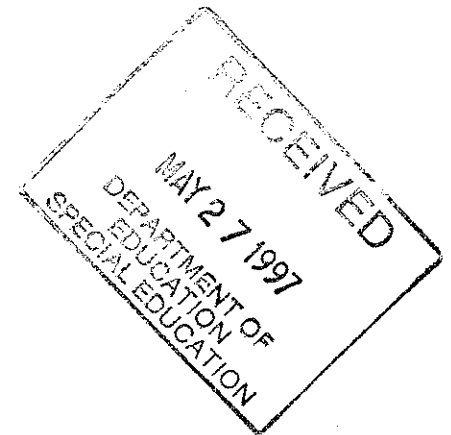


IOWA DEPARTMENT OF EDUCATION
(Cite as 14 D.o.E. App. Dec. 204)



In re: Amanda S...)
Susan S., Appellant) DECISION
v.)
Webster City Community School District)
and Arrowhead AEA 5, Appellees) Admin. Doc. SE-185

The above entitled matter was heard by Administrative Law Judge, Daniel J. Reschly, pursuant to Iowa Code Section 256B.6 (1993), the rules of the Iowa Department of Education, Iowa Administrative Code (IAC). 281-41-112 to 281-41-125, and the U.S. Code and regulations of the U.S. Department of Education implementing the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. Sections 1400-1485; 34 C.F.R. 300 (1996). The parties to this matter agreed to an evidentiary hearing as provided in IAC 281-41-117.

The hearing was conducted in response to an affidavit of appeal filed by the appellants on February 21, 1997 with the Iowa Department of Education. The appellant was represented by attorney Blake Parker of the Fort Dodge law firm of the same name. The appellees were represented by Dean Erb and Susan Ahlers of the Ft. Dodge law firm of Johnson et al. Extensions of the 45 day time period for resolution of due process hearings was granted at the request of the appellants on March 19 for 30 days and on May 4, 1997 by order of this administrative law judge for 14 days. The last continuance was necessitated by the continued submission of post-hearing documents and arguments by the parties.

At dispute in this proceeding were: a) the adequacy of the individualized educational program (IEP) formulated by the Webster City Community School District (WCCSD) and the Arrowhead Area Education Agency 5 (Arrowhead AEA); b) the adequacy of the notice to Mr. and Mrs. S regarding a critical staffing on February 11, 1997; and c) the appropriateness of the WCCSD and Arrowhead AEA recommendation of an out-of-district day treatment program in relation to legal standards for a free and appropriate education to children with disabilities in the least restrictive environment. Two additional issues emerged in the hearing: a) whether the suspensions during the 1996-97 school year were excessive and b) legal obligations to pay for the out of district program recommended by the school.

The hearing was conducted on April 8 and April 10 in the WCCSD central office. The parties were represented by legal counsel. In attendance for the appellants were Mr. and Mrs. S. and Amanda S. Representatives of the appellees were Frederick Krueger, Arrowhead AEA Director of Special Education and Dennis Bahr, Superintendent of WCCSD.

I. Findings of Fact

This Administrative Law Judge finds that he and the Iowa Department of Education have jurisdiction over the parties and the subject matter of this hearing.

The record for this matter consists of an extensive educational record, exhibits by appellants and appellees, appellant's pre-hearing memorandum and affidavit of appeal, appellant's and appellees' post-hearing briefs and memoranda, and testimony under oath by (in order of appearance) Amy L. Steen, WCCSD behavior disorders teacher, Susan S., mother of Amanda S., Mary Jesse "Polly" Nichols, appellant's expert witness and Educational Program Director in the Child Psychiatry Unit, University of Iowa Hospitals and Clinics, Susan Stock, WCCSD multicategorical resource program teacher, Tim Montgomery, Webster City police officer, Jean Paris Mowry, WCCSD physical education teacher, George Caggiano, WCCSD Middle School Assistant Principal, Sara L. Trueblood, Arrowhead AEA social worker, Mr. Krueger, and Kay Forsythe, WCCSD middle school principal.

