

IOWA DEPARTMENT OF EDUCATION

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In re Damian S.)
)
Eric & Susan S., Appellants)
)
v.)
)
Mason City Community School District,)
and Northern Trails Area Education)
Agency 2,)
)
Appellees)

Decision

Doc. # SE-244

#129

The above entitled matter was heard by Administrative Law Judge Susan Etscheidt on December 5, 2001 in Mason City, Iowa. The hearing was held pursuant to Section 256B.6, *Code of Iowa* and Chapter 281-41, *Iowa Administrative Code*. The appellants were not represented by legal counsel. The appellees were represented by Attorney C. W. McManigal.

On October 29, 2001, the appellants, Eric and Susan S., filed a request for a due process hearing, alleging that the Mason City Community School District (MCCSD) and Northern Trails Area Education Agency (NTAEA) 2 had failed to provide a free and appropriate public education (FAPE) to Damian. A pre-hearing conference call was held 11/23/01 with the appellants, Keith Sersland (Superintendent MCCSD), Gary Van Hemert (MCCSD Special Education Supervisor), Chuck McManigal (Attorney for the LEA/AEA), Hal Minear (Assistant Superintendent MCCSD), Joan Hodapp (Sector Coordinator NTAEA 2) and Marion Panyon (assigned DOE mediator) participating. The appellants were not represented by counsel. The issues of the appeal were identified as:

1. Damian's current Individualized Education Program (IEP) was not being followed or implemented. Specifically the appellants assert that the components of the Behavioral Intervention Plan (BIP) which call for a meeting with the counselor, teaching the LUCK problem solving strategy, providing a mentor and anger management activities have not been implemented. The appellants also questioned some provisions of the BIP (e.g., using participation in extracurricular activities as a means of reinforcing alternative skills);
2. The school district has implemented other disciplinary procedures that are not specified on the IEP (including the BIP). The appellants assert Damian is not permitted to go to the "IC" (Information Center) without an escort, and that such procedures are not identified in the IEP or BIP. Instead of utilizing BIP strategies, the school district has suspended Damian for misconduct); and
3. The appellants assert the school district did not provide proper notice of disciplinary action.

At the conclusion of the conference call, the Appellants agreed to e-mail additional issues and concerns prior to a second conference call. An e-mail sent to and distributed by the Iowa DOE identified one additional issue:

4. Procedural violations in the IEP development. The appellants assert: a) they were not in attendance at the IEP meeting scheduled for 10/29/01; b) the IEP of 10/29/01 (including the BIP) was "prewritten" without their input; c) they did not sign the 9/18/01 IEP or the 10/29 or 11/02 IEP revisions; and d) they were not provided a copy of the parents' rights brochure as indicated on the 10/29 IEP. The appellant also noted that the IEP contains several typographical errors (e.g., Damian's grade and meeting dates).

A second conference call was held Wednesday, November 21, 2001. The issues presented in the e-mail were clarified and the matter was set for hearing on December 5, 2001.

Finding of Fact

The Administrative Law Judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter involved in this appeal.

Damian S. is a 16-year-old boy who resides with his parents and siblings in Mason City, Iowa. The facts of this case document a history of discipline and behavioral concerns, which is the locus of this appeal.

PreSchool

During the summer of 1988, Damian was referred to NTAEA for "behavioral problems" and a screening was conducted 9/2/88. The results of the screening indicated Damian's skills were in the normal range and a full evaluation was not warranted. Discipline and positive reinforcement ideas were given to the parents. Damian's mother contacted the Medical Evaluation Clinic for Children of Area II (Mecca II) in Mason City, Iowa because of "discipline problems" and an evaluation was conducted on 9/13/88. The evaluation report, which was released to NTAEA the following week, indicated the parents were concerned about Damian's hyperactivity and aggression toward his younger brother. Dr. John C. Justin, the Mecca II evaluator, concluded Damian "does have some behavior problems and seems to have some hyperactivity," but felt his present counseling and involvement in preschool would assist in behavior improvement.

Damian entered Head Start of Mason City in the fall of 1989 and was referred by that agency in January of 1990 for preschool screening due to behavior problems. Damian's mother provided written consent for an evaluation by NTAEA, and the evaluation was conducted over the next month. The Social Assessment and Behavioral Evaluation report, completed by school social worker Renee Zinck, included a family history and behavioral observation. Damian's mother reported that he irritated others by interrupting, hollering or talking loudly. Ms. Zinck observed that Damian was capable of following requests, but had difficulty following directions. Al Hodapp, school psychologist, completed a diagnostic report which included an intelligence test, behavior checklists and rating scales, and tests of emotional development. Mr. Hodapp concluded that Damian scored

in the average range on the intellectual test, but that very significant behavior problems were indicated from the behavior rating scales completed by parents and the classroom teacher.

At a staffing held 3/15/90 members of the NTAEA team discussed education options, and concluded Damian would qualify for a preschool program for students with behavior disorders (ECSE). Damian's parents requested that he remain in Head Start through the end of the year, while they visited the preschool program. Another meeting was held 5/11/90 which Damian's parents did not attend. The parents indicated in a phone conversation that they preferred Damian attend the preschool readiness program at Jefferson Elementary instead of the ECSE program, and that no records be sent to Jefferson so Damian could start school without prejudice. The team agreed not to forward evaluation information unless problems arose in the future.

