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Iowa Department of Education

IN RE: JESSICA D., Rio and Sheryle D., Appellants vs. Interstate 35 Community School District Heartland AEA 11 and Iowa Department of Education, Appellees	Decision (Admin. Doc. SE-228) #124

The above entitled matter was heard by Administrative Law Judge Carl R. Smith on September 12th and 15th, 2000 in Indianola, Iowa. The hearing was held pursuant to Iowa Code Section 281.6 of the Rules of the Iowa Department of Education found in Iowa Administrative Code Section 281.6 of the Rules of the Iowa Department of Education found in Iowa Administrative Code 281-41.112-41.125 and applicable regulations found within the Individuals with Disabilities Act (IDEA) as amended in 1997.

The Appellants in this mater were represented by Attorney Curt Sytsma of Des Moines, Iowa. The Interstate 35 Community School District and the Heartland AEA 11 were represented by Attorney Andrew Bracken of Des Moines, Iowa. The Iowa Department of Public Instruction was represented by Ms. Chris Scase, Assistant Attorney General for the State of Iowa.

According to the appeal filed by the Appellants on August 9, 2000 the primary issue in these proceedings is the appropriate setting needed to provide appropriate special education services to Jessica D., a student born on September 11, 1986 and currently served in the Interstate 35 School District. Jessica has a complex physical condition known as CHARGE syndrome characterized by seizures, impaired vision, impaired hearing, physical abnormalities, severely delayed development and other difficulties. All parties agree that Jessica is a child with disabilities who is entitled to the protections of the Individuals with Disabilities Act and corresponding protections as delineated in the Iowa Rules of Special Education (2000).

The primary focus of these proceedings are questions regarding the appropriate setting in which Jessica should receive her special education program. According to the Appellants:

> We are requesting a due process hearing because Jessica's needs can be met in a self-contained classroom in a school with peers without disabilities. Further, Jessica's needs can best be met in such a setting. Notwithstanding these facts, the School District and the AEA have elected to place Jessica in a separate school without non-disabled peers. They have done so because, and only because, "an appropriate program in another school is not available." . . . (p. 2 of Request for Due Process Hearing)

The Appellants also assert that the failure to provide a self-contained special class in a comprehensive school setting also violates the State of Iowa's specific requirement that a continuum of services be made available to meet the needs of IDEA-eligible children with disabilities.

It should also be noted that the Appellants have also named the Iowa Department of Education as a party in this matter. As stated in the appeal:

> It (The Iowa Department of Education) is joined as a party defendant because . . . the State of Iowa has breached a specify duty imposed by 20 U.S.C. 1412(a)(5), to wit, the duty to have "in effect policies and procedures to ensure . . . [that, to] the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . .

The position asserted by the Interstate 35 School District (hereafter referred to as LEA) and the Heartland Area Education Agency (hereafter referred to as AEA) as Appellants is that Jessica's special education needs require a highly specialized educational setting, specifically the services available at the Ruby Van Meter School operated by the Des Moines School District. Ms. Scase, representing the Iowa Department of Education in this matter indicated at the outset of the proceedings that her clients had not yet taken a position regarding the assertion being made by the Appellants pertaining to the State's responsibility and wished to reserve the right to respond to this assertion at a later time.

It should be noted that the Appellees petitioned the Department of Education on two elements related to this hearing prior to the hearing date. First, they asserted that the appeal should be dismissed because it had not been filed in a timely manner. According to this position the Appellants were aware of the position being taken by the AEA and LEA at the end of the 1999-2000 school year yet chose to delay requesting a hearing until August, 2000 thus preventing the provision, of what they assert is the appropriate program for Jessica at the beginning of the 2000-2001 school year at Ruby Van Meter School. They assert that a statute of limitations interpretation of two months should be

applied in this situation thus making this request for hearing moot. This motion was denied by the Administrative Law Judge in a conference call held on August 30, 2000.

At the same time the above motion was filed, the Appellees also asserted that an interpretation of "stay put" should be applied in this situation that would define the Ruby Van Meter setting as the "stay put" setting during these proceedings. This was asserted on the basis of Jessica being enrolled by school officials in the Spring of 2000 in this program although she had not yet attended Ruby Van Meter under this enrollment. This motion was also denied by the Administrative Law Judge on August 30, 2000. The understanding of "stay put" for Jessica was agreed upon by counsel representing the parties in a conference call with the ALJ on September 20, 2000 following extended discussions. The details of this agreement will be delineated in the Decision in this matter.