Amanda S. is a 12-year old sixth grade student at the WCCSD middle school (Date of Birth, March 31, 1985). Appellants stipulate that Amanda's educational diagnosis of behavior disorder, first conferred in 1991 near the end of her kindergarten year, is appropriate and also agree that she requires special education services. The dispute revolves around the kind and intensity of those services.

Behavior Patterns and Educational Performance

According to Sara Trueblood, Amanda S.'s behavioral problems began in the preschool program where she was expelled (Educational Record, p. 80). Her behavior problems surfaced almost immediately in 1990-1991 in kindergarten where there were frequent incidents of aggression (kicking and biting) and non-compliance with rules and teacher requests. She was referred due to behavior problems in February, 1991, leading to, after parental consent was granted for a comprehensive evaluation, a behavior disorder diagnosis, an IEP, and special education placement with parental consent beginning in Fall, 1991. Her initial placement was in a special class with integration in the WCCSD (Educational Record, p. 76).

The WCCSD special class with integration program soon proved insufficient leading to a staffing in October, 1991 and a change of placement with parental consent to a Ft. Dodge special class with little integration. The change of placement was due to extreme aggressive behavior toward other students and adults in the form of scratching, biting, hitting, and kicking (Educational Record, p. 67a to 67p). One particularly upsetting incident involved Amanda S. slapping, "... Mrs. Tharp across the face which made her glasses fly across the room." (Educational Record, p. 67g).

The record at this hearing was sparse regarding Amanda S.'s educational achievement and behavioral progress in the Ft. Dodge special class with little integration from October, 1991 to October, 1995. Mrs. S. testified that she did well in the Ft. Dodge special class during first, second, third, and fourth grades. Significant problems emerged in September, 1995 as Amanda S. began fifth grade in a Ft. Dodge middle school. Apparently, she was

suspended during the first week of school due to, "Insubordination, disorderly behavior, intimidation, and willful disobedience ..." (Educational Record, p. 103a). According to Ms. Trueblood's testimony, Amanda S. was suspended three times by the Ft. Dodge schools in September, 1995 leading to that school district's refusal to provide special education programming for her (see also Educational Record, p. 51-51c). In late September, 1995 Amanda S. was returned to the WCCSD.

The unexpected return of Amanda S. to the WCCSD caused problems because that district did not have a self-contained with little integration program for students with behavior disorders. Subsequent to staffings on September 28, September 29, and October 10, attended by Mrs. S. and/or Mr. S., Amanda S. was placed into a resource teaching program with Ms. Stock and a full-time associate. In February, 1996 a program change with parental consent was instituted involving reducing the length of the school day and one-to-one instruction (Educational Record, p. 36-36e).

Numerous severe behavioral incidents in 1995-1996 are documented in the records and testimony. On October, 19, 1995, she refused to follow a directive from the teacher, refused to go where she was supposed to be, hit and kicked a teacher, hit the teacher associate, and wandered away from the classroom. In addition to such serious incidents, there were numerous daily occurrences of inappropriate behavior such as refusing to comply with school rules, profane language, wandering around the school without permission, and paranoid complaints about peers and adults (Educational Record, p. 44-44b). Several additional serious incidents during the 1995-1996 school year are documented in the record and described in Ms. Stock's testimony. For example, on April 24, 1996 Amanda S. called Mrs. Stock a "bitch" modified by various profane adjectives, kicked her causing bruises, threatened to "kill" a peer, and refused to comply with reasonable requests. The individualized educational program (IEP) was amended with parental consent on April 10, 1996 (Educational Record, p. 33).

Amanda S. began the sixth grade in the 1996-1997 school year in a WCCSD self-contained special class with integration taught by Ms. Steen. The IEP governing this placement was formulated and approved by Mrs. S. on October 3, 1996 (Educational Record, p. 31). Amanda S. attended the staffing. This IEP was amended first on November 26, 1996 due to escalating behavioral incidents (Educational Record, p. 23) and then again on December 19, 1996 when Amanda S.'s program was changed to self-contained with little integration and a new behavioral contract was written. The IEP changes in November and December were approved by Mrs. S.

