavior).

<sup>33</sup> Brennan L. Wilcox, H. Rutherford Turnbull, and Ann P. Turnbull (1999-2000). *Behavioral Issues and IDEA: Positive Behavioral Interventions and Supports and the Functional Behavioral Assessment in Disciplinary Context*, 8 EXCEP. 172 (1999-2000)(defining seclusionary and isolation timeout as an aversive intervention involving rooms, boxes, or other structures or spaces from which the student cannot

exit readily. The authors advise that no state or school district should use any such interventions nor include them in a behavior plan.); [Appellants' Record at 5011]; Alberto & Troutman, *Supra* Note 9, at 371 (this procedure is usually reserved for behaviors such as physical aggression, verbal aggression, and destruction of property" and must be shared with parties prior to implementation); Tim Knooster, Tricia Wells, & Kevin C McDowell, *Supra* Note 12 (noting seclusion timeout must not be implemented unless agreed to by the parents); Heartland AEA 11, CHALLENGING BEHAVIOR TEAM POSITION STATEMENT ON THE USE OF TIME-OUT PROCEDURES (2006)[Appellees' Record at 1603-1608](providing guidelines for the use of seclusionary timeout including the need to evaluate less intensive strategies, to document implementation integrity, and to ensure the appropriateness of timeout procedures through the "on-going and daily analysis of progress monitoring data" *Id.* At 1607. Seclusionary intervention should be used as "the intervention of last resort" *Id.* At 1605.

<sup>34</sup> Ken Merrell, in an article entitled "Effective Use of Timeout" published in 2000, discussed contingent release and concluded: under no circumstances should a child be told to go to timeout and come out "when they can behave...." as such practice violates "the basic assumptions of time-out, confuse the child, and set up scenarios where a power struggle is more likely" and that "repeated explanations combined with threats reduce the effectiveness of timeout [Appellants Record at 3933-3934]; Mark D. Shriver & Keith D. Allen, *Defining Child Noncompliance: An Examination of Temporal Parameters*, 30 J. APP. BEH. ANAL. 173 (1997)(finding that the use of short latencies in defining noncompliance may represent overly restrictive criteria)[Appellants' Record at 4900-4903];

<sup>35</sup> See Karen R. Harris, *Supra* Note 29 (noting that comparative investigations about contingent release are needed)[Appellees' Record at 2123-2132]; F. Charles Mace, Terry J. Page, Martin T. Ivancic, & Shirley O'Brien, *Effectiveness of Brief Time-Out with and without Contingent Delay: A Comparative Analysis*, 19 J. APP. BEH. ANAL. 79 (1986)(finding timeout not enhanced with contingent delay while noting lack of full analysis and need for replication studies due to potential liabilities).

<sup>36</sup> See Steven A. Hobbs & Rex Forehand, *Effects of Differential Release from Time-Out on Children's Deviant Behavior*, 6 J. BEH. THER. EXP. PSYCH. 256 (1975)(noting the scarcity of research concerning the effectiveness of contingent release timeout and finding contingent release more effective than non-contingent release on disruption during timeout and noncompliant behavior)[Appellees' Record at 2140-2141]; Steven A. Hobbs & Rex Forehand, *Important Parameters in the Use of Timeout with Children: A Re-Examination*, 8 J. BEH. THER. EXP. PSYCH. 365 (1977)(finding short timeout ineffective if the child has been introduced to longer periods of timeout and that, although few studies investigated this parameter, contingent release was more effective than non-contingent release)[Appellees' Record at 2142-2147]; Tom S. MacDonough and Rex Forehand, *Response-Contingent Time-Out: Important Parameters in Behavior Modification with Children*, 4 J. BEH. THER. & EXP. PSY. 231 (1973) (describing one version of contingent release as the prescription of a maximum duration of timeout with an extension until any disruptive behavior was terminated; calling for two-three minute durations prior to release)[Appellees' Record at 2164-2169]; D. Joe Olmi, Robert C. Sevier, & Deborah F. Nastasi, *Time-in/Time-out as a Response to Noncompliance and Inappropriate Behavior with Children with Developmental Disabilities: Two Case Studies*, 34 PSYCH SCHS 31 (1997)(finding a time-in intervention of positive touch and verbal praise coupled with brief time-out based on a 3-5 second contingent release period following calming behavior was more effective than time-in alone in addressing problem behavior)[Appellees' Record at 2172-2180]; Mark D. Shriver & Keith D. Allen, *The Time-Out Grid: A Guide to Effective Discipline*, 11 SCH. PSYCH. QUART. 67 (1996)(finding contingent release following a 3-5 minute timeout even if students are not quiet and calm may be used since this would not compromise the procedure. The teacher may also use a modified quiet contingency to release sooner than the timeout period for quiet behavior. Timeout should be avoided if the contract between the time-in and time-out environments cannot be established or if the student prefers isolation from peers or staff or tasks. The duration should also be short, since the longer a student remains in timeout, the more likely she will recruit or contact unplanned reinforcers that will contaminate the discriminability between time-in and time-out)[Appellees' Record at 2206-2214].