I.
Finding of Fact

The Administrative Law Judge finds that he and the State Board of Education have jurisdiction over the LEA and AEA parties and the subject matter involved in the appeal. The jurisdictional issue regarding the role of the ALJ in relation to assertion against the Iowa Department of Education will be subject to further exploration. As agreed to by the parties in this matter at the end of these proceedings, the focus of immediate decision contained in this document will be the appropriate setting for meeting the needs of Jessica D. The means by which the role and responsibility of the Iowa Department of Education will be determined will be discussed in further detail at the conclusion of this decision with final disposition postponed until after the primary matter in these proceedings is decided.

As stated above Jessica D. is a fourteen year old child with multiple disabilities that affect her educational performance and needs. There is no disagreement in this matter that Jessica qualifies as a student requiring special education under both the Individuals with Disabilities Act (IDEA) and within the Iowa provisions of special education (Chapter 256B, Code of Iowa). What follows is a summarized chronology of the programs and services provided for Jessica up until the time of this appeal and the primary themes as perceived by this ALJ that must be addressed in this decision.

Prior to 1994-95 School Year

Jessica was initially identified as a preschool child requiring special education in the Des Moines School District in 1989. She was served in a preschool program for children with disabilities between 1989 and 1993. During the first portion of this time she was served in a center-based program at Smouse School, a specialized facility serving students with disabilities operated by the Des Moines School District. In the Spring of 1992 a comprehensive evaluation was conducted by staff of the Early Childhood Special Education Program in Des Moines. It was recommended at that time that Jessica be placed in a setting where integration is regularly available (Appellant Records, p. 14).

Following this recommendation Jessica was moved from the segregated setting (Smouse School) to a comprehensive elementary setting (Adams Elementary School). The issue of integration opportunities was addressed at that time that has continued to be a significant issue for discussion in planning for Jessica's needs. As noted in her teacher's notes from Adams Elementary:

> Objective 4 Social Interaction
>
> . . . this objective is dealt with mainly in the kindergarten room. Jessica does a lot of playing alongside her peers. I try to encourage several times a week that the kids play a game, so that Jessica can join in. She does a good job and usually stays focused and interacts for about 10 minutes or so. (Appellants Records, p. 38)

It should also be noted that in describing the program needed for Jessica, as specified by the Des Moines IEP team at the end of the 1993-94 school year, "Jessica requires a low student teacher ratio. Jesse also requires maximization in classroom setting for socialization through peer interaction." (Appellants Records, p. 48). The program model used to serve Jessica through the end of the 1993-94 school year was a self-contained classroom located within a comprehensive elementary attendance center.

1994 - 1998 School Years

Jessica's family moved to the I-35 school district at the beginning of the 1994-95 school year. According to the records (Appellant's Records, p. 78) Jessica was continuing to receive a special education program similar to her previous program but had changed locations for such a program. The annual goals that were identified for Jessica's first year in this district (1994-95) included:

-Jessica will increase independent work skills in the general education program
-Jessica will use alternative communication systems to communicate
-Jessica will perform a motor movement in a response to sound
-Jessica will wash her hands independently
-Jessica will tolerate a toothbrush in her mouth
-Jessica will increase appropriate behavior and decrease refusals
-Jessica will improve social skills-communicate with playmates during play
-Jessica will remain dry throughout the school day
-Jessica will increase self-help skills

These goals provide a baseline against which we can compare the areas that Jessica has subsequently explored during her school experience at the Interstate 35 school district. Such an analysis would seem particularly relevant as we examine the question of the appropriateness of Jessica's current program, the extent to which this program has provided meaningful educational for Jessica and the extent to which she requires a more specialized program in order to receive such benefit.

Later in this first year of Jessica's attendance in the I-35 school district three additional goals areas were added dealing with alternate communication systems, independent work skills, and decreasing aggressive behavior (Appellant's Record, p. 54). The record does not provide information regarding Jessica's progress during this first year in the I-35 school district. The record does contain a report form her Speech-Language Pathologist, Linda Newsum that concludes, "She (Jessica) has met her first goal, that of matching like pictures. This is a real strength for her. On the second goal (using picture exchange cards to indicate her needs), Jessica is choosing the correct picture about 51% of the time." Appellant's Record, p. 92).

Jessica's IEP during the 1995-96 school year contained a number of goal areas across domains such as functioning independent in a restroom setting, independently working on academic skills and functioning independently during a feeding (Appellant's Record, p. 96). A three year reevaluation was held on 10/25/95. Behavioral concerns were noted at this time. For example, according to the Behavioral Observation completed by Carol Kuhn, Consultant:

> Jessica's presence in the class is a disruption to others around her as she makes frequent grunting noises and the activities appropriate for her require verbal prompting. Jessica displayed her wants and needs in primitive ways: grunting, turning away, pushing objects and the associate's hand. Many types of communication systems were attempted with Jessica but no consistent method was used. Throughout the observation period, Jessica did what she wanted to do instead of responding to requests and directives. An additional concern is that Jessica continues to physically assault (scratch, hit) staff members. (Appellant's Record, p. 100)