The behavioral incidents during the 1996-1997 year continued the pattern of a few severe episodes that constituted threats to the safety of Amanda S., teachers, and students as well as daily occurrences of non-compliance, verbal threats, and swearing. Some examples of these incidents daily non-compliance follow. On October 10 she kicked a desk, then pushed it over, and called her teacher a liar (Educational Record, p. 26b). On October 14, she kicked the lockers, swore, "got in the teachers face" and said "You can't tell me to do anything. What are you going to do about it?" On October 15, Amanda S. pushed over backwards another student, punched him in the eye, threw wooden pumpkins at school personnel, and turned over desks (Educational Record, p. 26a).

Even more serious behavioral incidents occurred about once per month during the 1996-1997 school year. These "behavioral earthquakes" as they have been called by one expert in the educational literature, constituted serious threats to the safety of Amanda S., other students, and WCCSD staff. Two especially troublesome episodes are cited here. On November 20, 1997 Amanda S. refused to go home due to an infraction as per the behavioral contract in her IEP. When prompted to comply, she lost control, became agitated, destroyed a "boom box" in the classroom, ripped a pencil sharpener off the wall, purposely cut her finger with the radio antenna, attempted to cut her wrists with the antenna, ran from the classroom and away from school officials. The police were called as per WCCSD rules for all students. She attempted to kick the police officers, swore at them and school officials, and verbally abused others attempting to help her. She was handcuffed because she constituted a threat to herself and to others in the judgment of Officer Montgomery (Educational Record, p. 24-24g and Montgomery testimony). According to the testimony of several school officials and Officer Montgomery, Amanda S. made threats to hurt herself, including statements about suicide (see also Educational Record, p. 89).

A particularly serious incident on February 10, 1997 led directly to this hearing. Amanda S. attacked another student, saying, "I'm going to f---ing kill you", grabbed him and threw him to the floor. The assistant principal was summoned. Amanda S. pushed him, kicked him twice, and punched him in the chest. During this and other incidents Amanda S. was described as in a rage, out of control, irrational, surprisingly strong, unapproachable by gentle touch or reasoned discourse, and threatening to herself as well as to others (testimony by Mrs. Stock, Mrs. Steen, Dr. Forsythe, Mr. Caggiano, Mrs. Mowry, and Mr. Montgomery). Eventually, in this incident as well as others, the rage subsided and Amanda S. wept, expressed extreme self-derogatory feelings, and agreed to go to the appropriate place as requested by school officials.

Amanda S.'s academic aptitude according to a comprehensive evaluation conducted in 1991 is slightly above average; however, her academic achievement is slightly below average. According to the testimony of Ms. Nichols this pattern is typical of students with behavior disorders. No concerns were expressed at the hearing or in the record regarding her academic skills.

Psychiatric Evaluations and Medications

The initial comprehensive evaluation by the WCCSD and the Arrowhead AEA was conducted by a multidisciplinary team in March and April, 1991. The most salient findings were average achievement and ability, markedly below average school-related social skills, and serious concerns about non-compliant and aggressive behaviors. She was classified as behavior disordered and placed in a self-contained special education class with integration.

The first psychiatric evaluations of Amanda S., conducted in Ft. Dodge by Dr. Hizon in May, 1991, resulted in a diagnosis of Attention-deficit Hyperactivity Disorder, a prescription of ritalin, and the observation that, "She's easily distractible and obviously hyperactive." (Educational Record, p. 106x). By September, 10, 1991 Dr. Hizon concluded,

"Ritalin has not worked in the past, so this time I am trying Atarax 10 mg. 3 times a day, hopefully increasing it to about 50 mg a day." At this session, she also encouraged the parents to seek further evaluation and recommendations in Iowa City (presumably, referring to the University of Iowa Hospital and Clinics).