<sup>37</sup> See *West Des Moines Community School District and Heartland Area Education Agency*, 36 IDELR 222 (SEA IA 2002)(finding that the IEP team must "assess what is or is not working for [the student] whom

everyone has agreed is dealing with significant behavioral challenges”); *Linn-Mar Community School District and Grant Wood Area Education Agency 10*, 41 IDELR 24 (SEA IA 2004)(finding the progress monitoring data presented by the school district is vague for certain IEP components and nonexistent for others. Few meaningful data are available to help the IEP team review progress or confidentially convince this ALJ that the programs offered to [the student] were calculated to provide meaningful benefit”); *Mason City Community School District and Northern Trails Area Education Agency 2*, 36 IDELR 50 (SEA IA 2001)(finding behavior intervention plans must be monitored to determine the effect of the planned interventions).

<sup>38</sup> A variety of alternative interventions may have proven efficacious for Isabel. See G. Rex Walker, *Noncompliant Behavior of People with Mental Retardation*, 14 RES. DEVE. DISAB. 87 (1993)(finding results of time-out interventions less desirable than reinforcement-based strategies) [Appellants’ Record at 4992-5010]; Rex Forehand, Mark W. Roberts, Daniel M. Doleys, Steven A. Hobbs, and Patricia A. Resick, *An Examination of Disciplinary Procedures with Children*, 21 J. EXP. CH. PSYCH. 109 (1976)(finding negative attention as a verbal reprimand decreased noncompliance more effectively than repeated requests or isolation)[Appellees’ Record at 2106-2111]; Samuel L. Odom, William H. Brown, Timothy Frey, Necdet Karasu, Lora Lee Smith-Canter, & Phillip Strain, *Evidence-Based Practices for Young Children with Autism: Contributions for Single-Subject Design Research*, 18 FOC. AUT DEV. DIS. 166 (2003)(finding that adult-directed teaching and differential reinforcement were well-established as efficacious, and that peer mediation, visual supports, self-monitoring, family involvement, positive behavioral support, videotaped models, and choice or preference in learning tasks were emerging as efficacious)[Appellants’ Record at 4778-4787]; Nathan A. Call, David P. Wacker, Joel E. Ringdahl, Linda J. Cooper-Brown, and Eric W. Boelter, *An Assessment of Antecedent Events Influencing Non-Compliance in an Outpatient Clinic*, 37 J. APP. BEH. ANAL. 145 (2004)(finding that adding positive reinforcers to a task as an antecedent strategy decreased non-compliance)[Appellants’ Record at 4065-4077]; Dorothea C. Lerman & Christina M. Vorndran, *On the Status of Knowledge for Using Punishment: Implications for Treating Behavior Disorders*, 35 J. APP. BEH. ANAL. 431 (2002)(cautioning against the use of punishment in behavioral interventions and emphasizing the need to improve the efficacy of less intrusive procedures)[Appellants’ Record at 4524-4557]; Vincent J. Carbone, Barry Morgenstern, & Gina Zecchin-Tirri, *An Analysis of Instructional Methods as Motivational Variables* (unpublished manuscript, no date)(describing the negative impact of escape-based behaviors on instruction with children with autism and finding that antecedent instructional modifications such as stimulus demand reduction, pace of instruction, interspersal training, choice making, neutralizing routines, and errorless instruction lead to a reduction of escape and avoidance behavior in children with autism during discrete trial training) [Appellants’ Record at 4079-4135]; Jay W. Harding, David P. Wacker, Wendy K. Berg, Anjali Barretto, & Barbara Rankin, *Assessment and Treatment of Severe Behavior Problems Using Choice-Making Procedures*, 25 EDUC. TREAT. CHILD. 26 (2002)(finding a choice assessment of preferred toys and parent attention assisted in developing a treatment program)[Appellants’ Record at 4378-4397]; Robert H. Horner, H. Michael Day, and Julie R. Day, *Using Neutralizing Routines to Reduce Problem Behaviors*, 30 J. APP. BEH. ANAL. 601 (1997)(finding that planning a child’s daily routine to diminish the reinforcer associated with problem behavior assisted in reducing problem behavior)[Appellant’s Record at 4398-4411]; Brian A. Iwata, Richard G. Smith, Jack Michael, *Current Research on the Influence of Establishing Operations on Behavior in Applied Settings*, 33 J. APP. BEH. ANAL. 411 (2000)(finding the determination and alteration of establishing operations essential to behavioral intervention)[Appellants’ Record at 4428-4435]; Craig H. Kennedy, Tina Ikonen, & Kristin Lindquist, *Comparing Interspersed Requests and Social Comments as Antecedents for Increasing Student Compliance*, 28 J. APP. BEH. ANAL. 97 (1995)(finding interspersed requests reduced non-compliant behavior)[Appellant Records’ at 4463-4464]; Peter McGill, *Establishing Operations: Implications for the Assessment, Treatment, and Prevention of Problem Behavior*, 32 J. APP. BEH. ANAL. 393 (1999)(finding the need to specify establishing operations in preventing problem behavior)[Appellants’ Record at 4685-4710]; Jack Michael, *Implications and Refinements of the Establishing Operation Concept*, 33 J. APP. BEH. ANAL. 401 (2000)(discussing the role of establishing operations in functional analysis methodology)[Appellants’ Record at 4711-4720]; Stephen C. Luce, Joseph Delquadri & R. Vance Hall, *Contingent Exercise: A Mild but Powerful Procedure for Suppressing Inappropriate Verbal and Aggressive Behavior*, J. APP. BEH. ANAL. 583 (1980)(finding contingent exercise, although not topographically related to the inappropriate behaviors, was easy to apply, effective, and minimally disruptive)[Appellants’ Record at 4620-4631]; James K. Luiselli, *Therapeutic Effects of*

