

RECEIVED

AUG 12 2004

IOWA DEPARTMENT OF EDUCATION

In re: Maurice M., (Cite as 23 D. o, E. App. Dec 001)  
 )  
 Robin M., Appellant )  
 )  
 v. )  
 )  
 Des Moines Independent Community )  
 School District, and Heartland Area )  
 Education Agency 11, )  
 )  
 Appellees )

DEPARTMENT OF EDUCATION  
Bureau of CPCS

Decision

#140

Doc. # SE-288

The above entitled matter was heard by Administrative Law Judge Susan Etscheidt on August 2 and 3, 2004 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 Appellant was present and represented by Curt L. Sytsma, Legal Director for The Legal Center for Special Education. The Appellees were represented by Andrew Bracken, of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C. The hearing was closed to the public at the request of the Appellant.

Procedural History

On June 7, 2004, the appellant submitted an amended and substituted request for a due process hearing to identify a single issue for the hearing: "On or about May 28,, 2004, the Appellees proposed that [Maurice] be placed in a special school...The appellant and her son oppose the proposed change in placement, and they do not believe that it is justified by the facts or by the law." A pre-hearing conference call was held June 14, 2004 and the matter was set for hearing on August 2-3, 2004. A motion for continuance was filed July 28, 2004 and the matter was continued to August 13, 2004. This decision was issued August 11, 2004.

Findings of Fact

Maurice is a 15 year-old student residing in the Des Moines Independent Community School District (hereinafter DSICSD) with his mother, Ms. M. Maurice first received educational services at two years of age to improve his communication skills, increase his attention span, strengthen his compliance with adults, and decrease his aggression toward peers. Maurice was diagnosed with attention-deficit hyperactivity disorder and was prescribed medication for the ADHD and for asthma. Maurice has also been diagnosed with Krohn's Disease. Following the early childhood services, Maurice was placed in a non-categorical special class with integration with a health care plan and speech/language services at McKee Elementary School. A psychological report was completed by Lisa Odson in 1997 as part of a three-year reevaluation for Maurice, who was then in 3<sup>rd</sup> grade. The report concluded that Maurice was functioning in the low average range of intelligence, and that behavior problems appear to exist (School Record at 115 - 119). In fourth grade, Maurice attended Lucas Elementary in a self-contained class with little

integration. A one-to-one associate was assigned to Maurice to “help Maurice remain at Lucus”. Another psychological evaluation was conducted by Patricia Hollinger in January of 2000, when Maurice was in 5<sup>th</sup> grade. The conclusions indicated that defiance and disruption were major areas of concern, and that he required a “structured setting with clear rules and expectations” and a positive behavior support plan. The report also recommended that Maurice be “taught and reinforced for appropriate behaviors” to replace inappropriate ones (School Record at 120 – 124). An independent educational evaluation (IEE) was conducted in January, 2001 by the University of Iowa. The psychological component recommended that a positive behavior plan be implemented (School Record at 103 – 104).

Throughout his educational career, separate evaluations have determined that Maurice functions in the low or below-average range of cognitive ability. Importantly, Maurice has consistently experienced behavioral difficulties since first receiving early childhood special education services in 1991. A compilation of evaluation recommendations from both the District and Iowa City assessments concludes:

A major theme which has been evident over time is that Maurice has lacked confidence in what he can do independently and he asks for help with tasks which are within his skill levels...His negative self-talk about this contributes to his becoming emotionally overwhelmed and then engaging in behaviors which allow him to escape what he perceives to be an aversive situation because he can't meet the expectations (School Record at 268).

Consultant Ann Benzshawel testified that one consistent “issue” was Maurice’s anxiety and verbal aggression when he becomes emotionally overwhelmed. Both the academic demands of the environment and the peer stimulation can contribute to his emotional reactions. As summarized in a psychological report in the fall of 2003:

A review of IEP goals and progress monitoring over time indicates that Maurice’s behavioral issues are typical of a student who has ADHD. Additionally, it would appear that he experiences the emotional distress often associated with having significant learning delays. His cognitive delays make it difficult for him to efficiently process situations which cause him to be emotionally reactive and verbally aggressive toward peers. He has a reactive pattern of non-compliance which is intensified when he is in situations where he feels overwhelmed. He is most able to demonstrate appropriate coping skills when he is dealing with an adult or teacher with whom he has developed a relationship (School Record at 209).

Compliance to directions has been a goal each year from 1991 up to the current year. Facts relevant to the current appeal are from the 2002 – 2003 and 2003 – 2004 school year.

#### 2002-2003 IEP

An annual review meeting held 4/26/2002 developed the 2002-2003 IEP. The 2002 - 2003 IEP listed goals for assignment completion, reading, written expression, math, and “environmentally appropriate” and “compliant” behavior. A Behavior Intervention Plan (BIP) was developed for Maurice on 10/23/2002. The BIP was described as a “3-strike” type of plan, where Maurice would be given two warnings (verbal or gestured) following inappropriate behavior. With the third “strike” he was sent to the office for the remainder of the day, where he completed the day’s assignments (School Record at 17 - 28).

Maurice made progress in all goal areas. The progress monitoring data for the behavioral goal showed the following improvements for compliance: 70% on 9/26/02; 80% on 11/13/02; 90% on 1/13/03; 80% on 2/28/03 and 90% on 4/16/03. A Progress Monitoring Summary of behavioral interventions for 2002-2003 indicated from 8/26 through 4/14 Maurice had 64 referrals (approximately 8/month).

In a meeting held 11/12/2002, it was agreed that a behavior plan be developed to "be passed on to high school" and that daily home-school communication concerning homework would be established (School Record at 44). The "three-strike" plan was described as "very effective", and was continued with modifications. The third strike would remove Maurice for the remainder of a class period. If Maurice was removed from three classes, he was to be sent home. A reward plan was also added: Maurice would earn special lunch privileges if not removed from any classes (School Record at 102).

In a meeting held December 9, 2002 options for assistive technology for Maurice (e.g., Kurzweil or Academy of Reading) were discussed (School Record at 45). A Student Health Plan was developed on 1/9/2003 for Maurice (School Record at 1-5). On 1/14/2003 a "pre-mediation staffing" was held (School Record at 30) and an amendment to Maurice's IEP was proposed. He was to be taken out of the Collaborative Science class and go into a general education science class. The reason for the change indicated:

Maurice has not been successful in Collaborative Science class this year. His behaviors cause him to be sent out of class to the interventionist. He has been sent to the interventionist 6 times this semester from the current science class. Ms. [M.] feels that his teacher is not making necessary accommodations for Maurice, and is engaging in unnecessary power struggles.

A mediation agreement reached between the school district and Mrs. M. on 1/24/2003 provided tutorial services two hours per week for the remainder of the semester, a FAX machine furnished to Ms. M. to facilitate communication, and a plan to complete a functional behavior assessment (FBA) by consultant Sherri Smith of the University of Iowa (School Record at 128). On March 12, 2003 an IEP review meeting was held to discuss Maurice's behavior (School Record at 52). The need for monitoring homework was discussed, as well as Maurice's two recent suspensions. Ms. M was reported as "concerned that the teacher let problems go on too long. She feels that if the teacher had taken steps earlier, Maurice may not have had the issues he did that day". A subsequent meeting was held March 25, 2003 to present the report from consultant Milligan-Smith. Her report included the following findings:

1. Classroom teachers provided more than the two verbal redirections specified in the BIP, and appeared hesitant to provide consequences for inappropriate behaviors. For two redirections, Maurice ignored the teachers' directions and instead commented on how his mother would intervene to negate the teachers' authority.
2. Maurice's behavior was most appropriate during classes with structure, and most inappropriate when not under direct adult supervision. It was recommended that the staff conduct a FBA and develop a proactive behavior plan.
3. Maurice should be encouraged to advocate for his learning needs, but not be allowed "to intimidate the school staff and/or threaten them with his mother's involvement" (School Record at 57 - 58).