This conclusion via consultant observation is consistent with a behavioral assesment conducted on September 18, 1995 by a school psychologist, Julie Fogt that was conducted to "gather information regarding the appropriateness of Jessica's educational program." Ms. Fogt concluded that "It is a concern . . . that Jessica's program may not be meeting her needs successfully and that other students in the classroom are being adversely affected by Jessica's current program." (Appellant's Record, p. 109). At this time the IEP team recommended a self-contained special class with inclusion. It appears, however, the LEA primarily utilized a Resource Teaching Model with modifications to provide this option (Appellant's Exhibit, p. 126).

On April 30, 1996 it appears that the team working with Jessica requested additional assistance in looking at the program being provided. In a report filed by Kristen Varnum Teeter (Appellant's Exhibit, p. 137) the following recommendations were given to the team:

> Define a curriculum and expectations for Jessica. I sensed and hear some frustration and question about what the most important goals for Jessica

> might be. If we are unsure of what we expect of her, she may very likely be getting a mixed message from us on the value of what we are asking her to do. If we can clearly define what our long-term dreams and plans for Jessica are, it will be easier to define what she needs to be working on now. (Appellant's Exhibit, p. 137).

Ms. Varnum Teeter went on in her report to strongly recommend the use of a behavior reinforcement system and to recommend more intensive training of the teacher assoicate working with Jessica.

The following goals were in place for Jessica during the 1996-97 school year:

-Jessica will independently sign supplied needed for school
-When shown the color, Jessica will sign independently
-Jessica will appropriately communicate the need to use the restroom
-Jessica will recognize her name
-Jessica will increase independent work without throwing objects (Appellant's p. 147)

Her goals for the 1997-98 school year consisted of:

-Jessica will work at a task independly at a non-frustration level
-Jessica will brush and comb her hair independently
-Jessica will count with 1:1 correspondence
-Jessica will improve functional communication skills
-Jessica will display socially appropriate behaviors
-Jessica will write her first name independently
(Appelants Exhibit, p. 172)

In reviewing Jessica's program over the first four years of her education in the I-35 school district we see a staff (LEA and AEA) who worked hard to put in place a program for a little girl with many complex needs. The goals over these years seem to expand across a wide range of domains and the primary service delivery model seems to be a Resource Room model modified to provide a more intensive program to meet her needs along with a teacher associate. We also see the documentation of a number of concerns regarding Jessica's behavior as well as evidence that the team working with Jessica was calling on others to help provide consultation in designing and delivering her program. As far as support and related services during this period it appears that Jessica received services in the areas of speech and language and occupational therapy but only at the level of one session per month for each of these service areas.

1998-99 School Year

At the beginning of the 1998-99 school year it appears that Jessica's IEP goals shifted somewhat to broader areas of interest. The goal areas for this year were in the areas of appropriate expression, functional writing, vocational, functional math and community

mobility. It appears that Jessica was largely receiving her program in the Resource Room during this year with her general education experience being limited to physical education.

On October 26, 1998 parent notice regarding a proposed change of placement was sent to Jessica's parents with the following action proposed:

> The team proposes to add a goal in community mobility. Jessica needs to gain skills to be more independent within the community. The team sees a need to explore and investigate placement options outside the district - to provide for Jessica's vocational needs. School staff and parents agree to visit a school. (emphasis added) (Appellant's Exhibit, p. 213)

This notice goes on to indicate that the team will be looking at the program at Ruby Van Meter School in Des Moines as part of this review.

Jessica's mother described her perceptions regarding the discussions leading up to this consideration of a special school:

> Through the years as the IEP meetings took place, I never lost my vision for her to be included with regular peers, nondisabled peers, but as the meetings progressed, placement at an alternative school was proposed to me the first year at the completion of her first year at I-35 and at that time then the IEP continued to get – I got less integration, less integration.
>
> I felt I made compromises. I was hearing a lot of, you know, "We can't do – we can't do wiaht I want."
>
> And I said, "Okay. If we can't do this, what can we do?"
>
> And I ended up compromising right out of inclusion all together, but I mean last year we were down to P.E. and we got music back in, P.E. and music. (Ms. D. test. p. 59)

Mr. Gray, Jessica's principal spoke to the overall efforts the district was making around this time in seeking other options for Jessica in surrounding districts. Apparently AEA and LEA staff were exploring, at this time, a number of options within comprehensive school settings (including students with and without disabilities). This exchange occurred between Mr. Gray and Mr. Sytsma:

> Q. So effectively as a school district, you didn't have the option of a self-contained classroom in a regular school district to offer.
> A. No, sir, we didn't
> Q. And no means of securing such an option for the parents?
> A. No. And we visited with those schools on several occasions. We visited with them and had the AEA look at those schools. They work in those schools every day.
> Q. Okay. I mentioned a metaphor . . The metaphor was you had to go around cup in hand begging other school districts for options. Is that apt?