Elementary School

By October of 1990, Damian's parents had expressed concerns that Damian might require a more structured program than the kindergarten readiness program. A staffing was held 10/31/90 to discuss several program options. The parents agreed to visit the recommended self-contained with little integration (SCI) program, and at a meeting held 11/5/90 agreed to place Damian in the SCI program at Madison Elementary School. Annual goals identified included: 1) to increase demonstration of acceptance of authority, 2) to increase ability to accept consequences, 3) to increase demonstration of acceptable self-control behavior, 4) to increase ability to demonstrate accepted play and activity behaviors, 5) to increase demonstration of appropriate behavior regarding property of self and others, 6) to increase positive attitude toward self and others, 7) participation in affective education and 8) to increase academics by improving reading readiness and math readiness to a beginning kindergarten level. At a conference held at the end of the year, it was noted that Damian's academic skills had developed nicely and aggressive behaviors had decreased significantly. The parents expressed an interest in a MECCA evaluation. The NTAEA team agreed to facilitate the referral to MECCA and agreed to schedule another staffing at the end of the school year. At a staffing held 6/3/91, Damian's improvement in academics and behavior were discussed. While office referrals had decreased, instances of hitting, kicking and physical aggression continued to be problematic. It was agreed that Damian would continue his placement in the SCI program at Madison with annual goals to include accepting authority, coping with conflict, improving communication skills and behavior in group activities, accepting responsibility for behavior, developing and maintaining positive relationships, participating in affective education, improving academics and maintaining integration into art and PE. The MECCA evaluation, scheduled for June 13, 1991, provided a diagnosis of ADD and included recommendations for family counseling and behavior management.

A meeting held during the 1991-91 school year at the request of Damian's parents addressed their concerns about his educational program. It was agreed that the goals of the last IEP should continue. Progress data on student objectives indicated Damian was successfully meeting most objectives, with less success in responding to teasing, problem-solving, refraining from initiating conflicts, and maintaining positive relationships. Damian's integration was increased due to progress in behavior, responsibility and academic skills. His academic progress continued throughout the 1992-93 school year and integration opportunities increased. However, behavioral concerns continued and annual

goals included cooperation with other students, respect for others in a group setting, and accepting adult authority.

The IEP for the 1993-94 school year contained annual goals dealing with cooperation with adults and other students and demonstrating responsible work study habits. At this time, Damian was integrated over half of his school day in regular education classes. However, on 2/2/94 a meeting was held to discuss changes in the integration schedule, as Damian was experiencing significant behavioral difficulties. Integration into music and math was decreased.

Damian's 3rd and 4th grade years were eventful. Damian's 3rd grade IEP identified one annual goal and six objectives dealing with appropriate peer interactions. The IEP referenced conflicts, negative comments and poor interactions with peers. Damian was enrolled in a SCI program with integration into reading, art and PE. On 12/15/94, his IEP was amended to increase his integration at recess. Later that year, his parents requested Damian be transferred from Madison Elementary to Hoover Elementary, his home school, and attend all regular education classes. A meeting was held 1/30/95 to discuss the transfer. The AEA support staff recommended "that Damian continue to be identified as a student eligible for special education services." Apparently, a decision was made to integrate Damian into regular education full time and develop a 504 plan for him. One annual goal was added to the IEP: "Damian will succeed in the school setting" with an objective "Given a 504 plan developed by school and parents, Damian will be provided accommodations in the regular third grade." The Hoover 504 plan listed areas of difficulty as "appropriate social skills," "following directions," and "transitioning activities." The accommodations included a safe place for "cool down" time, ignoring smaller violations/behaviors, non-verbal cues, and purposeful movement.

Later that year, Damian's mother contacted Iowa Protection and Advocacy Services and a representative from that organization joined a 3/23/95 meeting to discuss Damian's educational program. The 3rd grade teacher reported she had tried a variety of accommodations to address inappropriate behaviors that included inappropriate language, name-calling, sexual comments, disrespectful comments to his teacher, and inappropriate physical behaviors. The teacher reported that Damian's relationships with his peers had deteriorated. It was decided that an Iowa City evaluation would be completed and that Damian would remain in the regular 3rd grade classroom. A paraprofessional would be provided to accompany Damian throughout the day. The school counselor, Ms. Hynes, would be available to Damian and would also work with Damian's class on issues of sensitivity to name-calling and discrimination. On April 3, 1995, Sector Coordinator Patrick Clancy received a call from Damian's father requesting home-bound instruction. On April 5, 1995, Mr. Clancy received a call from Damian's mother withdrawing the request for an alternative placement. She indicated that the plan outlined on 3/23/95 for counselor assistance and paraprofessional assistance would be appropriate. On April 12, 1995, Damian's father called Hoover Elementary School to pull Damian out of school. A same-day call from Damian's mother to principal Tim Walrod suggested their concerns were the paraprofessional following Damian around school and name calling by Damian's peers. A notice for an April 14, 1995 staffing was sent to Damian's parents. The purpose of the staffing was to discuss Damian's program and the pending evaluation at Iowa City. The evaluation was cancelled at Damian's father's request. Another staffing was

scheduled for May 1, 1995 which the parents cancelled. Another staffing was scheduled for 5/3/95, but did not occur. Damian's parents contacted Legal Services Corporation of Iowa (hereinafter LSCI). Ann Hoffmaster from LSCI attended an IEP meeting on 5/17/95 to discuss amendments to the IEP concerning the paraeducator assistance, the Iowa City evaluation, and Damian's return to school. However, Ms. Hoffmaster contacted Mason City School on 6/15/95 to withdraw as the representative for Damian's parents, since they had decided not to pursue the independent evaluation. Damian's mother requested the IEP meeting scheduled for 8/16/95 be postponed until they were able to secure a legal representative. The IEP meeting was held as scheduled, without the parents in attendance. The team members present discussed program options including general education with a teacher assistant, resource program, special class with integration, self-contained class with little integration, and self-contained special class. The members present viewed the special class with integration as the best option for Damian. Prior written notice of the decision and a parents' rights brochure were provided to Damian's parents on August 18, 1995. A mediation conference was held October 11, 1995. The 1995-96 IEP developed at the mediation contained goals for academic performance at an 80% accuracy or above level, improved on-task behaviors during small group, large group and individual work time, school attendance consistent with district policy requirements, appropriate peer interactions and appropriate adult-student interactions, reduction of physical and verbal aggression by 100%, and appropriate bus behavior in 7/10 bus transports. A behavior intervention plan (BIP) outlined positive consequences for progress toward the objectives, as well as strategies for failure to comply. A school psychologist diagnostic report of 1/10/96 indicated Damian was on-task 94% of the time, while positive teacher-student interactions and peer interactions were reported 100% of the 7-day observation period. It was recommended that the school staff continue to reduce aide monitoring and also explore Damian's involvement in the Talented and Gifted Program. This report was summarized with Damian's parents on 1/10/96. A subsequent conference held 6/6/96 indicated that Damian had made successful progress in the regular classroom using the interventions of the BIP. On-task, teacher-student and peer interactions were described as very positive.