On March 26, 2003 Ms. M wrote to "Des Moines Public School" that "My child will not go to any Special Education Classes" and that she was withdrawing her permission to conduct a functional behavioral assessment (FBA) (School Record at 62 - 63). John Epp, Special Education Supervisor, and Ellen McGinnis-Smith, Deputy Director for Special Education, responded that any change in Maurice's IEP must be made through the staffing team, and directed Ms. M to schedule such a meeting if desired (School Record at 64). On March 28, 2003, Ms. M filed a request with the Department of Education for a due process hearing (School Record at 65). On March 31, 2003 a meeting was held at Ms. M's request, who indicated she wanted Maurice taken out of special education (School Record at 60). The support staff team asked Ms. M to reconsider allowing the team to evaluate Maurice to determine his needs.

On April 17, 2003 a meeting was held with district staff, Ms. M and her attorney. Ms. M was still requesting that Maurice be taken out of special education so that he could "open enroll" at Roosevelt. Tom Jeschke explained that Roosevelt was closed to open enrollment for special needs students, but that it was possible for Maurice to attend North. Ms. M. stated that she wanted the due process to drop special education services, and left the staffing. She testified that the reason she wanted him removed from special education was so he would open enroll at Roosevelt. The team continued to discuss Maurice's needs and decided that ceasing special education services would not be appropriate. The team also discussed that Mr. Lewis, Callanan principal with whom Maurice had a positive relationship, would be the principal at North the following fall and could assist Maurice in a smooth transition to that school (School Record at 67). Maurice was permitted to "open enroll" at Roosevelt, and a meeting was held in June of 2003 to plan his transition to Roosevelt. Consultant Benzshawel testified that at this meeting, various positive reinforcement systems were discussed, but that Ms. M wanted Maurice treated like a high school student, and was resistant to the idea of a reinforcement program. It was determined that Maurice would begin the 2003 - 2004 year at Roosevelt receiving services from the Behavior Intervention Services (BIS) program. The BIS is staffed with three teachers, Ms. Deb Hodges, Ms. Diane Kent and Ms. Fisher. Three associates were also assigned to the program: Ms. Williams, Ms. Burse, and Ms. Van Cleave.

A psychological report was completed September 12, 2003 to assist Maurice's IEP team in conducting a three-year evaluation and planning his educational program. School psychologist Deborah Hill-David reported that Maurice has been making "slow, steady progress at a rate commensurate with his overall level of cognitive functioning". Although Maurice had experienced "several behavioral incidents", he was reported as "able to deal with these smoothly" and "made a good adjustment to high school". Hill-David recommended "a support system" and "smaller, structured classrooms with a predictable routine." She concluded that his present program was "meeting these needs in a satisfactory manner at this time". Additional reports proposed that Maurice's inappropriate behaviors allowed him to "escape what he perceives to be an aversive situation" (School Record at 208 - 254).

#### The 2003 - 2004 IEP

A meeting was held October 15, 2003 to finalize Maurice's IEP for the 2003-2004 school year (School Record at 6-16). BIS teacher Ms. Kent discussed Maurice's progress in the

Behavior Intervention Services (BIS) program to date. She reported that he had responded well to the structure and systematic intervention plan. Office assistance had been needed on only two occasions. Maurice was reported to have a positive relationship with his case manager, Mrs. Hodges, and was seeking and accepting her assistance when problems surfaced. A systematic intervention plan was "being considered for implementation" in Maurice's regular education and collaborative classes. This information was included in the PLEP section of the 2003-2004 IEP:

Maurice is very social and peer relationships are important to him. He has had a smooth adjustment to Roosevelt and responds well to the structure of the Intervention Services Program. Maurice enjoys school and eagerly participates in class discussions. Within the BIS program, he is able to process problems in class and talk calmly about behaviors. Maurice has a large peer group and appears to be fitting in socially.

In discussing the effect of Maurice's disabilities on performance, the PLEP indicated:

Maurice has a diagnosis of ADHD and can in an optimum setting work for up to 30 min. at a time. He is most successful in a structured small student/teacher ratio classroom setting with clear expectations, limited distractions, and a behavior management system. He follows class rules best when these strict boundaries are clearly in place.

The IEP indicated that Maurice would receive special education services for reading, social science, math and social skills in the BIS. He was to receive a collaborative program for world history and interactive science, and general education for PE. Accommodations for the general education and collaborative programs included 1) using the computer for writing assignments, 2) distance from a challenging situation with problem-solving assistance from adults, 3) alternatives to note taking and outlining with assistance studying for tests, 4) assignments broken in 15-30 minute intervals, 5) assignments read to Maurice, and 6) positive feedback and encouragement to work to his potential, and keep from becoming negative and explosive (School Record at 10). Consultant Ann Benzshawel testified that integrating Maurice into general education classrooms had been "challenging" since his skills were significantly lower than peers and since he is often unwilling to accept or use the accommodations to assist him (e.g., reading texts/tests, modifying tests, using the calculator) and he did not want to appear different from his peers. She also testified that the collaborative program was necessary because a regular educator alone could not provide the extensive academic and behavioral accommodations Maurice required.

The 2003-2004 IEP established at the 10/15/2003 meeting included the following goal and baseline reports:

Baseline	Goal & Progress Monitoring
<p>Maurice has had 8 referrals to intervention during the first 6 weeks of school. Intervention consists of separation from peers and being required to problem solve with an adult about appropriate behavior for a situation. Additional consequences may or may not be assigned depending on the situation. Current interventions were in response to</p>	<p>Maurice will follow school and classroom rules without the need for adult intervention to use problem solving or coping skills for behavior that is non-compliant or disruptive only one time for a duration of 9 weeks.</p> <p>Progress monitoring: data through 3/12 show the number of incidents steadily decreasing from 13 on 10/30/2004 to 3 on 4/12/2004</p> <p>Maurice received Level 2 interventions as follows: October = 13; November = 12; December = 6; January</p>

difficulty coming under instructional control, complying with teacher requests and altercations with other students.	= 1; February = 8; March = 5; April = 1 Rated as "progress toward... goal will be met by time IEP is reviewed" on April 21, 2004.
Need current assessment data for this fall: from 9/3/03 8 <sup>th</sup> grade Stanford Diagnostic, 5 <sup>th</sup> grade Jamestown Inventory.	Maurice will read 7 <sup>th</sup> grade level materials and will answer comprehension questions with 80% accuracy. Progress monitoring: Comprehension scores improving from 46% to 65% on 3/1/2004 Rated as "progress toward... goal will be met by time IEP is reviewed"
Maurice can write 3 five-sentence paragraphs with 76% correct word sequence with errors in spelling, punctuation, capitalization and word usage.	Maurice will write three five-sentence paragraphs with 90% correct on spelling, punctuation, capitalization, and word usage. Progress monitoring: Steadily improving from 60% before 12/20 to 90% on 2/16/2004, but dropping to 80% on 3/12/2004 Rated as "progress toward... goal will be met by time IEP is reviewed"
Maurice averaged 75% correct on 5 <sup>th</sup> grade mixed math computation probes (in 8 <sup>th</sup> grade). His computations skills are at the 5.7 grade level.	Maurice, given assistance and adequate time, will compete 9 <sup>th</sup> grade level pre-Integrated Algebra assignments with 80% accuracy Progress monitoring: Rated "1" This goal has been met.
Maurice has difficulty with organizational skills and work completion. He averaged 86% of assignments completed and turned in.	Maurice will complete and turn in 100% of assignments independently with accommodations, modification, and intervention support services. Progress monitoring: variable from 100% in December and January to 80% on 4/23/2004 Rated from 2 to 3: "Progress made... goal may not be met by time IEP is reviewed"

An updated IEP provided at the time of the hearing indicated that goal 1 was rated a "3" for 5/14/04 and 5/25/04, with 7 incidents recorded. The reading goal showed 100% accuracy in May, 2004; the writing goal showed 75% accuracy in May, 2004; the math goal showed 60% in May, 2004; the assignment completion goal showed no outstanding assignments in May, 2004.

An Individualized Student Health Care Plan was developed for Maurice on 10/16/04 to address health concerns related to his asthma. The plan included components for avoiding "triggers" of asthma, such as weather conditions, dust and chalk, as well as dietary and pharmaceutical considerations (School Record at 182 – 184).