A. That's a good metaphor, right, and as Ms D. indicated, we went and visited schools. (Gray test. p. 131)

It should be noted that Mr. Gray did testify that the Ruby Van Meter Program is, in his opinion the "best services in the area" (Gray test. p. 154) but that other program could assist in meeting Jessica's needs (Gray test. p. 156).

Later in the 1998-99 year the team completed a form titled "Justification For Special School Placement". The following questions and responses were indicated on this form. In responding to the question regarding the reasons for needing a special school setting the team indicated that Jessica required a program providing community mobility training and specific vocational programming. They also indicated that the LEA was unable to provide a peer group for socialization. In responding to questions regarding needed supplementary aids and services the team listed the curricular areas of functional academic curriculum, daily living skills in a real life setting, community mobility, vocational training, PEC communication system and health care plan for feeding, toileting and other needs. When asked to describe why these aids and services could not be provided in the integrated setting the team described the limitations of the rural setting of I-35 and the lack of peer interactions. In describing the continnum of services available in the LEA the team stated, "The District does not have a functional self-contained program that addresses community mobility and specific vocational training.

On 10/13/98 a three year reevaluation meeting was held. The summary of this meeting indicates that a significant change in Jessica's program was being considered. This evaluation as contained in the record (Appellant's Exhibit, p. 230-234). The extent of progress was evaluated for each goal area. The team determined that Jessica was meeting her goals in the areas of task related behavior, functional math, and functional communication (PEC system). It was determined that she was not meeting her goals in the areas of daily living, functional communication, social behavior and functional writing. The team indicated that they reviewed the areas of health, hearing, vision, academics, behavioral assessment, motor functioning, adaptive behavior, social functioning, communication and educational history and that no other evaluations were determined to be needed. The team did indicate that they needed to add a goal area of community mobility for Jessica.

A similar meeting was held on 4/27/99 to review all of the existing data related to Jessica's special education program. It was indicated that this review was being held because a significant change in Jessica's program was being considered (Appellant's Exhibit, p. 238). The team reviewed the areas of communication, vocational/assembly, functional writing, functional math and mobility. It should also be noted that Jessica was having transportation difficulties in the latter part of the year leading to a recommendation that a restraining seat be used in transportation.

1999-2000 School Year

A meeting to discuss Jessica's educational needs was held on August 23, 1999 at the Ruby Van Meter School. At this time it appears that Jessica's mother agreed to a 45 day trial program which involved half days at Ruby Van Meter School and half days in the I35 School District. As stated in the parent notice (Appellant's Exhibit, p. 303):

> The full-time options . . . were rejected as the team agreed to a compromise of half-time in Ruby Van Meter and half time in Interstate 35 for a trial period of 45 days. The District continues to believe a full time placement at Ruby Van Meter would be the most appropriate placement for Jessica. Mrs. D. believes placement in the home district would be appropriate for Jessica.

It appears that following this 45 day trial placement that the team again felt that the Ruby Van Meter placement was needed for Jessica. On 11/10/99 another form dealing with the justification for a special school was completed. In this version the following supplementary aids and services were listed:

-P.E.C. Communication System
-Interventions to improve here ability to hear
-Use of an if-then schedule
-Training related to PEC communication system and functional communication
-Community mobility
-Vocational training
-Health care plan

In stating why these services cannot be provided in an integrated setting the team replied:

> Because of the intensity of the goals and the need for extensive direct instruction the District is unable to provide the services through current special education programs. (emphasis added) (Appellant's Exhibit, p. 358)

Several evaluation activities took place during this school year. In one of these evaluations, conducted by Susan Adams, Deafblind Specialist with the Iowa Braille and Sight Saving School and requested by Jessica's parents observed Jessica in both the I-35 setting and the Ruby Van Meter School. In commenting on the Ruby Van Meter classroom Ms Adams observed:

> As a thirteen year old, Jessica is in need of interactions with same age, typically developing peers. Although Jessica does have peers at Ruby Van Meter who are closer to her age, they are not non-disabled peers. The teacher at Ruby Van Meter indicated that the class which Jessica was participating in was lower functioning. Jessica had a good deal of "down" time. If a placement, such as Ruby Van Meter were to be considered,

> Jessica would have to be in a faster paced classroom. (Appellant's Exhibit, P. 395).