Treatment with Dr. Hizon was discontinued late in 1991 or early 1992 because Mrs. S. did not agree with her suggestions that the parents were somehow remiss in parenting Amanda S. (Mrs. S. testimony). The next document reflecting psychiatric treatment is a March 20, 1991 progress note by Dr. Szeibel who noted that prior treatments of ritalin did not have the desired effects and that imipramine was objectionable due to the side effects of nightmares and nocturnal hallucinations. He then recommended the combination of cylert in the morning and imipramine at a low dose taken at 6:00 PM daily (Educational Record, p. 106m). The cylert continued with good results at least through February, 1993 (Educational Record, p. 106b), but the imipramine was discontinued by July, 1992 (Educational Record, p. 106g).

Although other psychiatric treatment was mentioned in the testimony of Mrs. S. and Mrs. Trueblood, the records are silent on treatment between mid 1992 and mid 1995. Dr. Scholten of the McFarland Clinic in Ames suggested diagnoses of oppositional defiant disorder, conduct disorder, and intermittent explosive disorder in 1995 (Educational Record, p. 105-105g and p. 107-107b). Medication was suggested including re-establishing cylert and imipramine treatment; however, both were rejected by Amanda S. and her parents.

Amanda S. was admitted under Dr. Scholten's care to the psychiatric unit of Mary Greeley Hospital in Ames in late November, 1995 for ten days for the purpose of observing her behavior and medication trials. The hospital evaluation apparently was unsuccessful due in large part to Amanda S.'s refusal to cooperate and the opposition of Amanda and her parents to the suggested medications. At discharge Amanda S. was placed on the medication Depakote. A follow-up visit with Dr. Scholten on December 19, 1995 indicated a good result with Depakote. The next notation in the record occurred on February 19, 1996 where Dr. Scholten suggested the use of a day treatment program in Ft. Dodge under the jurisdiction of Dr. Szeibel in Ft. Dodge. It is this program or a program very similar to it that the school is now attempting to use as a placement for Amanda S.

Amanda S. apparently is currently under the care of Dr. Buck of Des Moines (Educational Record, p. 10-10e). Dr. Buck diagnosed Amanda S. as "ADHD-combined type, Conduct Disorder, and History of Oppositional Defiant Disorder." She is currently on dexedrine as prescribed by Dr. Buck, apparently with good result (testimony of Mrs. Steen). The dexedrine was described by Mrs. Steen as improving Amanda S.'s attention, but having little effect on the daily oppositional and defiant behavior. Moreover, the most recent serious outburst in February apparently occurred while she was on the dexedrine treatment.

Although different diagnoses have appeared in Amanda S.'s psychiatric records, all are in the broad category of externalizing disorders involving behaviors intended to cause harm to others accompanied by refusal to conform to the rules and expectations that others of the same age generally accept and follow. Several medications have been attempted. All were seen at least by the prescribing physician as conferring benefits for a time, but none have

been used over the long term and none have significantly altered the behavioral patterns of daily oppositional defiant behavior and periodic severe outbursts that place Amanda S. and others at risk for physical harm.

More intensive intervention options such as day treatment have been recommended in the psychiatric evaluations. This option has not been attempted previously. The contention in the appellant's post-hearing brief that day treatment had been tried and failed (referring to the ten day hospitalization at Mary Greeley Hospital in 1995) is incorrect. The Mary Greeley hospitalization was for observation and evaluation. Intensive clinical-behavioral treatment was not provided.