A Behavior Intervention Plan (BIP) was established for students in the BIS program at Roosevelt High School. Although the Appellant thought the "3-strike" plan from Callanan was to be "imported" to Roosevelt and that a functional behavioral assessment "begun" at Callanan (School Record at 67) was to be completed to assist in the development of a BIP for Maurice, BIS teacher Deb Hodges testified it was her understanding that Maurice would begin with the "stock" BIP for students in the BIS. The components of the BIP included:

1. Verbal redirection
2. Verbal redirection with teacher/associate proximity
3. Change student's seating assignment with associate support
4. Remove student to Level 2
5. Complete Crisis Intervention Form
6. Complete a successful student and staff conference
7. Return to classroom

Deb Hodges testified that "Level 2" was a separate room from the BIS that was used for a variety of purposes: to "process" or reflect on behavior incidents, to provide privacy for the student involved in behavioral misconduct, and to remove the "peer audience" which helped to extinguish inappropriate behavior. Level 2 may also serve as an in-school suspension or detention for students assigned there by building administrators. If a student is unable to successfully complete steps 5-7, the student will remain in Level 2 for the next class period. If a student is unsuccessful for 3 consecutive periods of Level 2 then a full day or "time in" level 2 will be assigned. While in Level 2, students are not allowed to attend general education classes, talk with other students, have passing periods or social lunch (School Record at 187).

When assigned to Level 2, the BIS teachers help BIS students "process" behavior and misconduct with a Crisis Intervention Plan (CIP). The CIP involves the following components: 1) Describe the behavior that got you assigned to Level II; 2) What made you decide to act this way and what did you expect to get from it?, 3) Of the identified thinking errors, name the ones you used, 4) Describe a positive way you could have reacted, 5) How do you plan to act if the situation arises again?, and 6) What do you plan to do when you return to the classroom? Although not in the record, teacher Hodges described a point system that was also part of the BIP for the BIS program. Ms. Hodges testified that a description of this point system was shared with Ms. M. and that Maurice was "successful" with the system, which was used until October. The students began daily with 20 points, which were removed for incidents of misconduct. Students maintaining 80% of their points received a reinforcing activity.

This "stock" BIP was individualized for Maurice on 10/20/03 (School Record at 188 - 193) for implementation in his general education and collaborative classes. Inappropriate behaviors were to be ignored if not disruptive or redirected with the following steps:

1. Redirection in general to stop negative or inappropriate behavior
2. Teacher will provide another verbal redirection with proximity
3. Teacher will make a specific redirection by stating his name and the behavior to be stopped, "Maurice,..."

If behavior escalates to a point that would normally result in referral to the vice principal's office (in accordance with the general disciplinary procedures for Roosevelt High School), then teacher will move to step 4:

4. Maurice will be provided a pass to Mrs. Hodges and Level 2 where he will process the request made of him and identify the replacement behavior so he can return to the class on the next day. If unable to process then a referral will be written.

The individualization of the BIP for Maurice was that instead of a referral to the office, he would go to Level 2 to "process" behavior with Ms. Hodges. The CIP was also individualized: While in Level 2 Maurice will verbally review with a teacher or associate the following: 1) what he feels occurred (e.g., Maurice's view of the problem), 2) the

teacher's explanation of the problem, 3) the teacher's expectation for resolving the problem; 4) thinking errors; and 5) identification of a replacement behavior (e.g., what to do instead). Maurice's ability to calm down and engage in the instructional problem solving process would determine when he would return to academic instruction. Notice of the Level 2 referral and work missed during intervention was to be provided to Ms. M. Since the BIS environment allowed for "multiple intermediary steps in order to de-escalate or stop a behavior that are not possible within a general education setting), Level 2 interventions "will be used only for serious issues when these occur in this setting". Acts of physical aggression, possession of alcohol, weapons or drugs will be referred directly to the vice-principal's office. BIS teacher Deb Hodges testified that the CIP was an "instructional technique" to improve compliance.

The BIP did not include interventions for unstructured environment (e.g., hallways) since "Problems that occur in the hall at passing or before and after school are not considered in class behavior issues". Maurice's difficulties in unstructured settings (e.g., hallways) and the absence of adequate BIP components to address those difficulties are important facts of this appeal. Maurice's difficulty in transition times was an important consideration in proposing a more restrictive placement for Maurice. Ms. Hodges testified that extending a BIP to include non-structured settings (e.g., hallway) was "not feasible" in a comprehensive high school. In order to monitor behavior, a 1:1 associate traveling with Maurice in the hallway would be necessary – a service which Maurice would resist. Monitoring behavior in unstructured settings was "not a realistic need that can be met" in a comprehensive high school setting. Dr. McGinnis-Smith testified that no hallway BIP was developed in an attempt to respect Ms. M's request that Maurice be treated like everyone else. She described a constant "tension" between the District prescribing what it thought best while disregarding parental input versus acquiescing to parental requests knowing the result was not in Maurice's best interest.

The BIP did not include positive strategies, although Maurice's IEP called for "positive feedback and encouragement to work to his potential, and keep from becoming negative and explosive" (School Record at 10). Ms. Hodges testified that although positive strategies were not included on the BIP, teachers provided Maurice with positive feedback. The provision of positive feedback was not monitored, since "regular education teachers with other 175 students" would find it "very difficult" to monitor positive feedback. Monitoring positive feedback in the BIS would also be difficult, according to Ms. Hodges: "I would spend no time teaching and no time with any of my students if I spent time documenting all the positives". However, Ms. Hodges testified that she frequently reinforced Maurice for good decisions and good future planning and that frequent positive reinforcement was "standard operating procedure" for the BIS. After the BIP was introduced to teachers on 10/20/2003, referrals to Level 2 increased and Maurice's performance and attitude in general education classes (e.g., history and physical education) were negatively impacted. Prior to the introduction of the BIP, Michael was doing well at Roosevelt (School Record at 7), and Vice Principal Adcock testified Maurice had 7 office referrals before that date. Deb Hodges testified that a simplified version of the BIP was distributed to the regular education teachers, and that teachers had different behavioral expectations and implemented the BIP for various types of misconduct. Ms. Hodges conceded there were inconsistencies in the implementation of the BIP.



Since the BIP did not address noncompliance in “unstructured” settings (e.g., hallways), Maurice began “racking up” office referrals. When Ms. M. contacted the school to discuss the referrals, she was told by Vice Principal Pilon that Maurice was on “Step 5 of the discipline policy” and “close to losing his placement at Roosevelt” (School Record at 274). On November 17, 2003 a meeting was held at Ms. M’s request, and Mrs. Pilon clarified she was only explaining the policy change that was developed for Maurice on 11/3/2003, in which Maurice is sent directly to intervention services instead of to the office. The BIP was in place in all general education classrooms, and teachers had been instructed on how to use it. Ms. M requested homework for Maurice and notification of tests in advance so she could help him prepare. On November 20, 2003 a meeting was held in regard to a very serious behavioral incident which had occurred after Maurice learned he was failing general education Interactive Science Class. Ms. M stated that she did not know Maurice was failing, that she was not aware of homework incomplete, and had not been notified in advance of tests in that class. It was decided to provide Ms. M with a notebook of the required work, accommodations, and expectations for the Interactive Science class. A description of the clarified modifications (e.g., content modification and a modified grading scale) for the class were developed (School Record at 275 – 277).

On December 15, 2003, a mediation was held. The BIP was modified again, and specified the following:

When a discipline referral to Level 2 is made, Maurice will be provided with “distance” from the classroom. If Maurice does not want to discuss the incident leading to distance, he will be provided up to 15 minutes in distance quiet time and then be directed back to class. If Maurice is not calm in 15 minutes, the intervention teacher (Mrs. Hodges) will call Ms.[M] in an effort to calm Maurice. If Maurice is unable to calm down, he will be suspended for the remainder of the day. If Maurice is suspended for physical aggression, possession of alcohol, weapons or drugs a staffing will be held with Ms. Moon in attendance. Maurice may self-refer to Vice Principal Adcock from Mrs. Hodges’ room with a pass and must wait in outer office without disruption until Mr.Adcock can meet with him. If Maurice is still waiting in the outer office at the end of the class period and he is calm, he may leave the office and attend his next class. If Maurice is disruptive in the office, Mr. Adcock will call Ms. M. and decide on an appropriate action which may include sending him home. When Maurice is meeting with Mr. Adcock he will be allowed to call his mom. In the event that Mr. Adcock is not available, the secretary will allow Maurice to call his mother. If Maurice is calm at the end of the class period, he will be allowed to return to class. Following a conversation, Maurice will return to class.