A functional behavioral assessment was conducted by Dr. Barbara Rankin of the AEA staff in November of 1999. The results of this provided assistance related to Jessica's self injurious behavior. It should also be noted that Dr. Rankin filed a dissenting opinion regarding the team's desire to place Jessica in the Ruby Van Meter School. According to Dr. Rankin's testimony during these proceedings it appears that she has reconsidered her overall analysis of the appropriateness of the Ruby Van Meter placement but at the time of her dissenting opinion she stated:

> As part of that team, I agree that a self-contained classroom would best meet Jessica's needs. However, I disagree with the team's plan to provide that programming in a special school for children with disabilities. Placement at Ruby Van Meter does not insure that Jessica will have interactions with nondisabled peers. The team was able to develop a very intense and rigorous IEP for Jessica that all members appeared proud of. The goals developed for Jessica will require intensive direct instruct for the majority of her day. Little time is left for integration and if some of that time is spent on integrating Jessica with a group of disabled peers, less time is available for integration with nondisabled peers. Jessica will never be able to display the behaviors necessary to become an integrated part of society as an adult if she is not taught those behaviors while in school. (Attachment to Appeal)

The AEA and LEA also agreed to pursue an independent educational evaluation with Dr. Tim Hartshorne from Central Michigan University, a nationally recognized expert on CHARGE Syndrome. Various reports regarding Jessica's program and a videotape were sent for Dr. Hartshorne's review. A two-hour teleconference was held involving team members and Dr. Harshorne on January 24, 2000. Dr. Hartshorne made a number of recommendations regarding Jessica's program. Regarding questions related to the appropriate placement for Jessica he do not make a specific recommendation. He did, however, state:

> There has been a movement over the past 20 years toward a family-centered model of service delivery. What is meant by this is that service options are made available, parents are enabled to understand the implications of each option, and then parents choose the option that they believe will be best for their child and for their family. Parents are in the best position to make these choices. Certainly, we should work to make sure parents do not make a choice that would be clearly harmful to their child. But ultimately, the [parents] are responsible for the care and raising of Jessica. We as educators should help them make the decision they feel is best for their child, and then work to make the outcomes of that decision as positive as we can. Any of the proposed options for Jessica would

> probably "work" to some extent. We will never know which would truly be the "best". (Appellant's Exhibit, p. 425).

Jessica was also evaluated by Carol Miller, Teacher of the Deaf and Hard of Hearing and Cindy Moses, AEA Audiologist in early 2000. These evaluations dealt with areas such as total communication and the need for Jessica to use all of her hearing capacities.

It should be noted that in these proceedings the professionals who testified did consistently refer to the extent to which they believe the Ruby Van Meter option is best for Jessica. For example, Carol Kuhn, the AEA consultant stated:

> If we're going to use all that and get the most out of education for this child, she needs to be where thy can open it up. She needs to be in a program that's already developed and already able to help her. She doesn't need to be in a program that is trying to invent the wheel and losing time in the process. (Kuhn test. p. 257)

The perceived limitations of the current options in the I-35 School District were described by Ms. McDonald, Jessica's special education teacher in the following manner:

> As a school district, I think we have peaked. I think that we are stagnant, and I think we have hit a wall.
>
> We keep readjusting and trying new things, and she needs a door that will open and say, "Here. Try all this stuff. Let's try all this stuff." And we're giving her this much stuff (indicating). And then I think Jessica could come out.
>
> I think we are putting her in a tiny little room and saying, "You need to socialize," and there's nobody to socialize with.
>
> As a person, as a teacher, I wish that I could have been with Jessica more. In a district like this, if you want Jessica in a district that is limited, it isn't going to happen.
>
> She's going to be with an associate three-quarters of her day and teacher on-quarter of her day.
>
> So here you've got the most need child in the school with the least amount of experience person. So yes, I wish I could do more. No, I can't. (test. of Ms. McDonald pp. 314-315)

These proceedings focus on several salient themes that must be explored in order to address the primary focus of this appeal which relates to the program necessary to meet Jessica's needs. These themes include what constitutes an appropriate special education program for Jessica, the setting in which such a program can be provided which includes the consideration of least restrictive environment considerations, the importance of a continuum of services, the role of parental preference in selecting the specific program to be provided for a student. A related issue that will not be addressed in this phase of these proceedings is the responsibility of the State Department of Education to provide general

supervision in assuring the provision, in this case, of a least restrictive program for students such as Jessica.

II.
Conclusions of Law

The Appellants in this matter identify their primary issue as their belief that Jessica can appropriately have her needs me in a self contained special education setting in a school with peers without disabilities. They further assert that the school has not met it's burden of proof responsibility regarding the need for Jessica to leave the I-35 School District and be served in the Ruby Van Meter School, a special school setting in Des Moines.