An IEP team meeting was scheduled September 30, 1996 to discuss a re-evaluation and conduct an annual review. At that meeting, Damian's progress was described as positive in both academics and behavior. Damian's anger control was described as an on-going concern, particularly during unstructured times such as lunch, recess and bus times. The IEP developed continued the goals of appropriate peer and adult interactions, and on-task behavior. Although Damian's mother was present at the IEP meeting and signed the document, a 12/3/96 memo indicated that the parents had chosen not to sign the IEP, requested a file review and that the IEP be rewritten. The file review was conducted, and a meeting to discuss the file review and transition for Damian to middle school was scheduled for 5/14/97 and later rescheduled for 5/21/97. An IEP amendment dated 5/21/97 included a decision to discontinue the aide support. Additional staff support was to be discussed at an IEP meeting prior to the beginning of middle school.

Middle School

On 8/8/97 a meeting was held to discuss Damian's school program for Roosevelt Middle School. It was decided that in addition to quarterly grade reports, a data sheet would monitor Damian's on-task, peer interactions, adult interactions and behavior in unstructured settings. Consultative social work and psychological services were also included. At a progress-monitoring meeting scheduled on 11/18/97, it was determined that Damian's progress would be monitored by the social worker and/or psychologist. A BIP listed positive consequences as well as redirection for targeted behaviors. The appellants and Robert Boone, Roosevelt principal, reviewed the plan. On 3/6/98 and 4/21/98 the IEP team met to discuss Damian's progress. Damian's grades had been slipping, and he had spent four days in time out. It was determined that Damian would be provided psychological counseling services to focus on problem-solving skills and management of his impulsive behavior for 20 minutes per week. The parents requested this information be shared with all Damian's teachers. The single IEP goal was for Damian to "use problem solving or decision making or social skills to cooperate with staff." Three related objectives were developed. The BIP was continued, as well as planner/journal entries and a behavior monitoring sheet.

At the beginning of his 7th grade year, a meeting was held on 9/30/98 to plan Damian's IEP. Damian had no office referrals. Goals for assignment completion and cooperation with staff were developed, as well as transition plans. The general education interventions described included selective seating, use of a planner, and redirecting. His performance was to be monitored and psychological services for 20 minutes per week were included. Damian was also to receive support services from the resource room teacher for organizational and study skills. In January of 1999, the parents requested a meeting to discuss concerns about Damian's failing grades and office referrals, as well as the support service and instructional support he was receiving. A meeting was scheduled for January 26, but was rescheduled for February 4, 1999. At that meeting, it was decided that Mr. Paul Conner, the special education resource teacher, would monitor assignment completion and inform the parents. During his scheduled sessions with the school psychologist, Damian would have an opportunity to make up any assignments. On 5/5/99, the appellants requested a meeting to discuss Damian's suspension. Damian was accused of saying he wished a teacher was dead. The parents felt the comment was taken out of context and that the police should not have been called. It was determined that Damian would apologize to the teacher, and in the future the parents would be contacted before police were called. The summary also indicated that the parents would receive information on a functional behavioral assessment.

At the beginning of his 8th grade year, an IEP meeting was held on 9/7/99. The purpose of the meeting was "review" and "re-evaluation." Damian was provided a laptop computer for note taking and organization, weekly problem-solving meetings with AEA support staff, regular and special education study halls to assist with assignment completion, and weekly phone contacts with his parents. A goal was developed for assignment completion. Written prior notice indicated NTAEA proposed to "continue program," with weekly support meetings, study hall help, phone contact to parents, and lap top use. The only behavioral incident in the record was a 5-day bus suspension for inappropriate language toward the bus driver.

High School

In September of his 9th grade year, an IEP meeting was held. The 9/15/00 IEP indicated Damian was doing well academically. There were some concerns with disruptive behavior in science (removed for throwing objectives and disruption). It was recommended that Damian receive a "warning" before being removed from class. A "cool down" opportunity was also provided, as well as weekly meetings with the school social worker. Three goals were established: 1) to interact appropriately with adults, 2) to successfully complete class requirements, and 3) to deal with peer issues appropriately. Regular classroom modifications included provision of the laptop computer, extended time to complete assignments, and opportunity to write out his version of the story when a situation occurs. Planning and communication time between the regular education teacher and the special education teacher were also provided. Damian also received tutoring assistance 50 minutes a day from the special education resource teacher.

A copy of the Conduct Report indicated that in September Damian received three days of in-school suspension (ISS) for disruption, demeaning language, defiance and insubordination, as well as a 3-day out-of-school suspension (OSS) for "profanity to adults, noncompliance to administrator request." Rescheduled three times, a meeting to discuss Damian's behavior was held November 6, 2000. It was decided that Damian would work with Mr. Finn to review discipline situations, consider appropriate responses and practice role-playing. If noncompliance occurred, Damian would be asked to go to the office. If he did not comply, an administrator would be notified as well as parents. If noncompliance continued, police were to be contacted. Parental notification and conferences would follow. A progress-monitoring conference was held 11/20/00. Academically, Damian's progress was good, but there were behavioral concerns in Mechanics and Math. The Conduct Report for October and November showed Damian receiving eleven "conferences" for inappropriate behavior (e.g., disrupting class, insubordination, disrespectful language, noncompliance), three ½-day ISS for inappropriate behavior (e.g., throwing tools at other students, losing control, inappropriate gestures and bathroom destruction), and office time out and after school detention for swearing and inappropriate behavior. On 12/11/00, Damian and his father met with school personnel to discuss the high school program. In particular, Damian had been issued a 3-day OSS for threatening a teacher. The options the team considered included: a return to Mason City High School, a structured program at MCHS, a "school within a school" at MCHS, an alternative setting at the MCCSD administration building, and an adjusted schedule with early release to "help deal with frustration of instructional time." It was decided that Damian would begin the second semester with the adjusted schedule.