For hallway and before or after school, Maurice will follow the building-level plan with one exception: at Step Four and higher, consequences will be assigned by Mr. Adcock through the behavior intervention services plan. If Maurice is not accepting consequences through the BIS program or is unable to calm down, he may be suspended for the remainder of the day. If suspended, Ms. M will be invited to attend a readmit conference with Mr. Adcock and Maurice, but will not be required to attend (School Record at 194).

If communication between school officials and Ms. M. needs assistance, Mr. Sytsma will be contacted. For academics, Maurice's progress was to be monitored. He would stay in general/collaborative science for the second semester, receiving accommodations previously developed.

Teacher Deb Hodges testified that the modifications to the BIP following this mediation were not in Maurice's best interest. The value of the CIP was to discuss triggers of misconduct and to have Maurice identify more appropriate behavior options. Ms. Hodges lost a "window of opportunity" when unable to process behavior immediately following an incident – either because Maurice did not wish to "process" or having to wait until Ms. M could be called and involved in the discussion. Ms. Hodges thought this modification in the BIP "significantly tied her hands" in attempts to improve Maurice's behavior. Ms. Hodges also testified that the parental notification revision to the BIP was "intensive". Ms. M. was to be contacted each time Maurice was referred to Level 2. Often these phone contacts involved "lengthy discourse" of "he said – she said", which she described as "splatter" that avoided addressing Maurice's behavioral needs. Some of the contacts with Ms. M. were successful in resolving Maurice's behavioral issues. Vice Principal Adcock testified that the "lag" resulting from the modified BIP was not in Maurice's best interest since he was out of instruction as they attempted to contact Ms. M. He concluded that the way Ms. M wanted behavior "handled" resulted in one of her continuing concerns: that Maurice was out of instruction in response to misconduct. Further, Ms. M apparently was the person deciding if Maurice would return to class following an office referral for misconduct, thereby circumventing team or administrative decision-making. Consultant Ann Benzshawel similarly testified that the team tried to respect the "boundaries" Ms. M put into effect, but often disagreed professionally that the result was right for Maurice.

Another meeting was held on January 7, 2004 at the request of Ms. M., who was concerned that Maurice was being sent out of Reading, World History, and Science classes for behavior too frequently. Since the BIP had been in place in the regular classrooms, Maurice had been sent to Level 2 a total of 12 times in October and November, and 7 times in December, an average of 12 times a month or 3 times each week. Reasons for behavioral difficulties were discussed, and the staffing team recommended that the World History teacher and Interactive Science teacher be changed to a BIS teacher. Ms. M was not in favor of changing the science teacher, so the team agreed to continue with the current teacher in Science (School Record at 278). A progress monitoring meeting was held 1/14/2004 in accord with the mediation agreement. Ms. M was pleased with Maurice's progress on the five goals of his IEP (School Record at 283). Another mediation was held February 3, 2004. It was agreed that Maurice will read 20 minutes at home each day, and record the activity in a reading log. Maurice was also to be provided assistive technology (e.g., Kurzweil) to assist with challenging reading work.

During the second semester, a change in Maurice's schedule resulted in BIS teacher Diane Kent providing two hours of instruction in the BIS, instead of one. Deb Hodges testified that Maurice was unable to deal with this change despite additional behavioral support (e.g., Ms. Hodges assisting during her planning period, more associate support). She explained that Maurice had decided he "hated" Ms. Kent and "targeted" her with negative behavior, "terrorizing" her to the point she considered resigning. Ms. Hodges

testified that despite this difficulty, Ms. Kent was able to teach Maurice math. In fact, the progress monitoring data indicate that by the end of the second semester, Maurice had met his math goal.

Numerous discipline referrals are included in the school record from October, 2003 through April, 2004. Most of the referrals resulted in 2-3 hours in "Level 2". Deb Hodges testified that "tracking" Level 2 referrals assists in examining patterns of behavior and in planning and assessing the effectiveness of behavioral interventions. Maurice also had out-of-school suspensions for 12/4 and 12/5. Associate Williams reported non-compliance and disruption on several occasions. PE teachers reported a decline in Maurice's behavior and academics. Reports of threats and violence were also included. Notes from Math and English teacher Diane Kent reported serious non-compliance and disrespectfulness. A daily behavior log compiled by teachers Kent, Fisher and Hodges similarly reported on-going non-compliance and peer difficulties. Observational reports from Diana Fisher dated February 17, 2004 to March 15, 2004 indicated consistent disruptive behavior and non-compliance from Maurice in his general education keyboarding class. On several occasions, he was removed to Mrs. Hodges Level 2 (School Record at 307 – 342).

On May 4, 2004 a meeting was held to discuss Maurice's program and plan for his 10<sup>th</sup> grade IEP. Members of the IEP team identified several program components that were essential for Maurice and concerns regarding the feasibility of providing those components in the present placement at Roosevelt. The key components involved parental notification, the availability of teachers trained in positive behavioral supports, and the elimination of collaborative classes due to budget cuts. Further, Maurice was not to be assigned to one of the BIS teachers due to "issues", and so it was uncertain who would teach math and science to Maurice. Ann Benzshawel testified that members of the team reviewed Maurice's proposed schedule and believed that the world history class with Fisher, along with the speech, English, and study skills classes with Hodges, the social skills class with Foot, and the Reading class with Bartelt would be appropriate. However, the pre-algebra class with S. Brown and the computer application class with C. Pitulio would not be successful, since a special education collaborative teacher would not be available to assist due to budget cuts.

On 5/14/2004 the IEP team met to review Maurice's program since "a significant change in the student's program is being considered". According to school records, the purpose of the meeting was to conduct a manifestation determination since Maurice had been suspended from school nine days (School Record at 418) and an additional suspension for his latest misconduct – Maurice was off campus for lunch – would extend the 10-day limit. The manifestation determination process typically concludes with the selection of one of three recommendations: return to previous school placement with modifications/behavior intervention plan, transfer to an alternative placement with behavior intervention plan, or expel with appropriate services and a behavior intervention plan. After determining that the misconduct during lunch was a manifestation of his disability, the team chose to "transfer to an alternative placement with behavior intervention plan." Specifically, the "team" composed of Ann Benzshawel, Ron Adcock, Deb Hodges and Ellen McGinnis Smith (Ms. M refused to sign) proposed that Maurice receive services in a special school placement (the self-contained level 3 Behavior

Disorders program at Scavo) with transportation and Health Care Plan. Teacher Deb Hodges testified that in order to be successful, she believed Maurice needs to be closely monitored in a highly-structured environment which had the “flexibility” to meet his needs – which was not the general education classroom. She did not clarify why a self-contained placement at Roosevelt could not provide that environment. Consultant Benzshawel testified that a special school would be preferable to a special class placement because Maurice would have multiple teachers with proper training, yet confirmed that a self-contained placement had not been attempted with Maurice. Dr. McGinnis-Smith testified that placement success depended on the teacher: “if [Maurice] was self-contained with Deb Hodges, he’d probably be fine”. However, the team rejected the self-contained option at Roosevelt due to the behavior difficulties in the unstructured settings (e.g., hallways).

Since the proposed placement was a special school, the members of the IEP team were required to justify the need for the program. The members of the IEP team responded to the following questions: *Reasons*. What are the reasons that the eligible individual cannot be provided an educational program in an integrated school setting? Maurice will only comply with 3 staff members in his current comprehensive school placement and has demonstrated severe disrespect to several staff members. In the event that Maurice is referred to the office for intervention beyond what his behavior plan can address the parent has requested to be contacted immediately and that staff do not conference with Maurice about the incident without her presence. In addition, each incident has required a full investigation with written reports or conferences with all involved. Provision of these services has adversely affected equity of instruction and behavior intervention to peers. Program components (see list) needed to support Maurice are too extensive and intense to be accommodated in a comprehensive school setting.

*Support needed*. What supplementary aids and services are needed to support the eligible individual in the special education program? Maurice performs best when his self-contained services can be provided by multiple teachers trained to address both his academic and behavior needs resulting in his not having any one teacher more than one period a day. Maurice has a diagnosis of ADHD and Oppositional Defiant Disorder. He requires frequent positive feedback and his questions to be answered in a short amount of time or he becomes disengaged in learning. Support staff are needed on call to implement behavior intervention plans, document, investigate and process with this student and parent in the event of a major rule infraction or to design more effective positive behavior support plans on a frequent basis.