In addressing this primary issue of program appropriateness for Jessica it is important to review several related and relevant principles. This includes the concept of least restrictive environment (LRE) and the concept of a continuum of programs or services.

Least Restrictive Environment

The basic elements that define the expectations for serving students with disabilities in the least restrictive environment have been in place since the passage of the Education of the Handicapped Childrens Act in the 1970s. The act requires that each public agency shall ensure:

> (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
> (2) That special schools, separate shooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved saatisfactorily. (CFR 300.550)

The Iowa Rules of Special Education (2000) build on this basic foundation and add the expectation that, " . . . Whenever possible, hindreances to learning and to the normal functioning of eligible individuals within the general school environment shall be overcome by the provision of special aids and services rather than by separate programs for those in need of special education (emphasis added)(Iowa Rules 41.37(2)(b)). These Rules also provide guidance regarding the expanded procedures that are to be followed when considering a circumstance in which a special school setting (such as Ruby Van Meter School) is being considered by posing the following questions to be answered by the IEP team:

> -What are the reasons that the eligible individual cannot be provided an educational program in an integrated school setting?

-What supplementary aids and services are needed to support the eligible individual in the special education program?
-Why can't these aids and services be provided in an integrated setting?
-What is the continuum of services available for the eligible individual?

As noted earlier, the IEP team for Jessica did address these questions during the consideration of the Ruby Van Meter School Placement. This ALJ questions, however, the extent to which the team addressed the supplementary aids and services question. For the most part the responses by the team seemed, in his opinion, to address curricular areas rather than supplementary aids and services. The answers also seem limited in explaining what aids and services cannot be provided in an integrated setting.

One, long-standing interpretation of the LRE expectations was provided by Dr. Judy Schrag, former Director of the Office of Special Education Programs in the Deparmtment of Education. According to Dr. Shrag LRE favors integration but still allows for separation when required for and individual student and is a presumption rather than an ironclad rule (17 EHLR 279). There are a number of court rulings over the past few years that have applied LRE criteria to the decision making process of IEP teams (Daniel R.R., 1989, Oberti, 1993).

In these proceedings there is a sharp distinction between the parties regarding what constitutes the least restrictive program for Jessica. The Appellants clearly contend that such a program consists of a special class setting in a comprehensive school setting (a school attended by disabled and nondisabled peers). The Appellees assert that Jessica's needs are so significant that she requires an intensive program such as the Ruby Van Meter School provides. While they seem to concede that there are other options that would more closely meet Jessica's needs outside of the I-35 School District and operated by other LEAs they presented information suggesting that because these other options were not willing to accept Jessica as a student that the Ruby Van Meter School was the only option left. For example, Dr. Rankin, a behavioral specialist with the AEA identified another program located in a comprehensive school setting as being, by far, the most desirable program for Jessica. She cited specifica curricular and programmatic traits as being important here including the availability of non-disabled peers as being quite important in Jessica's program. This seems consistent with the position taken by the Appellants in this matter.

At the outset of these proceedings, the parties presented, at the requrest of the ALJ, information regarding their beliefs of which party carries the burden of proof responsibilities in looking at Jessica's programming needs. It appeared to this ALJ that both the attorney representing the Appellants (Mr. Sytsma) and the attorney representing the LEA and AEA (Mr. Bracken) agreed that the party advocating the more restrictive setting in this situation (the AEA and LEA) carry this responsibility. In this ALJ's opinion, the need for Jessica to have her program delivered in a special school setting (Ruby Van Meter School) has not been established. The unwillingness of other districts to cooperate in providing a needed program or does not, in this ALJ's negate the

responsibility of the AEA and LEA to provide an appropriate program in the least restrictive setting.

Support Services/Supplementary Aids and Services

Related to the concept of the least restrictive environment is the expectation that various supports, complementing the instructional setting and the teacher providing services for a student are provided. This may include support services such as speech and language services, occupational therapy, audiological or teachrs of th hearing impaired. These services are defined in the Iowa Rules of Special Education (2000) in the following manner:

> **281--41.86 (256B,34CFR300) Support services.** Support services are the specially designed instruction and activities which augment, supplement or support the educational program of eligible individuals. These services include special education consultant services, educational strategist services, audiology, occupational therapy, physical therapy, school psychology, school social work services, special education nursing services, speech-language services and work experience services . . .

The Iowa Rules also make provision for the provision of supplementary aids and services (281-41.90) that assist a student with disabilities in the general education classroom or other education-related settings to be educated with non-disabled individuals to the maximum extent appropriate. According to the Rules, "These may include intensive short-term specially designed instruction; educational interpreters; readers for individuals with visual impairments; special education assistants; speical education assistants for indiviudals with physical disabilities for assistance in and about school, and for transportation; materials; and specialized or modified instructionally related equipment for use in the school.