Another meeting was held on 1/30/01 to discuss behavioral concerns. The Conduct Report indicated that from 12/12/00 through 1/30/01 Damian had received two 1-day OSS for inappropriate behavior with staff, refusal to follow directions and obscenities. The appellants were not present. Discipline procedures were developed by the IEP team members present and included the following:

- 1) If Damian causes serious disruptions in the classroom, he will be sent to the office and will make up time after school. He will receive an unexcused absence, three of which result in administrative withdrawal from class.

2) Insubordination, profanity and other behaviors determined by the principal will result in a 1-day out-of-school suspension (OSS).

3) Fighting, disrespect for property-vandalism, theft of property or disruption of the educational process will result in a 3-day OSS.

A consent for evaluation, including a FBA and social/behavioral assessment, was not signed by the parent. Written prior notice indicated that the action the school proposed was to address deficit areas and complete an FBA in area of noncompliance, defiance and poor use of unstructured time.

A mediation was held April 12, 2001. It was stipulated that the mediation agreement would be included as part of Damian's official school record. The agreement specified that an independent educational evaluation (IEE) would be conducted by Dr. Michael Hopkins and until an IEP meeting was held, Sharon Meyer, Associate Principal, would serve as the single point of contact between the appellants and MCCSD to facilitate communication. Following receipt of the IEE, an IEP team was to convene and develop an IEP to include 1) a single point contact person, and 2) a BIP that included a crisis plan utilizing the single point contact person (see Exhibit E).

On April 16, 2001, Damian reported to his 7th period class using profanity. His teacher, Mr. Evans, directed him to go to the office and Damian refused to leave. Administrators were summoned, the other students were directed to leave, but Damian attempted to leave with them. Sharon Meyer testified that she tried to call the parents before the police were called. Sharon Meyer telephoned the appellants to notify them that Damian was suspended for obscenity and defiance of authority. Damian apparently returned to the school building the following day. Both Mr. Van Hemert and Sharon Meyer contacted the appellants to verify Damian's suspension and that Damian would be sent home via city transit with a bus token provided by the school. On April 19, 2001, Damian left school at 2:45 without permission and was informed he would serve three days of ISS during his 7th period class. On April 34, 2001, Damian used inappropriate language with a paraprofessional and received an ISS.

A supplement to the mediation agreement was added April 24, 2001 (see Exhibit E) outlining the discipline procedures to be followed pending the development of the new IEP and BIP: 1) Damian will be taken out of class when and if his behavior disrupts the class or defies school authority; the discipline for such behavior will be three days of in-school suspension for the class period in which the disruptive or defiant behavior occurred, 2) the school district will then make a good faith effort to call the parents or leave a message and then proceed as with any other student, 3) the parents will be given an opportunity to de-escalate the situation (talk Damian down) if they can be reached, 4) if the parents cannot talk Damian down, they will be given an opportunity to take him home; if they have not arrived within 20 minutes, he will be given a bus token to go home, 5) Sharon Meyer will be the contact person for the parents and audiotape every conversation to insure against miscommunication; parties will conduct these communications with civility and 6) Damian will drop 7th hour class with no negative mark or grade and return home after 6th hour.

An independent educational evaluation (IEE) was conducted by Dr. Mike Hopkins on April 24, 2001. A diagnosis of ADHD and Oppositional Defiant Disorder (ODD) was provided, as well as several recommendations: 1) clearly stating goals, accommodations, consequences and contingencies 2)

exploring learning conditions and “verbal patterns of teacher-student interaction,” 3) modeling appropriate behavior and reinforcing appropriate behavior, 4) providing inservice training for school staff concerning ADD and ODD, 4) implementing a conflict resolution plan, 5) modeling of appropriate behavior by peers, 6) seating away from distractions, 6) providing assistance during unstructured passing time, 7) allowing Damian to use a self-imposed time out, 8) feeding him praise and positive comments, and 8) providing stress preparation and stress inoculation. Dr. Hopkins also suggested Damian and his parents discuss possible medical interventions with a mental health professional.

In an IEP meeting before the beginning of his 10th grade year (8/20/01), the IEE was discussed and behavioral issues were addressed. The IEP was finalized at a meeting 9/18/01 with the appellants present. The IEP documented that Damian was in all regular classes and one class with the Talented and Gifted program. The Present Level of Performance (PLEP) section indicated that academically Damian was doing very well. Annual goals for assignment completion, on-task behavior, and participation in problem-solving seminars were included. Damian was to be provided extra time to complete assigned work when “overwhelmed with workload.” There were no behavioral incidents reported in academic classes, but some in “unstructured” environments (e.g., lunch period). The BIP incorporated several recommendations from Dr. Hopkins’s IEE and included two goals: 1) Damian will comply with school procedures in structured and unstructured settings and 2) Damian will seek attention from peers in ways that will not interfere with compliance with school procedures. The proposed interventions included positive phone calls home, school activities that promote positive compliance, 1:1 sessions with Sharon Meyer or Mike Finn to discuss social/behavioral issues and parent contacts to discuss noncompliance situations. The “crisis” plan a) allowed Damian to use “self-imposed” time-outs, b) imposed “punishments” the day following the incident, and 3) initiated an immediate dialogue with the parents. The appellants did not sign the IEP but verbally agreed to it (Exhibit O).

Although the school year started with three ½-day ISS for insubordination, Damian’s behavior was reported “successful” for the week of 9/18 and 9/24, with only one parent contact initiated. There was also a concern that Damian had lost points for a late assignment in Mrs. Ekhart’s class since she was unfamiliar with his IEP (Exhibit A). Sharon Meyer confirmed in an e-mail that Damian would be given full credit for the late assignment. An inservice on ADHD and ODD was provided by Mark Shepp to Mason City High School faculty on 9/5/01. The week of Oct. 1, Damian received a letter citing harassment from a middle school student regarding a bus incident (Exhibits H, O). The BIP was implemented for appropriate peer interactions and parents were contacted. The week of October 8, 2001 one administrative intervention and teaching interaction was necessary with the associate principal. Damian had encouraged his brother to refuse a teacher’s directions. The BIP was implemented by Sharon Meyers conferencing with Damian regarding appropriate ways to deal with conflict in school. On October 18, 2001, Damian was involved in a hitting, pushing and shoving incident with a middle school student in the bus area. Damian refused to follow repeated directions from paraprofessionals, the middle school principal, his general education teacher and the high school associate principal. Damian later entered the school building, ran away from staff and refused to

comply with directives. The 30-minute incident included vulgarities. Damian's father was contacted in accordance with the BIP and he picked him up from school (Exhibit O).