*Integrated setting*. Why can’t these aids and services be provided in an integrated setting? Multiple self-contained teachers and support staff are not available to provide his entire class schedule in a comprehensive school setting. This results in the provision of his academic classes being from one teacher or a limited numbers of teachers. At the present time Maurice will only comply with one teacher in the comprehensive school setting. Maurice needs a setting where all staff who interact with students are trained in intense de-escalation strategies. Documenting, investigating, and conferencing with Maurice and about Maurice’s behavior has affected equity of services to peers in a comprehensive school setting. Other students IEPs are not able to be met.

*Continuum of services available*. What is the continuum of services available for the eligible individual? The following services are available to Maurice based on the staffing team decision: general education; general education with accommodation or

modification; general education with a resource level of service; a self-contained with little integration level of service; a self-contained special class with little integration level of service; a self-contained class; special school; hospital and/or homebound services (School Record at 417).

Notice of the proposed change in Maurice's program was provided to Ms. M. The notice included 1) a description of the action proposed: The staffing team at Roosevelt High School recommends that Maurice continue to have a self-contained level of service as an Entitled Individual with goals in reading, math, written language and behavior, but that provision of these services be in a special school placement, 2) an explanation why the action was proposed: Maurice currently has a self-contained service at Roosevelt High School. With these services in place he is unresponsive to directions from staff and demonstrates severe disrespect to them with the exception of his special education case manager, the classroom associate and Vice Principal. Remaining at Roosevelt will require that his entire curriculum be provided by this teacher with the assistance of this associate. When behavior incidences occur the subsequent behavior intervention, documentation, investigation, student and parent conferences are time intensive for these 3 individuals to the point of adversely affecting equity of instruction/service to other students, 3) a description of the other options considered: continuing a self-contained level of service at Roosevelt High School, providing a self-contained level of service at Maurice's home school, East High School, and providing a self-contained level of service in a special school setting, and 4) an explanation of why other options were rejected: The staffing team determined that Maurice was unwilling to cooperate with services at Roosevelt High School provided through one teacher in a self-contained classroom. Maurice would benefit from a special school environment where multiple staff members are trained and available to work with Maurice's disabilities setting clear limits with high expectations. Staff needs to be able to communicate in a timely manner with Ms. [M] and Maurice when behavior incidents occur without affecting equity of instruction to other students (School Record at 415).

#### Conclusion of Law

The IDEA requires that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living [20 U.S.C. § 1400(d)(1)(A)]. The free appropriate public education is to be provided in conformity with the individualized education program [20 U.S.C. § 1401(8)(D)]. Similar specification is found in federal regulations [34 C.F.R. § 300.1(a); 34 C.F.R. § 300.13(d)] and in Iowa regulations [§ 281- 41.3(3) I.A.C.]. The IEP must include 1) a statement of the child's present level of educational performance, 2) a statement of measurable annual goals, including benchmarks or short-term objectives, 3) a statement of the special education and related services and supplementary aids and services to be provided to the child or on behalf of the child to advance appropriately toward attaining the annual goals, 4) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class, 5) a statement of individual modification in the administration of State or districtwide assessments of student achievement ... or if the IEP team determined that the child will not participate, a statement of how the child will be assessed, 6) the projected date for the beginning of services, and the frequency, location, and duration of those services, 7) a statement of transition services, and 8) a statement of how the child's progress toward annual goals

will be measured and how the parents will be informed of the extent to which the progress is sufficient to enable the child to achieve the goals by the end of the year [20 U.S.C. § 1414(d)(1)(A)(i-vii); 34 C.F.R. § 300.347(a-b); § 281- 41.3(3) I.A.C.]. Once the needs, goals, and services have been identified in the IEP, a placement decision is made.

Once a placement decision has been made, changes in that placement may occur only if certain procedural safeguards have been assured, including the documentation of each evaluation, test, record or report that was used as the basis for the proposal. A change of placement may occur when the IEP team determines a change is needed in a child's educational program, but also when children are denied access to prescribed educational services – which may result from discipline sanctions such as suspension and expulsion.

School personnel have the authority to place a child in an appropriate interim alternative educational setting, another setting or suspension for not more than 10 school days (to the extent such alternative would be applied to children without disabilities) [20 U.S.C. § 1415(k)(1)(A)(i)]. Federal regulations additionally provide for "additional removals of not more than 10 consecutive school days in the same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement) [34 C.F.R. § 300.520(a)(1)(i)]. A change in placement would occur if the removals constituted a pattern because they cumulated to more than 10 school days in a school year and because of factors such as length of each removal, the total amount of time the child was removed and the proximity of the removals to one another [34 C.F.R. § 300.519(b)]. Children repeatedly suspended for minor school code violations must not be "cut off from educational services" and their problem behaviors must be addressed [64 Federal Register, No.48, 12618 (March 12, 1999)].

Prior to taking disciplinary action that would result in a change of placement (e.g., suspensions accumulating to more than 10 days) a school district is required to conduct a manifestation determination [20 U.S.C. § 1415(k)(4)(A)]. According to Iowa regulations and consistent with IDEA requirements, the IEP team is expected to review all relevant information such as evaluation and diagnostic results, including information supplied by the parents, observations of the student and the current IEP and determine that: 1) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement, 2) the child's disability did not impair the ability of the individual to understand the impact and consequences of the behavior subject to disciplinary action, and 3) the child's disability did not impair the ability of the individual to control the behavior subject to disciplinary action [§ 281 - 41.72 I.A.C.]

On May 14, 2004, Maurice's IEP team met to conduct a manifestation determination since his latest behavior incident – leaving campus for lunch - would suspend him beyond the 10-day limit. At the end of the meeting, members of the IEP team recommended an alternative placement at Scavo with a behavior intervention plan. Since the school district proposed to change Maurice's educational placement, written notice of the proposal must be provided to the parent [20 U.S.C. § 1415(b)(3); see also 34 C.F.R. § 300.503(a) and § 281 - 41.104 I.A.C.]. The specific content of the notice is outlined at [20 U.S.C. § 1415(c); see also 34 C.F.R. § 300.503(b) and § 281 - 41.104(1) I.A.C.]. These required

components were completed for Maurice, again justifying the reason for the alternate placement. The team was proposing a special school placement because Maurice was unresponsive and disrespectful to staff and because the behavior intervention, documentation, investigation, student and parent conferences are “time intensive” to the point of adversely affecting equity of instruction to other students. Other options were rejected since Maurice needed multiple staff members who are trained and able to provide the intense and extensive modifications. Although the district argues that Scavo may not be a “special school” since non-disabled students attend, the placement would be more restrictive than the current placement at Roosevelt High School. The question is whether Maurice required a more restrictive setting to receive FAPE.

#### An LRE Question

The DMICSD’s proposal to place Maurice at Scavo special school is the single issue of this appeal. The District argues that the placement is justified due to the “intense and extreme” accommodations required for Maurice to remain at Roosevelt. The Appellant asserts that the proposed placement at Scavo is supported neither by fact nor by law.

At the administrative due process hearing the DMICSD has the burden of proving that its proposed IEP and placement would satisfy the requirements of the IDEA and provide Maurice with a free appropriate public education [*Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 31 IDELR 321 (8<sup>th</sup> Cir. 1999)]. As noted in *Oberti v. Board of Education of the Borough of Clementon School District*, 995 F.2d 1204, 19 IDELR 908 (3<sup>rd</sup> Cir. 1993): “Indeed, the Act’s strong presumption in favor of mainstreaming 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”. Did the DMICSD demonstrate that the current placement at Roosevelt would fail to offer FAPE and that Maurice required a more restricted, segregated environment? Did the SD meet its burden of showing a more restrictive placement was necessary?