It should be noted that Jessica has benefited through her educational career from a wide range of the services described above. These proceedings included testimony from many professionals representing the positions described above. As the IEP team moves forward with Jessica's program it seems appropriate to realize that this full range of services will need to be reviewed in arriving at the comprehensive program required for Jessica; regardless of the setting in which she is served.

Continuum of Services

Closely related to the question of least restrictive setting is the notion of a continuum of alternative placements. The Appellants in this matter contend that Jessica and her parents have not been provided access to such a continuum but rather have been faced with the "no-win" situation of Jessica either staying in an situation in the I-35 School District in which the local school district is facing significant challenges in arranging for the array of service needs that Jessica presents or being placed in a program that does provide a much more comprehensive array of services but is provided in a more restrictive special school

setting that does not include non-disabled peers; a aspect of the program that is considered critical by the team and particular Jessica's parents as well as being cited at one point as a major issues leading to a dissenting opinion being filed by a behavioral specialist employed by the AEA (Dr. Rankin, Attachment to Appeal).

The concept of a continuum of alternative placements (emphasis added) is described in the Code of Federal Regulations (C.F.R. 300.551) and have been a part of the basic foundation of special education since the passsage of 94-142. This expectation is to:

> (1) Include the alternative placements listed in the definition of special education under 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions): and
> (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

The Code goes on to state that this continuum must be available ". . . to the extent necessary to implement the IEP for each child with a disability." (300.552(b))

In a memorandum issued by the U.S. Department of Education in 1994 the concept of a continuum of alternative placements was discussed in more detail by Dr. Judith Heumann, Assistant Secretary. She states, in part:

> This requirement for the continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each student with a disability. . . . The placement team must select the option on the continuum in which it determines that the student's IEP can be implemented. Any alternative placement selected for the student outside of the regular educational environment must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student. (emphaisis added)(21 IDELR 1152)

The Iowa Rules of Special Education (2000) puts a similar focus on this concept but chooses the language of continuum of of services (emphasis added) and states:

> Each agency shall ensure that a continuum of services is available to meet the needs of eligible individuals for special educaton and related services. (281-41.38)

In these proceedings here are serious questions regarding the extent to which a continuum of placements and/or services is, in actuality, available to Jessica and her family. The I-35 School District and AEA have made significant efforts to develop a special class for Jessica within the I-35 school district but this has largely meant having their resource

teacher, apparently without teacher certification or training to work with more severely involved students, (McDonald test. p. 315) work with the team in designing a more full day program for Jessica that ran on a parallel track with the other students she worked with, most of whom more closely match her training and certification status. Ms. McDonald did indicate that with the help of three teacher associates or paraprofessionals that she was also serving some other students with complex needs but it seems prudent to pose a question regarding the extent to which one program model as defined in the Iowa Rules of Special Education (2000) can be stretched to reach the needs of such a varied group of students and still meet the intent of the definition of special education from either federal or state perspectives.

We also heard testimony from Mr. Gray, Jessica's principal that he and other staff had gone "cup in hand" to other districts with more specialized programs and services who had turned down their request to consider Jessica as a "tuition in" student. While others in these proceedings described the way in which they generated the list of critical factors in Jessica's program and then narrowed the choice to only Ruby Van Meter, this ALJ is still left with the impression that this process was significantly influenced by the historic unavailability of programs in other districts. To cite again from the 1994 position of the U.S. Department of Education:

> . . . school districts may not make placements solely on factors such as the following:
>
> category of disability;
> severity of disability;
> configuration of delivery system;
> availability of educational or related services;
> availability of space; or
> administrative convenience.

Availability issues have been mentioned in these proceedings. This situation with Jessica also raises the question of the collective responsibility of LEAs in a region to serve a student with complex needs such as Jessica. One is left wondering if these districts that refused to accept Jessica would respond in a similar manner if a student with Jessica's needs moved into their district and their current programs were at capacity.

Program Appropriateness

Throughout these proceedings the question of what constitutes an appropriate program for Jessica has loomed. The program at the Ruby Van Meter School has been desribed as "the best" , "the most appropriate" or simply as "WOW" . Others have viewed this option as deficient, primarily on the basis of it being a special school setting with limited opportunities for interaction with nondisabled peers.

The appropriateness of what can be provided in the I-35 School District has also varied across the persons working with Jessica. The record, as noted by the Appellants (Ms. D's

test. p. 79, for example) contains numerous references to the progress Jessica has made in her program over the years at I-35. Many caring professionals and a committed family have obviously led to many celebrations of Jessica's accomplishments and potential. Yet, on the other hand, the professionals involved seem to have reached a consensus that they have "hit a wall" in their ability to provide an appropriate program for Jessica within the current resources and capacity of the I-35 school district. And this conclusion would seem reasonable, particularly as we consider the points raised above regarding the extent to which the basic program has been "stretched" to meet Jessica's needs.