On October 22, 2001, Damian rode his bike in the school hallway after school and refused redirection with inappropriate language. Sharon Meyer sent an e-mail to Mr. Van Hemert requesting a meeting due to Damian's severe, repeated noncompliance. On October 23, 2001, Damian used inappropriate language in a classroom and refused to follow directions at the bus stop area. That same day, Mr. Van Hemert arranged an IEP meeting with the appellants for 10/29/01. Mr. Van Hemert testified that the meeting was called because the MCCSD staff did not believe the BIP or "Crisis Plan" of 9/18/01 were working. On Friday, October 25, 2001 Damian used inappropriate language with Dr. Judas and she suspended him for three days. The following Monday, October 29, Damian reported to school and Mr. Van Hemert discussed with Damian the discipline referrals. Mr. Van Hemert notified Damian in person and Mr. S by phone that Damian was suspended for three days.

An IEP conference was scheduled for 10/29/01. The appellants did not attend the IEP meeting. At the meeting, the school members of the IEP team determined that a revised behavior plan was necessary, due to "escalating behavioral concerns." A "draft" IEP and BIP had been prepared for the meeting. The IEP proposed a revision in the IEP goals to include social skills and anger reduction skills. The BIP, which is the focus of this appeal, lists several preventive and environmental strategies to address the behaviors of concern (e.g., refusing instructions, shouting, swearing and using vulgar language, engaging in dangerous behavior) including verbal prompts, redirection, teacher proximity, direct instruction of appropriate, positive behavior, self-imposed time out, counseling, contact with school psychologist, and the opportunity to call home. Alternative skills to be taught included dealing with demands using the "LUCK" strategy and anger-control strategies. The use of alternative skills was to be reinforced with positive verbal feedback, reports to parents, participation in extracurricular activities, and weekly feedback on the behavior rating scale. Support for team members included inservice training and back up assistance. The "Crisis Management" component of the plan indicated that Damian would be instructed to report to the time out area or office to calm down. If his behavior continued to escalate, disciplinary action such as ISS or OSS would be given. His parents would be asked to pick him up, and "other alternatives will be implemented if parents refuse." Long-term preventive strategies include counseling with the school social worker, anger management strategies and provision of a mentor in areas of high interest. The team also discussed Damian's placement but decided to wait until the "parents could participate in the discussion."

The appellants did not attend the rescheduled IEP meeting of 10/31/01, but did attend the meeting rescheduled 11/02/01. The criterion levels on revised goals were discussed and modified based on the appellants' concerns. Several changes to the BIP were made, including allowing Damian to discuss his concerns with the school psychologist when an administrator was not available or to journal his concerns. Escort services during unstructured time were rejected, but the appellants agreed that a hall monitor within close proximity of Damian would be aware of the BIP and encourage Damian to follow the intervention plan. The "School within a School" program or the alternative high school were discussed but rejected by the appellants. The appellants did not sign the revised 11/2/01 IEP but verbally agreed to changes in the document (Exhibit O).

Damian returned to school 11/2/01. On November 5, 2001, Damian was not allowed to go to the Information Center (IC) without supervision of the hall monitor. Mrs. S. e-mailed Gary Van Hemert to challenge this "restriction" (Exhibit F & G). Mr. Van Hemert indicated the supervision during unstructured times was consistent with the IEP developed 11/02/01. On November 6, 2001, Damian and a group of friends entered the high school office demanding to see Principal Judas about not being allowed to play hacky-sack during lunch. Damian reportedly used inappropriate language while in the office. Mr. Van Hemert and Dr. Judas visited with Damian later that afternoon. Damian became argumentative and left the office without permission. Mr. Van Hemert e-mailed the appellants that Damian would be suspended for one day for insubordination (Exhibit D & L). Later that day, Damian returned to the office demanding to see Dr. Judas and refused to leave. After several interruptions and refusals by Damian, Dr. Judas called the police. Mr. Van Hemert informed the parents of a 3-day suspension by e-mail and also by letter the following day (Exhibits I, J & K). On November 12, 2001, Damian was disrespectful to Dr. Judas during a presentation in Mrs. Eckhart's class. Damian continued to have behavioral difficulties in Mrs. Eckhart's class November 14 and 15, 2001. A summary of reinforcement data was sent November 16, 2001 to the appellants (Exhibit N). On November 20, 2001, Mr. Van Hemert shared three letters with Damian concerning complaints of harassment from a teacher, secretary and the principal (Exhibit C). Damian testified that he becomes very "frustrated" when he tries to talk with someone and no one is available.

Conclusions of Law

The appellants assert that MCCSD and NTAEA have denied Damian a FAPE. Specifically, they contend that the IEP and BIP are technically and substantively flawed.

Issue #1: Failure to provide services and strategies in the BIP

The IDEA ensures that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independence [20 U.S.C. § 1400(d)(1)(A)]. The FAPE to be provided is defined as special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program (IEP)[20 U.S.C. § 1401(8).

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, and a statement of the program modifications or supports for school personnel that will be provided for the child, 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 any individual modifications in the administration of State or districtwide assessments of student

achievement, 6) the projected date for beginning of services and modifications, 7) a statement of needed transition services, and 8) a statement of how the child's progress toward annual goals will be measured and how the child's parents will be regularly informed [20 U.S.C. § 1414(d)(1)(A)(i-viii)].

During the development of the IEP, the IEP team is to consider several factors including:
in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior [20 U.S.C. § 1414(3)(B)(i)].