Educational Services and IEPs

Numerous modifications in Amanda S.'s special education program were implemented over the past two years by the WCCSD and Arrowhead AEA. These changes appeared in successive IEPs and IEP modifications over the past two years (Educational Record, p. 8a-8k, p. 18a-18e, p. p. 23a-23b, p. 31a-31m, p. 33a-33c, p. 36, and p. 41a-41g). These modifications have involved changes in program models, goals, intervention techniques, and behavioral contracts. None have significantly altered Amanda S.'s high rate of daily non-compliant, defiant, profane, and disruptive behaviors, nor the periodic severe rages that place her and others at physical risk. According to Mrs. S., she and her husband "went along with what the school wanted to do" until the most recent staffing on February 11, 1997 when the school and AEA officials sought to place Amanda S. in a day treatment program.

The bases for the school's recommendation of a day treatment program for approximately 45 days is the apparent futility of their concerted, intensive efforts to assist Amanda S. in developing more responsible social and emotional behaviors. The school officials believe they have provided high quality interventions that typically are successful with students with behavior disorders. They fear that Amanda S.'s periodic out of control outbursts will lead to serious injury to her or to others in the school environment. Furthermore, continuation of the daily non-compliant and disruptive behaviors puts her at severe risk for negative educational, social, and career outcomes. Day treatment is seen as a means to short circuit this downward trajectory (testimony of all school officials). Dr. Forsythe was quite explicit in her advocacy of the day treatment program, "Amanda needs a program with a clinical-therapy component in order to receive an appropriate education."

Ms. Nichols' testimony agreed with the parents' view that the WCCSD self-contained special class with little integration could be an appropriate program for Amanda S. if the program was improved. She specifically cited the needs for more explicitly defined and more effective anger control interventions, stress management programming, and consequences for appropriate and inappropriate behaviors (e.g., differential reinforcement of low rates of behavior as a means to eliminate swearing). Ms. Nichols also was critical of WCCSD's implementation of best practice standards for behavior disorder programs.

The recent IEPs were found deficient by Ms. Nichols due to insufficiently explicit and detailed specifications of a crisis intervention plan, social skills program, and plan for re-

integration of Amanda S. into general education. Moreover, she contended that a day treatment placement should not be contemplated unless specific goals were established along with an explicit plan for re-integration into the WCCSD. Nichols also cited specific programs or techniques for teaching anger control and social skills programming.

WCCSD witnesses claimed that their program provided most if not all of what Ms. Nichols recommended including the use of specific techniques for anger control and curricula for social skills. The differences among these witnesses involved in large part the degree of specification preferred in the IEP. Ms. Nichols advocated a detailed IEP that included precise descriptions of all elements of the special education program. In contrast, appellees' witnesses defended the IEP as a general plan that included statements of present levels of educational performance, goals, and objectives with further specification of behavioral change techniques, curricula, and teaching methodology left to a teacher's daily lesson plans. Mr. Krueger testified that the IEPs met state and federal legal standards as well as the Arrowhead AEA criteria. During cross-examination Ms. Nichols conceded that the WCCSD February 11, 1997 IEP met legal requirements.

A day treatment placement for Amanda S. was considered or recommended previously in psychiatric evaluations and WCCSD staffings (Trueblood testimony). According to this testimony, Mrs. S. agreed tentatively to a day treatment program in March, 1996, but then refused when payment for the placement necessitated the filing of a "child in need of assistance" (CHINA) petition and severance of parental rights.

The Ft. Dodge Trinity Adolescent Program (TAP) includes a partial hospitalization-day treatment option that provides intensive therapeutic and educational services to students with behavior disorders (Educational Record, p. 109f). Ms. Trueblood endorsed this program as one that has produced good results with students with problems similar to those exhibited by Amanda S. It appears to provide the intensive clinical services component described by Dr. Forsythe as required for Amanda S. to receive an appropriate educational program.

The parties' expectations regarding payment for the day treatment program were unclear at the hearing. In the post-hearing briefs the appellants argued that if a day treatment program placement was established in this decision, the entire burden should be borne by the WCCSD. The appellees argued that the parents' insurance should be available to pay for the partial hospitalization costs to the extent that they suffered no financial loss such as a decrease in the lifetime benefits.