#### LRE Inquiries

Several circuit courts have identified a series of questions to examine decisions by educational agencies seeking to place students in more restrictive settings. For example, in *Roncker v. Walter* [700 F.2d.1058, 9 ELR 827 (6<sup>th</sup> Cir. 1983)] the court concluded that some students would need more restrictive placement either because the child would not benefit from mainstreaming, any marginal benefits received from mainstreaming would be outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated facility, or the child would be a disruptive force in the non-segregated setting. The Sixth Circuit also determined that cost was a proper factor to consider since excessive spending on one child may deprive other children with disabilities. The Court cautioned that “cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements”. In *Daniel R. R. v. State Board of Education* [874 F.2d 1036, 53 ELR 824 (5<sup>th</sup> Cir. 1989)] the court articulated a standard for LRE disputes: “First: we ask whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily for a given child”. Specifically, has the school district taken steps to accommodate the handicapped child in regular education? Are the efforts to provide supplementary aids and services and to modify the regular education program sufficient?

Will the child receive an educational benefit from regular education? Is there any detriment to the child from the proposed mainstreaming? What effect does the child's presence have on the regular classroom environment and the education the other students are receiving? "Second, we ask whether the child has been mainstreamed to the maximum extent appropriate". Similar inquiries were adopted by the Circuit Court in *Greer v. Rome City School District*, 950 F.2d 688 (11<sup>th</sup> Cir. 1991). First, the educational benefits that the child will receive in a regular classroom, supplemented by appropriate aids and services, are compared to the benefits he or she would receive in a self-contained special education environment. Second, the effect the presence of the child in a regular classroom would have on the education of other children in that classroom is considered. The court cautioned that school districts must keep in mind their obligation to consider supplemental aids and services that could accommodate the child. Third, the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the child in the regular classroom may be considered. If the cost of educating the child in a regular classroom would be so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom would not be appropriate. The 3<sup>rd</sup> Circuit in *Oberti v. Board of Ed of the Borough of Clementon School District* [995 F.2d 1204, 83 ELR 1009 (3rd Cir. 1993)] identified questions and criteria for analyzing LRE appeals. The court first must ask whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily for a given child. The three criteria for this determination include 1) whether the school district made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services, 2) a comparison of the educational benefits available in a regular class and the benefits provided in the special education class, and 3) the possible negative effects of inclusion on the other students in the class. If this analysis does not support regular class placement, the court must then ask whether the child has been mainstreamed to the maximum extent appropriate. The Ninth Circuit in *Sacramento City Unified School District, Board of Education V. Rachel H.* [14 F.3rd 1398, 89 ELR 57 (9th Cir. 1994)] outlined a very similar set of inquires. When determining the appropriateness of an inclusive placement, the court must assess the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom, the non-academic benefits to the handicapped child of interaction with non-disabled children, the effect of the presence of the child on the teacher and other children, and the costs of supplementary aids and services necessary to mainstream the child in a regular classroom setting.

Although the Eighth Circuit has not identified a specific set of inquires, consideration of educational benefit [see *Independent School District No. 284, Wayzata v. A.C.*, 35 IDELR 59 (8<sup>th</sup> Cir. 2001)("because the preponderance of the evidence shows that she will not receive educational benefit in the less restrictive setting, the statute's preference is overcome here); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 31 IDELR 321 (8<sup>th</sup> Cir. 1999)("Under the applicable standard, the School District must only provide Grace with "some educational benefit") and potential harmful effects [*Missouri Department of Elementary and Secondary Education v. Springfield R-12 School District*, 40 IDELR 204 (8<sup>th</sup> Cir. 2004)("failing to consider any harmful effect on or quality of services provided to a child when selecting the least restrictive environment for learning") are factors that have been considered in LRE appeals. The adequacy of



supplemental aids and services in supporting placement in less-restrictive placements has also been a factor in several due process decisions in Iowa [e.g., *In re: Amanda S.*, 26 IDELR 80 (SEA IA 1997); *Mason City Community School District and Northern Trails AEA 2*, 32 IDELR 216 (SEA IA 2000)]. Therefore, a reasonable compilation of questions for LRE disputes in Iowa would include the following:

1. Has the school district provided adequate supplementary aids and services to support the child's placement in less-restrictive program?
2. Will the child receive educational benefit (academic and non-academic) in the less-restrictive program?
3. Will the placement be detrimental to the child or to the less-restrictive classroom environment?

For Maurice, the less-restrictive environment would be the BIS program at Roosevelt compared to the more-restrictive placement at the Scavo special school.

#### Adequate Supplemental Aids and Services

In determining a child's educational placement, a school district must ensure that the placement decision "[i]s 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." 34 CFR 300.552(a)(1). In addition, a district must ensure that a child's placement is: (1) determined at least annually; (2) is based on the child's IEP; and (3) is as close as possible to the child's home [34 CFR 300.552(b)]. In selecting placement options, each agency must ensure that children with disabilities are educated in the least restrictive environment (LRE):

To the maximum extent appropriate, children with disabilities are to be educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular education 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(5)(A); see also 34 C.F.R. § 300.550; § 281 - 41.37(2) I.A.C. (italics added)].

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum must include alternative placements such as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. The public agency must also make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement [34 C.F.R. § 551; § 281 - 41.38 I.A.C.]. These alternative placements must be available to the extent necessary to implement the child's IEP in the least restrictive environment. In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs [34 C.F.R. § 552(d); § 281 - 41.39(4) I.A.C.]. A child with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum [34 C.F.R. § 300.552(e); § 281 - 41.39(5) I.A.C.]. Iowa regulations further specify: Whenever possible, hindrances to learning and to the normal functioning of eligible individuals within the general school environment shall be overcome by the provisions of special aids and services rather than by separate programs for those in need of special education [§ 281 - 41.37(2)(B)].

In examining the first LRE question, the school district would contend that not only were the supplementary aids and service provided to Maurice at Roosevelt adequate, but that those supports were “intensive” and “extensive”. According to Maurice’s IEP, he was to receive several supplemental aids and services, including the following: “distance from a challenging situation with problem-solving assistance from adults” and “positive feedback and encouragement to work to his potential, and keep from becoming negative and explosive” (School Record at 10). These supplemental aids were to be provided in both the general education and BIS settings. In addition, a BIP was also developed for Maurice to be implemented in the general education and BIS settings.

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must identify *positive behavioral interventions, strategies, and supports* to address that behavior [20 U.S.C. § 1414(3)(B)(i)] (italics added). The specific components of the BIP are not identified in either the federal statute or regulations. State rules similarly require consideration of behavioral strategies in the development of the IEP [§ 281-41.67(5)(b)(1) I.A.C.] but do not outline the specific contents of a BIP. In an earlier ruling, this Administrative Law Judge identified several criteria useful in examining the appropriateness of a BIP. These criteria were 1) the BIP must be based on assessment data, 2) the BIP must be individualized to meet the child’s unique needs, 3) the BIP must include positive behavior change strategies, and 4) the BIP must be consistently implemented as planned and its effects monitored (36 IDELR 50, SEA IA 2001).

The need to provide adequate behavioral supports has been clearly established in judicial and administrative decisions. In *Neosho R-V School District v. Clark*, 38 IDELR 61 (8th Cir. 2003), the Eighth Circuit held that failure to properly implement a behavior management plan was a denial of FAPE. In *CJN v. Minneapolis Public Schools, Special School District No. 1*, 38 IDELR 208 (8th Cir. 2003) the Eighth Circuit the use of time out and restraint was justified for a student’s escalating behavior, since the student was making academic progress and the behavior intervention plan was based on functional behavioral assessment data and included a positive point reward system. Earlier in *Evens v. District No. 17 of Douglas County*, 841 F.2d 824 (8th Cir. 1988) the court held that an IEP cannot ignore behavior, particularly when it is a prominent problem and significantly affects the child’s ability to learn. The need to address behavior in an IEP was also confirmed in several administrative decisions from Iowa, including *North Scott Community School District*, 21 IDELR 226 (SEA IA 1994)(finding the IEP inappropriate in addressing behavior), *Mason City Community School District and Northern Trails Area Education Agency 2*, 102 LRP 3993 (SEA IA 2001)(finding that the student’s BIP was followed but recommending the district explore options other than suspension), *West Des Moines Community School District and Heartland Area Education Agency*, 36 IDELR 222 (SEA IA 2002)(finding the IEP must be revised to include a carefully constructed BIP to be carried out in the general education classroom based on an expansive functional behavioral assessment), *Mason City Community School District and Northern Trails Area Education Agency 2*, 103 LRP 13527 (SEA IA 2003)(finding the district had developed a BIP that was non-punitive and consistently implemented), *Linn-Mar Community School District and Grant Wood Area Education Agency (AEA 10)*, 41 IDELR 24 (SEA IA 2004)(finding BIP not based on assessment data, not consistently implemented or monitored).