This "behavioral intervention plan" (BIP) is referenced in the discipline provisions of the IDEA. Prior to disciplinary action the local educational agency (LEA) is to review the BIP if one exists or develop a BIP if the LEA "did not conduct a functional behavioral assessment and implement a behavioral intervention plan" [20 U.S.C. § 1415(k)(B)(i)].

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 [Iowa Administrative Rules of Special Education (IARSE 281-41.67(5)(b)(1) Iowa Administrative Code (IAC)] but do not outline the specific contents of a BIP.

An analysis of administrative and judicial decisions suggests several criteria for examining the appropriateness of a BIP. First, the BIP must be based on assessment data. For example, in *Westminster School District* [23 IDELR 592 (SEA VT 1995)] a hearing officer (HO) found the district's behavioral plan for the student was responsive to the student's needs as identified in the various evaluations of the student. In *Kelseyville Unified Sch. Dist.* [25 IDELR 1115 (SEA CA 1997)] a HO determined the BIP was appropriate, addressed the student's problem behaviors and was based on a functional analysis assessment. In other decisions, school districts failed to develop BIP's when both formal and informal assessment data indicated the need for such a plan (see *Board of Education of the City School District of the City of New York*, 34 IDELR 192 (SEA NY 2000); *Lodi Unified School District*, 29 IDELR 826 (SEA CA 1998); *Neshaminy School District*, 29 IDELR 493 (SEA PA 1998); *South Pasadena Unified School District*, 28 IDELR 1112 (SEA CA 1998); *Board of Education of the Middle Country School District*, 28 IDELR 75 (SEA NY 1998); *Cumberland Valley School District*, 27 IDELR 127 (SEA PA 1997); *Stoudsburg Area School District*, 27 IDELR 975 (SEA PA 1997); *Watson Chapel Sch. Dist.*, 27 IDELR 899 (SEA AK 1998); *Windsor C-1 Sch. Dist.*, 29 IDELR 170 (SEA ME 1998); *Independent School District No. 2310*, 28 IDELR 933 (SEA MN 1998). The goals and strategies of a BIP must be based on assessment data.

Second, the BIP must be individualized to meet the child's unique needs. In *Fort Madison Community School District* [18 IDELR 1138 (SEA IA 1992)], the Administrative Law Judge (ALJ) ruled that appropriate accommodations had been made with regard to the school's assertive discipline policy to meet the individual needs of the student. Conversely, "the belated, cryptic reference to (a reinforcement system) which the (school) uses for all its SED students" was not "sufficiently specific or tailored" to meet a student's individual needs [*Jim Thorpe Area Sch. Dist.*, 29 IDELR 320 (SEA PA 1998)]. BIP's must be individualized to address a child's unique needs.

Third, the BIP must include positive behavior change strategies. The OSEP has instructed school districts to take “proactive measures” to address the needs of students with behavioral issues [*Letter to Osterhour*, 35 IDELR 9 (OSEP July 25, 2000)]. In *Connally Independent School District* [34 IDELR 309 (SEA TX 2001)] the HO found the variety of behavioral strategies in the BIP appropriate. These strategies included adjusting the stimulation level and/or task difficulty, reinforcing adaptive replacement behaviors, telling social stories, redirecting the student, and discussion of appropriate behaviors. The positive and “chief components” in a BIP for a 14-year-old with LD, speech and language impairments and ADHD included the opportunity for the student to show a “red card” when the student became angry along with the option to leave the classroom and go to the social skills instructor’s classroom and assistance to the student in managing stress and using composure time [*Eric J. v. Huntsville City Board of Education*, 22 IDELR 858 (N.D. Ala. 1995)]. A BIP calling for replacement of aggression and inappropriate verbal language with positive behaviors and modifications to the environment was also appropriate [*Corona-Norco Unified Sch. Dist.*, 30 IDELR 179 (SEA CA 1998)]. In *Sandwich Community Unit School District No. 430*, 35 IDELR 173 (SEA IL 2001) a HO ordered the district’s IEP team to meet with the parents to develop a BIP incorporating positive reinforcement to encourage attendance. Often, school districts utilized the expertise of behavior specialists to develop positive BIP’s [see *Lyon County (NV) School District* (OCR, June 21, 2001)] or were ordered to contract behavioral specialist services to develop a BIP [see *Quaker Valley School District*, 31 IDELR 255 (SEA PA 1999); *Board of Education of the City of New York*, 28 IDELR 1093 (SEA NY 1998); *Jessieville Sch. Dist.*, 28 IDELR 697 (SEA AK 1998)]. In contrast, BIP’s which incorporated negative, punitive measures were found to be inappropriate. For example, an ALJ in Iowa concluded that the BIP developed for a student was punitive in nature and did not teach the student appropriate behaviors in a positive manner. Developed in a “perfunctory manner,” the BIP incorporated verbal or non-verbal cueing, hallway conferencing, time-out and “other consequences due to the severity of his behavior (e.g., giving up recess, going to detention)” [*Mason City Community School District and Northern Trails AEA 2*, 32 IDELR 216 (SEA IA 2000)]. Similarly, in *Lewisville Independent School District*, 35 IDELR 236 (SEA TX 2001), a HO ruled that the BIP established for a student placed too much emphasis on punishments and discipline rather than positive reinforcements. In fact, the punitive nature of the BIP resulted in too much time out of the classroom, with negative effects on self-image and academic performance. In *Ingram Independent School District*, 35 IDELR 143 (SEA TX 2001), the district implemented a “very cursory and ineffective” BIP, which did not address problem behavior and negatively affected academic performance due to excessive time-outs and suspension. In *Hempfield Sch. Dist.*, 28 IDELR 509 (SEA PA 1998), review officers held that a student’s BIP was inadequate since it did not address misconduct in positive ways: “minor infractions are met with time-out, which has not reduced the severity or frequency of behavioral outbursts...(we cannot) endorse, as a supplementary aid or service, a behavior plan that responded negatively to inappropriate behaviors arising from communication and socialization deficits, and ignores alternative coping skills.” The BIP must include positive behavioral interventions, supports and strategies.