Notice

Appellant argues that the notice regarding the IEP meeting on February 11 did not comply with federal and state legal requirements. An IEP meeting was conducted at 4:00 PM on February 11. The meeting was held the day after a severe outburst of violent, aggressive behavior. A staffing after the next violent outburst was agreed to by the parties in an IEP amendment on December 19, 1996 (Educational Record, p. 18b). Written notice of the February 11 IEP meeting was not provided; however, immediately after it became apparent that a staffing was necessitated by Amanda S.'s behavioral outburst on February 10,

school officials initiated communications with the parents. First, Mr. Caggiano told Mr. S. that a staffing would be held the next day. At 4:00 PM Dr. Forsythe phoned Mr. S. to ask him if a 4:00 PM time would be convenient for him and Mrs. S. and whether both would attend the meeting. According to Dr. Forsythe, Mr. S. answered affirmatively to both questions (Dr. Forsythe testimony). In fact, both parents did attend the staffing on February 11.

The second issue regarding notice involves whether parents received written notice prior to the WCCSD initiating the change of placement (i.e., to a day treatment program) subsequent to the staffing on February 11, 1997. The record clearly indicates that written notice of a change in placement was provided in at least two forms: a) the parents received a copy of the proposed IEP at the February 11 staffing; b) a letter from Dr. Forsythe to Mr. and Mrs. S. on February 12 discussed the recommended change in placement and assures them that the "stay put" provision of federal and state law will be observed while the disagreement between the school and parents over the appropriate placement is resolved. In fact, the school has not implemented the change in program placement because of the parents' disagreement with the February IEP recommendation for a day treatment placement.

Suspension

Evidence presented at the hearing indicated that Amanda S. has been suspended less than ten days during the 1996-1997 school year. All suspensions appeared to follow serious behavioral incidents that placed at risk Amanda S. and others in the school environment. The suspensions generally were accompanied by staffings at which IEP amendments were developed to increase the effectiveness of her educational program.

II. Findings of Law

Appellant's contentions regarding the inadequacies of the IEP prompt consideration of the state and federal IEP requirements (34 CFR 340 to 34 CFR 350; IAC 281-41.59 to IAC 281-41-69). These requirements specify that the IEP must be a written document, formulated by a team of professionals with the participation of parents and, as appropriate, the student with a disability. Moreover, the IEP must be formulated before special education services are initiated or a modified IEP developed prior to changes in the special education program. The record clearly confirms WCCSD's compliance with these requirements.

The content of the IEP is specified at 34 CFR 300.346 and IAC 281-41.67. The mandatory content includes statements of the present levels of educational performance, annual goals and instructional objectives, the special education and related services program for the child and the extent of participation in general education, appropriate objective criteria, evaluation procedures, and schedules for determining at least annually the progress toward achieving program objectives and projected dates of service. The IEPs for Amanda S. had these mandatory components, thus complying with the relevant federal and state legal requirements. Moreover, the content of the IEP was intended to confer educational benefits and the relevant records and testimony indicated that Amanda clearly was benefiting, at

least academically, from the educational program, thus meeting one of the Rowley criteria for the appropriateness of an educational program [Board of Education v Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982)].

Professional opinion varies on the degree of specificity required in an IEP, a question that has troubled educators and parents since the inception of Education of the Handicapped Act (now the IDEA). Clarification of the IEP requirement was provided in an appendix to the federal regulations at 34 CFR 300 Appendix C. The following excerpts provide guidance on the question of specificity.

"However, the goals and objectives in the IEP are not intended to be as specific as the goals and objectives that are normally found in daily, weekly, or monthly instructional plans." (Question 37).

"Classroom instructional plans generally include details not required in an IEP, such as specific methods, activities, and materials (e.g., use of flash cards) that will be used in accomplishing the objectives." (Question 39).

Amanda S.'s IEP was sufficiently detailed to meet the relevant legal standards.