The adequacy of a BIP is a factor in determining placement decisions. Placements in more restrictive placements were sanctioned when adequate, positive BIP's were unsuccessful in addressing serious misbehavior [see e.g., *USD 259 Wichita Public Schools*, 36 IDELR 48 (SEA KS 2002)(finding that various interventions were unsuccessful and the child's behaviors were escalating). If a BIP was inadequate, placement at a more restrictive placement was not permitted. In a case from Kansas, a district proposed that a student be placed at a special day school whose staff had "advanced training in dealing with behaviors". A state review officer determined that the district failed to provide adapted methodology and a positive BIP, and "could not use a change in placement as the easy panacea for its negligence of duty... IDEA does not permit such a solution to the District's problem" [*USD #259 – Sedgwick County*, 36 IDELR 203 (SEA KS 2002)].

The first LRE question examines the adequacy of the supplemental aids and services in Maurice's IEP and the positive supports in his BIP. Were the supplemental aids and services listed in Maurice's IEP provided and were they adequate to support his placement at Roosevelt? Did the BIP provide adequate positive behavior supports to accommodate Maurice's placement at Roosevelt? The Appellant asserts that the supplementary aid identified in Maurice's IEP as "positive feedback and encouragement to work to his potential, and keep from becoming negative and explosive" (School Record at 10) was not provided. The Appellant also points to several inadequacies of the BIP: 1) the BIP was not based on a functional behavior assessment, 2) the BIP did not address behavior in unstructured settings (e.g., hallways) despite recommendations from several evaluations and despite Maurice's "racking up" several office referrals due to inappropriate behavior in those settings, 3) the BIP did not specify behaviors – a recommendations from several evaluations - to be targeted in the regular classroom environments, resulting in increased referrals to intervention from those settings, 4) the BIP did not include positive strategies, despite a consensus that Maurice needs frequent, positive reinforcement, and 5) the BIP was not consistently implemented by teachers.

The record substantiates these claims. Although the Appellees contend positive feedback was provided in general and collaborative classes, there is not documentation to support that assertion. Although the District argues that the reason a functional behavioral assessment was not completed because Ms. M revoked her consent for evaluation, a BIP must be based on assessment data (36 IDELR 50, SEA IA 2001). The DMISCSD claims that addressing behavior in unstructured settings is not "feasible" in a comprehensive high school, and that Maurice would resist a 1:1 escort. Yet, if a behavior interferes with a student's learning (which Maurice's behavior in unstructured settings did as it resulted in time away from instruction), the IEP team must identify positive behavioral interventions, strategies and supports to address those behavioral difficulties [20 U.S.C. § 1414(3)(B)(i)]. A 1:1 escort is not necessarily the only possible strategy. Perhaps Maurice could "earn" transition time for periods of appropriate behavior in the BIS or general education; perhaps Maurice could self-monitor appropriate transitions and these data could be shared with Ms. M weekly. Numerous strategies are available, and Maurice's team has the experience and expertise to explore these strategies. Ann Benzshawel is an extraordinarily gifted consultant, Deb Hodges is an impressive and talented teacher; and Ellen McGinnis-Smith is clearly an intelligent and sensitive professional. They know exactly how to build and monitor positive behavioral supports into Maurice's IEP and

BIP. In fact, one extremely effective support was originally a component of Maurice's BIP: the crisis intervention plan (CIP). For a student with behavioral difficulties at the secondary level, this type of "processing" represents an essential and valuable instructional tool. Ann Benzshawel knows this; Deb Hodges knows this, and Ellen McGinnis-Smith knows this. And yet, in their own testimony, in an effort to "respect Ms. M's "boundaries" and maintain parental cooperation, they entered into a mediation agreement that permitted Maurice to decide if he would "process" with his teacher. The efforts of this team to maintain a collaborative approach in planning Maurice's education program are clearly evident. As noted in *Board of Education of the Barker Central School District*, 40 IDELR 173 (SEA NY 2003):

This collaborative approach is reflected in the 1997 amendments to the IDEA in provisions which are intended to expand and promote opportunities for parents and regular and special education personnel to work in new partnerships at both the state and local levels (H.R. Rep. No. 105-95, at 79 [1997]) and to encourage parents and educators to work out their differences by using nonadversarial means (H.R. Rep. No. 105-95, at 82 [1997]).

Although vigorous advocacy is an anticipated by-product of a policy encouraging parental involvement [*Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80 (3<sup>rd</sup> Cir. 1999)], parental preferences must not be permitted to defeat the purpose of the IDEA – to provide a free and appropriate public education (FAPE) in the least restrictive environment (LRE). A parent must not be permitted veto power over IEP provisions viewed by other team members as necessary for FAPE. Parents clearly do not have the right under IDEA to unilaterally or independently determine the content of their child's IEP [see *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988)(finding that parents, no matter how well-motivated, do not have a right under the Act to compel a school district to provide a specific program); *Petersen v. Hastings Public Schools*, 831 F.Supp. 742, 750 (D. Neb. 1993), *aff'd*, 31 F.3d 705 (8th Cir. 1994); *Dreher v. Amphitheater Unified School District*, 797 F.Supp. 753, 756 (D. Ariz. 1992), *aff'd*, 22 F.3d 228 (9th Cir. 1994)]. Parental preference can be neither the sole nor predominant factor in a placement decision (*Letter to Burton*, 17 EHLR 1182 (OSERS 1991)).

Members of Maurice's IEP team view Ms. M's "vigorous advocacy" as obstruction. For example, teacher Deb Hodges testified that certain modifications were not in Maurice's best interest and "significantly tied her hands" in attempts to improve Maurice's behavior. She also testified that this "interference" created dissension and invited Maurice to play one side against the other. Vice Principal Adcock testified that he believed Ms. M may "overadvocate" for Maurice, causing "turmoil" in the school. Consultant Benzshawel testified that she would come to all meetings willing "to do whatever we can to help Maurice be successful", yet the meeting time was often used for "fact finding" at the insistence of Ms. Moon instead of addressing Maurice's behavioral needs. Ms. Benzshawel stated that discussion about BIP's were narrowed to what Ms. M "wants and expects", and that recommendations for the IEP team were not entertained. Dr. McGinnis-Smith testified that when Ms. M revoked consent for evaluations, postponed or hastily left meetings, efforts to address Maurice's needs were obstructed: "It's a no-win situation... we have not been able to put a plan into place that would be effective".

Ms. M's ever-vigilant advocacy must not obstruct the IEP team's affirmative duty to provide FAPE in the LRE nor "detract from pursuit of the purpose of a congressional statute that seeks to help disabled children by creating a system of rights for their parents, even hostile parents, to advocate on their behalf" [*Lillbask v. Sergi*, 117 F.Supp.2d 182, 33 IDELR 180 (DC CT 2000)]. Their duty is to provide Maurice a FAPE in the LRE, an obligation which does not lessen with a lack of consensus. If members of Maurice's IEP team believe "processing" with Deb Hodges following misconduct is necessary to provide Maurice with FAPE at Roosevelt, they must "step up to the plate" and insist it be included as a component of the BIP. When members of the IEP team know that the BIP must address behavior during unstructured time, they must explore how to address that behavior with a sensitivity to Ms. M's desire for Maurice to be treated like a high schooler and Maurice's desire to be like his peers. Dialogue, negotiation, resolution facilitation, and mediation as tools to reach consensus must still ensure the provision of FAPE for Maurice.

The DMISD was required to provide adequate supplemental aids and services to support Maurice's placement in the LRE. The District has failed to show that Maurice's goals and objectives could not be implemented at Roosevelt with the provision of adequate supplemental aids and services.

#### Educational Benefit

The IDEA requires that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living [20 U.S.C. § 1400(d)(1)(A)]. The free appropriate public education is to be provided in conformity with the individualized education program [20 U.S.C. § 1401(8)(D)]. Similar specification is found in federal regulations [34 C.F.R. § 300.1(a); 34 C.F.R. § 300.13(d)] and in Iowa regulations [§ 281-41.3(3) I.A.C.].