Fourth, a BIP must be consistently implemented as planned and its effects monitored. A HO in *Lyford Independent School District*, 25 IDELR 1181 (SEA TX 1997) concluded that a school district fully implemented a student’s BIP in response to serious misbehavior. Specifically, the plan called for

placement in the alternative educational center if the student exhibited persistent inappropriate behavior or physical assault. His placement in the center following a threat to burn down the house of a district employee, vandalizing some homecoming decorations, and physically assaulting another student was deemed appropriate. Similarly, the incorporation and implementation of an "emergency removal" for dangerous out-of-control behavior was an appropriate component of the BIP for a 15-year-old student exhibiting extremely disruptive and dangerous behavior [*Carrollton-Farmers Branch Independent School District*, 29 IDELR 665 (SEA TX 1995)]. In contrast, a HO ruled that a student's BIP was not consistently implemented nor reexamined when a student's behavior deteriorated [*Modesto City School District*, 30 IDELR 170 (SEA CA 1998)]. Inconsistent implementation of a student's BIP in *Jessieville Sch. Dist.*, 28 IDEAL 697 (SEA AK 1998) resulted in punishment for behavior caused by a student's disability. BIP's must be implemented as planned and must be monitored.

Damian's BIP, which is the focus of this appeal, lists several preventive and environmental strategies to address the behaviors of concern (e.g., refusing instructions, shouting, swearing and using vulgar language, engaging in dangerous behavior) including verbal prompts, redirection, teacher proximity, direct instruction of appropriate, positive behavior, self-imposed time out, counseling, contact with school psychologist, and the opportunity to call home. Alternative skills to be taught included dealing with demands using the "LUCK" strategy and anger-control strategies. The use of alternative skills was to be reinforced with positive verbal feedback, reports to parents, participation in extracurricular activities, and weekly feedback on the behavior rating scale. Support for team members included inservice training and back up assistance. The "Crisis Management" component of the plan indicated that Damian would be instructed to report to the time out area or office to calm down. If his behavior continued to escalate, disciplinary action such as in-school or out of school suspension would be given. His parents would be asked to pick him up, and "other alternatives will be implemented if parents refuse." Long-term preventive strategies include counseling with the school social worker, anger management strategies and provision of a mentor in areas of high interest.

Damian's BIP appears to meet the first three criteria. It is based on assessment data. The recommendations from Dr. Michael Hopkins's IEE are incorporated. It is individualized. The plan is designed to address Damian's needs. It includes positive behavior change strategies, as well as a "crisis plan" if the preventive or supportive measures are unsuccessful. The fourth criterion, consistent implementation and monitoring, is the first issue of this appeal.

The appellants allege that MCCSD has failed to implement Damian's BIP and failed to follow the recommendations of the IEE. The IEE recommended clearly stated goals, contingencies and consequences which are included in Damian's BIP and Crisis Plan. The IEE suggestion of modeling and reinforcing appropriate behavior is achieved in counseling sessions with the school social worker and counselor. The conflict resolution and stress inoculation recommendations from the IEE have also been addressed in the counseling sessions. Damian, Mr. Finn, and Mr. Van Hemert all testified that the counseling services had been provided. The LUCK strategy and anger reduction strategies had been implemented. Mr. Finn testified that he met twice with Damian in November; one week there was no school and another week Damian was not in school. Mr. Van Hemert testified that

Damian was successfully implementing the anger reduction strategies. The Conduct Record references several behavioral incidents followed by "conferences" discussing appropriate behavior alternatives. The IEE recommendations also included assistance during unstructured passing time. The hall monitor in close proximity to Damian during unstructured passing times represents the school district's attempt to incorporate that recommendation. The school district is monitoring the BIP through the "Summary of Reinforcement Data" and teacher reports. No evidence concerning a "mentor" or the "use of extracurricular activities to reinforce alternative skills" was presented. It is clear from the school records and testimony that the components of the BIP have been implemented and monitored.

Issue #2: Use of disciplinary sanctions not identified in the IEP or BIP

The discipline provisions of the IDEA are expansive and explicit. 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)]. The school district is therefore permitted to use the disciplinary sanction of suspension as long as the suspensions do not constitute a change in placement for students with disabilities: "As was the case in the past, school personnel have the ability to remove a child for short periods of time as long as the removal does not constitute a change of placement" [64 *Federal Register*, No. 48, 12412 (March 12, 1999)].

Courts have consistently interpreted the IDEA to prohibit expulsion or suspension for more than 10 school days for misconduct without compliance to procedural safeguards [*Honig v. Doe*, EHLR 559:231 (1988)]. OSEP has consistently taken the same position. In the Memorandum *Initial Disciplinary Guidance Related to Removal of Children with Disabilities from Their Current Educational Placement for Ten School Days or Less* [OSEP Memorandum 97-7, 26 IDELR 981 (OSEP 1997)] OSEP clarified that removals for less than 10 days do not require additional action by the school district. However, school districts are strongly encouraged to review as soon as possible the circumstances that lead to the child's removal and consider whether the child was being provided services in accordance with the IEP and whether the behavior could be addressed through minor classroom or program adjustments, or whether the IEP team should be reconvened to address possible changes to the IEP [see also *Letter to Osterhout*, 35 IDELR 9 (OSEP, 2000); *Letter to Shows*, 33 IDELR 223 (OSERS 2000) noting additional ten-day suspensions can occur in the same school year for separate incidents of misconduct, as long as there is not a pattern of removals and the educational services are not ceased].

Whether or not in-school-suspensions (ISS) are included in the 10-day limit was addressed in the Analysis of Comments and Changes [64 *Federal Register*, No.48, 12619 (March 12, 1999)]. The

guidance indicated that in-school suspensions would not be considered a part of the days of suspension as long as the child is afforded the opportunity to continue and appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP and continue to participate with nondisabled children to the extent they would have in their current placement. Further, portions of a school days (i.e., half-days) that a child had been suspended would be included in determining whether the child had been removed for more than 10 cumulative school days or subjected to a change in placement. Damian's ISS's appear to afford him the opportunity to continue and progress in the general curriculum and to receive the services specified on his IEP.