The next questions have to do with whether the February 11, 1997 IEP was formulated properly, a crucial issue in determining compliance with federal and state legal standards (Rowley, 1982). Legal requirements at 34 CFR 300.345 and IAC 281-41.64 use nearly identical language in establishing the importance of parental participation in IEP meetings. The federal requirement is quoted below.

"Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including----(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place."

The notice also is to indicate the purpose, time, and location of the meeting as well as who will be in attendance. Appellant's claim that the notice given to the parents regarding the February 11, 1997 IEP failed to meet these requirements is based in part on the interpretation of these provisions as requiring written notice. In fact written notice is not required here and if the developers of the regulations had meant to require written notice, they would have so written as they did at 34 CFR 300.504 and IAC 281-47.104. The record unequivocally confirms that verbal notice was provided on February 10 as soon as the necessity of an IEP meeting was established by Amanda S.'s behavioral outburst and that both parents agreed to the time and place. Most importantly, both parents participated in the meeting where they disagreed with the proposed changes in the IEP.

The second issue regarding notice is whether the school provided adequate communication regarding the intended change in placement subsequent to the IEP meeting on February 11, 1997. Here the legal requirements clearly specify that the notice must be written (34 CFR 300.504; IAC 281-47.104). Both require written notice when an educational agency

proposes to change the educational placement of a child with a disability. This written notice must be accompanied by a:

"..description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected; A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and A description of any other factors that are relevant to the agency's proposal or refusal." (34 CFR 300.505)

The compliance of the educational agencies with the written notice requirements also are unambiguous. The written IEP and the letter on February 12 with a copy of the IEP appended from Dr. Forsythe to the parents constituted adequate written notice. The parents clearly knew the reasons for the proposed action and the options considered. They rejected the actions proposed by the school immediately after the IEP meeting and initiated this proceeding within a few days of the meeting. Further, the educational agencies did not initiate the day treatment placement as provided for in the disputed IEP in deference to the appellant's legal right to dispute the change in placement and to invoke the "stay put" rule while the matter was adjudicated. Any violation of the written notice requirements would amount to a technical abridgment that had no substantial impact on the appellant's rights or Amanda S.'s educational program. Such technical violations, and it is unlikely that the facts of this case rise to that level, cannot be the basis, absent substantive impact on parental or student rights, for overturning the IEP as legally flawed [Thomas v. Cincinnati Board of Education, 918 F.2d 618 (6th Cir. 1990); Hiller v. Board of Education of the Brunswick Central School District, 748 F.Supp. 958 (N.D. NY 1990); Doe v. Alabama State Department of Education, 915 F.2d 651 (11th Cir. 1990); Independent School District No. 283 v. S.D. et al., 88 F.3d 556 (8th Cir., 1996)].

The final issue is the most ambiguous: the right of the appellees to place Amanda S. in a more restrictive, out of school placement. Federal and state law are clear on the preference for the delivery of educational services in the least restrictive environment (34 CFR 300.550).

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

The ambiguity of applying 34 CFR 300.550 is reflected in the rich array of case law dedicated to examining decisions by educational agencies seeking to place students in more restrictive settings. The least restrictive environment legal tests to guide decisions involving placement of students with disabilities are now well established in case law [Greer v. Rome City School District, 950 F.2d 688, 697 (4th Cir. 1991); Barnett v. Fairfax County School Board, 927 F.2d 146, 153-154 (4th Cir. 1991), cert denied 112 S.Ct. 175

(1991); Daniel R.R v. State Board of Education, 874 F.2d 1036, 1044 (5th Cir. 1989); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983); Board of Education v. Holland, 786 F.Supp. 874 (E.D. CA 1992) (9th Cir. 1994); Oberti v. Board of Education, 995 F.2d 1204, 1216 (3rd Cir. 1993); Poolaw v. Bishop, 67 F.3d 830 (9th Cir. 1995)]. Application of the legal tests to any set of facts is, however, enormously complex.