Substantively, an IEP must be reasonably calculated to provide educational benefit. The benefits must be more than trivial or de minimis (*Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130, 1988) but need not be optimal or maximum (*Rowley*, 1982, at 3046). Importantly, the 8th Circuit held that the IDEA does not require a program to maximize ability or produce "the best possible education or superior results. The statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student" [*Fort Zumwalt School District v. Clynes*, 26 IDELR 172 (8th Circuit 1997)].

Proposed placements in special schools were deemed appropriate in cases where progress in general education and less-restrictive environments had been minimal or non-existent. [see *Beth B. v. Van Clay*, 36 IDELR 121 (7<sup>th</sup> Cir. 2002)(noting the student's academic progress was "virtually nonexistent" and her developmental progress was "limited" in the regular education setting); *Clyde K. v. Puyallup School Districts*, 21 IDELR 664 (9<sup>th</sup> Cir. 1994)(finding it was undisputed that the student no longer received an academic benefit from his mainstream placement, as evidenced by his declining level of academic achievement and his disruptive classroom behavior which interfered with his learning); *Edwin K. v. Jackson*, 37 IDELR 63 (ND IL 2002) (finding that an alternative school placement was appropriate since the student had not made progress in a regular education

environment, despite the District's efforts), *South Lane School District*, 36 IDELR 82 (SEA OR 2001) (finding that despite behavioral interventions, strategies and supports, the student did not receive any significant benefit from the resource room setting)].

The DMICSD did not present evidence to support a claim that Maurice was not receiving a FAPE or not benefiting from the program at Roosevelt. In fact, progress monitoring data for all five goals of the 2003-2004 IEP reveal that "progress has been made toward the goal", including the behavioral goal of following school and classroom rules without the need for adult intervention. Although teacher Deb Hodges testified that Maurice's behavior the second semester impacted his learning, she also testified that Ms. Kent was able to teach Maurice math. Despite the difficulties with teacher Kent, the progress monitoring data show his reading goal was met in the second semester. Consultant Benzshawel testified to Maurice's progress academically, but stated that behavioral issues increased over the year (i.e., taken out of more classes). Yet progress monitoring data for through May shows a steady decline in behavioral "incidents" requiring adult intervention.

The DMISD failed to show that a more restrictive placement was necessary for Maurice to benefit from his education program. Progress monitoring data and testimony show Maurice made gains in all IEP goal areas.

#### Detrimental Effects

The DMISD documented and testified that the reason for proposing the Scavo placement was due to the "extensive and intense" accommodations required to maintain Maurice in his current program at Roosevelt. The DMISD argument suggests that providing these accommodations would be detrimental to the BIS program and present "equity" concerns. The extensive and intense accommodations include the parental notification requirements of the BIP and the training and availability of teachers. The DSMISD also argues that the unavailability of collaborative classes due to budget cuts would be detrimental to Maurice.

Parental Notification. One justification for the proposed placement at Scavo was the time and staff required to implement, document, investigate and conference with the parent and child. Due to the "untrusting relationship" between DMISD and Ms. M, the DMISD argues that a smaller, structured program would be better equipped to handle the level of parental interaction. The staff and time required to document, investigate and conference with Maurice and his parent adversely affects the other students in the BIS program: "other students' IEP are not able to be met".

The DMICSD agreed to the conditions of parent notification in a mediation agreement, and now argues that those extensive notification requirements justify the need for a more restrictive placement. Once again, in an effort to work collaboratively with Ms. M. and her attorney, school district personnel agreed to a parental notification plan that became excessively time-consuming for teachers and administrators. Rather than proposing a change in placement, the school district should propose a change in the parent notification plan:

While a school district's obligation under the IDEA to permit parental participation in the development of a child's educational plan should not be

trivialized, the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives [*Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 31 IDELR 321 (8<sup>th</sup> Cir. 1999)].

Perhaps e-mail and FAX messages could be utilized. Perhaps a school social worker could serve as a liaison between school and home and assist with behavior reporting. To enhance the trust between the DMICSSD and Ms. M., perhaps John Hawkins, voluntarily working with Maurice to prevent future involvement with juvenile authorities, could assist at Roosevelt. There are many solutions – short of a change of placement – to address the problems with the parental notification plan. By modifying the parental notification component of the BIP (e.g., implementing, notifying, documenting, conferencing), the DMICSD will comply with Iowa regulations requiring difficulties “shall be overcome by the provisions of special aids and services rather than by separate programs for those in need of special education [§ 281 - 41.37(2)(B)].

Teacher Training and Availability. Another justification for the DMICSD proposing the Scavo placement concerned personnel. The District argued that “Maurice performs best when his self-contained services can be provided by multiple teachers trained to address both his academic, and behavior needs” and that “Maurice needs a setting where all staff who interact with students are trained in intense de-escalation strategies”. Further, Maurice “is unresponsive to directions from staff and demonstrates severe disrespect to them with the exception of his special education case manager, the classroom associate and Vice Principal”. Remaining at Roosevelt will “require that his entire curriculum be provided by this (one) teacher with the assistance of this associate”.

The record does not support Maurice’s need for multiple teachers, only his need for positive feedback and encouragement. In fact, Dr. McGinnis-Smith testified that “if [Maurice] was self-contained with Deb Hodges, he’d probably be fine”. Roosevelt has a corps of highly-trained, experienced teachers and support staff who are fully capable of providing an appropriate program for Maurice at Roosevelt. Their willingness “to do whatever we can to help Maurice be successful” is clearly evident in their participation in numerous meetings and mediations. Yet they express frustration and feel restricted in their efforts to develop an appropriate program for Maurice. Just as Ms. M. has a right and duty to advocate for her son, these professionals have a similar duty to advocate for Maurice. They have a duty to develop and provide an appropriate program for Maurice, and a duty to monitor and modify his program if necessary. They must advocate for the supports necessary to accommodate Maurice in the LRE. In order for Maurice to remain at Roosevelt, these professionals must not be dissuaded from insisting on provisions in Maurice’s IEP and BIP that are essential for FAPE.

Collaborative Classes. Another factor influencing the proposed change of placement was the unavailability of collaborative general education programs due to budget cuts. Deb Hodges testified that due to budget cuts, special education teachers would not be able to collaborate in general education classrooms. The DMICSD argument suggests that the unavailability of collaborative programs at Roosevelt would be detrimental to Maurice.

While the unavailability of collaborative classes would only affect two courses for Maurice next year, the District must explore options to provide inclusive placements if

they are determined to be necessary for the provision of FAOE in the LRE. Regardless of budgetary constraints, a school district remains bound to the requirements of FAPE and LRE for each child with a disability [*Letter to Thurmond*, 18 IDELR 1306 (OSERS 1992). (see also *Stockton v. Barbour County Board of Education*, 22 IDELR 543 (ND WV 1995)(holding that the student's need outweighed the financial harm to the school and the public interest in upholding the IDEA outweighed the board's budgetary constraints); *Jefferys v. State of New Jersey*, 23 IDELR 945 (DC NJ 1996)(finding fiscal squabbles notwithstanding, compliance with the IDEA's terms is mandatory); *Freetown-Lakeville Public Schools*, 20 IDELR 791 (SEA MA 1993)(holding that a school district may not void their legal obligation to provide a free appropriate public education by reliance on budget limitations). Accepting federal funds from IDEA obligated the District to assure compliance with the conditions specified for the receipt of those funds... including the education of students with disabilities in the least restrictive environment.

#### Decision

The Appellant has prevailed in this matter. The district could not demonstrate that the current placement at Roosevelt did not offer FAPE and that Maurice required a more restricted, segregated environment to benefit from his IEP.

The IEP team is ordered to reconvene within two weeks of this ruling to finalize Maurice's IEP for the 2004-2005 school year at Roosevelt and to arrange for a functional behavior assessment to assist in the development of his BIP. This is not an order for an independent educational evaluation; the professionals on Maurice's IEP team are expertly qualified to conduct such an assessment. In fact, these professionals have demonstrated a remarkable resolve to collaboratively design an appropriate program for Maurice. It would be difficult to imagine a team of professionals more competent or qualified to craft Maurice's educational program.

The IEP and BIP must be modified to include adequate supplemental aids and services to support Maurice's placement at Roosevelt.

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 [§ 281-41.124(2) I.A.C.].

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

8/11/04  
Date