*Brief Contingent Effort on Severe Behavior Disorders in Children with Developmental Disabilities*, 13 J. CLIN. CHILD PSYCH. 257 (1984)(finding brief contingent exercise of arm movement was more effective than reinforcement procedures in reducing problem behavior)[Appellants' Record at 4632-4637];

<sup>39</sup> Senate Committee on Health, Education, Labor, and Pensions, November 3, 2003, 108<sup>th</sup> Congress, 1<sup>st</sup> Session, 108 S. Rpt. 185 (2003).

<sup>40</sup>Professional organizations such as the Council for Exceptional Children have published standards which address behavior interventions. The CEC standards require application of behavioral procedures which do not undermine the dignity of the individual [Council for Exceptional Children, WHAT EVERY SPECIAL EDUCATOR MUST KNOW: ETHICS, STANDARDS, AND GUIDELINES FOR SPECIAL EDUCATORS (2003)].

<sup>41</sup> Ms. Percival provides psychological services through the Des Moines Pastoral Counseling Center. Ms. Percival holds a Master of Arts Degree in Applied Behavior Analysis from Drake University and a Specialist Degree in School Psychology also from Drake. She has worked as a pediatric psychologist at the Iowa Methodist Medical Center prior to her appointment at the Des Moines Pastoral Counseling Center. Ms. Percival was a school psychologist for Des Moines Independent School District from September 1983 – August 1993. Ms. Percival worked with Isabel's parents to use visual schedules, social stories, using words to express the need for breaks or timeout, structuring play groups, and using a "safe place" to calm down. Notes revealed that she discussed positive, nurturing and assuring interventions with parents versus the use of "stern" approaches that may engender anxiety, silliness and aggression. She incorporated play therapy as the treatment approach.

<sup>21</sup> Dr. Took is a psychiatrist at Blank Children's Hospital in West Des Moines, Iowa. He received his M.D. from St. Louis University and is a board-certified practitioner. Dr. Took also serves as a clinical professor at the University of Iowa College of Medicine and supervises student interns. He has served as director of child and adolescent psychiatric services at Blank Children's Hospital since 1994.