Perhaps the most widely applied tests are those established in the Holland decision, citing the Greer, Barnett, Daniel R.R., and Roncker decisions, all of which prevailed in appeals to the circuit courts. Progression to a more restrictive placement must be based on a showing that: a) the educational benefits available to the child in a regular classroom (*self-contained special education class at WCCSD*), supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom (*day treatment placement*); b) the non-academic benefits to the handicapped child of interaction with non-handicapped children; c) the effect of the presence of the handicapped child on the teacher and other children in the regular classroom; and d) the costs of supplementary aids and services necessary to mainstream the handicapped child in the regular classroom setting. In the Holland tests as applied to Amanda S., the self-contained special class is substituted for regular classroom and the day treatment program is substituted for special education classroom.

The extensive review of Amanda S.'s educational program indicated that she now has relatively little contact with regular education classrooms or regular education students due to her defiant, non-compliant, and periodic serious outbursts. She currently is placed in a self-contained special class with little integration which provides at best limited contact with nondisabled peers.

The daily disruptive behaviors as well as the out of control episodes have a substantial, negative impact on other students and teachers, threatening their physical safety and disrupting an orderly educational environment. On the basis of the threat to others alone, the day treatment program would be justifiable legally.

Although Amanda S. clearly is deriving educational benefits from her current placement, at least in terms of academic achievement, the usefulness of these skills is put at such serious risk by her behavioral problems that any speculation of superior academic benefits in the current special class is over shadowed by her behavioral programming needs. Amanda S.'s behavior is of paramount concern. Absent significant changes in behavior, educational achievements such as completing high school or post high school education or training will be futile because her behavior will negate whatever benefit she might otherwise gain from those accomplishments. Furthermore, the current patterns of behavior involving violent rages, if continued into the teen-age and adult years, put her and others at grave risk. The promise of effectively treating these behaviors through the day treatment program outweigh the possible benefits of the WCCSD special education class. Finally, the WCCSD has provided extensive supplemental aids and services, with only modest results. The day treatment placement clearly is justified according to the Holland tests.

Finally, there is the matter of financial responsibility for the additional costs of the day treatment program. The educational costs are of course borne entirely by the WCCSD since

Amanda S. will be a publicly-placed student in a non-school setting (34 CFR 300.401). Responsibility for the non-educational costs also are the responsibility of the school since, in their opinion, "Amanda needs a program with a clinical-therapy component in order to receive an appropriate education." In this case the "clinical-therapy" component is a related service since it is required in order for the student to receive an appropriate education.

A parent's health insurance benefits may be used to pay for special education and related services under certain circumstances [Seals et al. v. Loftis 614 F. Supp. 302 (E.D. TN 1985); Raymond S. ex. re Joseph S. v. Ramirez No. C-95-3027 (N.D. IA 1996); 20 IDELR 627]. First, the insurance billing must be voluntary if any threat of financial loss to the parent exists. For example, educational agencies cannot compel parents to use insurance benefits if they incur costs such as a decrease in lifetime coverage, an increase in premiums or a loss of insurance coverage, or out of pocket expenses for deductible amounts or other expenses. Insurance billing also requires parental consent according to the text of a 1993 Office of Special Education Programs policy clarification (20 IDELR 627).

III. Decision

Appellees prevail on all substantive matters at issue in this hearing. The WCCSD may place Amanda S. in a day treatment program as per the February 11, 1997 IEP.

The WCCSD and Arrowhead AEA will conduct a staffing, seeking diligently the participation of the parents and Amanda S., to make plans for implementation of the day treatment program, to establish goals for the day treatment program, and to formulate criteria and plans for the return of Amanda S. to a WCCSD program.

The length of the day treatment program is to be dependent on the progress of Amanda S. in acquiring appropriate behavioral competencies that will enable her to participate in a WCCSD program without placing herself or others in danger or disrupting the educational process on a daily basis to the extent that an orderly educational environment is impossible for her and others.

The day treatment placement is to be implemented at the beginning of the 1997-1998 school year.



Daniel J. Reschly, Ph.D.
Administrative Law Judge

5-22-97

Date