The need for the I-35 School District to make provision for Jessica's program outside of the district does not seem to be the primary issue we are dealing with in these proceedings. The Appellants appear ready to accept an out-of-district placement that can provide for Jessica's needs in a more comprehensive manner, addressing the full complexity and everchanging profile of her needs and having staff who are specifically trained in meeting the needs of students such as Jessica. This seems to be compatable with the needs as perceived by the Appellees as well. This is evidenced through the development of the critical elements checklist developed by the IEP team in the Spring of 2000.

In examining this question it seems relevant to review how this concept of appropriateness has been defined as illustrated by the Supreme Court decision in Board of Education v. Rowley (458 U.S. 179, 1982). In this decision, in defining this appropriateness concept the Court stated: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable to child to receive educational benefits?" (pp. 206-07).

The Iowa Rules of Special Education (2000) also address this issue of appropriateness and define an appropriate program in the following manner:

> Each child requiring special education shall be provided a specially designed education program that is based on the individual's specific educational needs. (41.3(6))

As asserted by the Appellees in this matters, the educators and parents working on behalf of Jessica have diligently put together a number of programming components to provide an appropriate program for Jessica up to this point in time. In moving forward with Jessica's programming it would seem that the vehicle for providing an appropriate program for Jessica should not be limited to the Ruby Van Meter special school option.

As team members shared in these proceedings even if Jessica were placed in the Ruby Van Meter Program is appears that the extent to which the various component parts identified as critical for Jessica were, in fact, going to be provided would be dependent upon the classroom in which she was served. As shared by Ms. McDonald in these proceedings:

> I don't see what our IEP team has to do with where to place her in the school (Ruby Van Meter). I would say the school knows what programs they have, just as if a student came to our school, and we would check out what needs they have, and we would place them in what room we had that fit their needs, and that would be Ruby Van Meter's job. I mean I wouldn't say, "I want my child in that room." (McDonald test. p. 335)

Yet it would seem to this ALJ that the specific elements of Jessica's program is just what the team has been discussing. These elements would seem to include both school-wide and classroom specific components as well as the support and related services needed by Jessica.

The LEA and AEA staff that has worked so hard with and on behalf of Jessica should be recognized for the hard work, thoughtfulness and commitment that they have put forth in trying to design a program that works for Jessica and provides the growth opportunities she needs at this point in her life. This commitment will be critical as the staff and parents move forward in committing to the development of a program to meet Jessica's needs within a comprehensive school environment. This is stated with a recognition that there may come a time when Jessica does, in fact, require an education that can only be delivered in a special school setting. As of now it does not appear that the need for such an option has been demonstrated.

III. Decision

The Appellants prevail in these proceedings. The conclusion that Jessica's needs require that she be served a special school setting has not been established. The IEP team should reconvene as soon as possible to plan for Jessica's 2000-2001 school year special education program based on this decision. Because of the ongoing nature of this Appeal and the unresolved issue regarding SEA responsibility the ALJ would like to have the agreed upon IEP for Jessica sent to him no later than October 18, 2000.

An agreement regarding the stay put status of Jessica's program was confirmed in a teleconference involving counsel representing the parties (Mr. Sytsma, Mr. Bracken and Ms. Scase) on September 20, 2000. At that time it was agreed by all parties that the following arrangements will define Jessica's stay put status.

Since the beginning of this school year Jessica has continued to receive the level of services specified in her ESYS program in her home setting. This includes three hours per week of services each from a speech-language pathologist, hearing support person and audiologist. These services have been supplemented through Medicaid coverage. The parties have agreed that up until the time that Jessica begins her more comprehensive special education program that the AEA and LEA agree that Jessica will receive compensatory education in the form of one-to-one instruction with a teacher of the hearing impaired at the rate of one hour of service for every three hours of missed education since the outset of the 2000-2001 school year. This includes that time that she has been receiving the continued ESYS services. The compensatory services will be

provided at the end of the current (2000-2001) school year and do not replace what may be deemed as needed ESYS services for the Summer of 2001.

As noted earlier the matter of the responsibility of the state department of education is not addressed in this decision and is therefore continued for later resolution. With this in mind, the ALJ request that the Department make arrangements for a conference call to discuss the procedures to be followed in resolving the questions involved with the larger systemic issues raised by the Appellants. Because of the complexity of issues that may arise impacting the LEA, AEA and SEA it is requested that counsel representing each of these entities remain involved pending the successful resolution of the systemic issues raised.

9/29/00
Date

Carl R. Smith, Ph.D.