Mr. Van Hemert testified that Damian has been suspended a total of 7 ½ days OSS and 1 ½ days ISS this academic year. A review of the Conduct Report verifies these data. The school district has the authority to implement sanctions of suspension if they do not constitute a change in placement. Damian's 1 ½ days of ISS are not included in the 10-day limit. Since the school district has not exceeded the 10-day limit, a change in placement has not occurred.

Mr. Van Hemert testified that the Dr. Hopkins's IEE "did not suggest Damian is exempt from consequences." He stated that serious sanctions were necessary when the requests from the highest ranking school official are disobeyed. Mr. Van Hemert testified that suspensions may need to be part of the consequences for inappropriate behavior to "let a student know things are serious." He stated that the BIP is not a guarantee Damian will not be suspended. As noted in the Analysis of Comments and Changes [64 *Federal Register*, No.48, 12554 (March 12, 1999)]: "School officials need some reasonable flexibility when dealing with children who violate school conduct rules, and interrupting a child's participation in education for up to 10 days over the course of a school year, when necessary and appropriate to [sic] the circumstances, does not impose an unreasonable limitation on a child with disabilities [sic] right to FAPE."

However, it is important to note that Damian continues to experience behavioral conflicts. The continued use of short-term out-of-school suspension may not be an available option for the school district. Cumulative short-term suspensions totaling more than 10 school days in a school year may constitute a change of placement under the IDEA when the removals create a pattern of exclusion. Factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another must be considered in determining whether or not a pattern of exclusion exists [34 C.F.R. § 300.519(b)]. Other factors to consider in determining whether or not a pattern may exist might include the nature of the misconduct or characteristics of the disability. Since Damian's misconduct could be consistently described as insubordination, a pattern might easily be established. 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)].

The school district may want to explore alternatives to OSS, including a modification of Damian's BIP and Crisis Plan. Some possible options may include:

1. Involving Damian in self-monitoring of target behaviors (e.g., appropriate passing in hallways) with clear contingencies for achieving goals (e.g., positive reports home) and for not

- achieving goals (e.g., hall escort);
2. Increasing contact with support staff (e.g., school social worker, counselor) for counseling and developing conflict resolution plans;
3. Scheduling and monitoring journal writing prior to (and possibly following) "unstructured" times. These "unstructured times" (e.g., hallway passing, lunch) have been associated with misconduct. Journaling prior to these times may assist Damian in reviewing consequences for appropriate and inappropriate behavior prior to entering the setting;
4. Assigning a *daily* contact person for Damian. This teacher or counselor would arrange a time each day to contact Damian (e.g., 1-2 minutes after lunch). The daily contact would serve a "progress monitoring" function. The contact may also be preventative, whereas the opportunity to talk to the school psychologist listed on the current BIP is to "de-escalate concerns" - and would most likely be implemented *after* behavioral incidents have occurred;
5. Establishing adult-student interactions that will result in successful compliance. For example, instead of ultimatums ("Damian, leave the area or I will call the administrator") which might encourage resistance and insubordination, it might be more successful to provide Damian with actual choices (e.g., "Damian you may schedule an appointment with me 6th hour or take five minutes now to write your concerns"); or
6. Specifying the conditions of the strategies on the BIP. For example, the opportunity to call home is a preventive strategy. However, this opportunity cannot be misused (Exhibit F) or misapplied (e.g., during a crisis and implementation of the crisis plan). Specifying when and how often this strategy may be used might assist Damian.

Although the use of an escort to the "IC" was a concern of the appellants, it appears from the exhibits and testimony that such an intervention is both consistent with the IEP/BIP and an appropriate strategy for reducing conflict.

Although not specified as an issue of this appeal, MCCSD should examine its policy for police involvement. Police contact is not a specific component of Damian's current IEP or BIP, but may be considered one of the "other alternatives" options of the Crisis Plan. In fact, police have been summoned for Damian. MCCSD may want to clarify the school-wide policy and examine its application to students with disabilities. Police involvement to maintain school security is appropriate, however police involvement cannot be used as an alternative to the individualized educational planning required by the IDEA.

Issue #3: Failure to provide notice of disciplinary action

The IDEA requires parents be provided written prior notice whenever the AEA/LEA proposes or refuses to initiate or change "the identification, evaluation or educational placement of the child" [20 U.S.C. § 1415(b)(3)]. The contents of that notice must include:

- 1) a description of the action proposed or refused by the agency;
- 2) an explanation of why the agency proposes or refuses to take the action;
- 3) a description of any other options that the agency considered and the reasons why those options were rejected;
- 4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;
- 5) a description of any other factors that are relevant to the agency's proposal or refusal;
- 6) a statement

that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and (7) sources for parents to contact to obtain assistance in understanding these rights [20 U.S.C. § 1415(c)].

For discipline matters, a change in placement is defined at 34 C.F.R. § 300.519 as (a) a removal for more than 10 consecutive school days; or (b) a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

For short-term suspensions (i.e., less than 10 days), the necessary due process requirements were specified in *Goss v. Lopez* [419 U.S. 565, 95 S. Ct. 729 (1975)]. These minimal procedural protections include providing the student with the accusations or charges against him, the basis for the accusations or charges and an opportunity to tell his version of the event.

Mr. Van Hemert testified that he discussed the suspensions with Damian and provided the parents notice of short-term suspensions via phone contact and a follow-up letter. It is clear from the record and testimony that the school district provided adequate notice regarding the short-term disciplinary actions.

Issue #4: Procedural violations

Participation in IEP meetings

The appellants assert they were not in attendance at the 10/29/01 IEP meeting. The regulations for IDEA specify that each public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate by 1) notifying the 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 time and place [34 C.F.R. § 300.345(a)]. The notice to the parents must a) indicate the purpose, time and location of the meeting and who will be in attendance and b) must inform the parents of provisions concerning the addition of other IEP team members with knowledge and special expertise regarding the child [34 C.F.R. § 300.345(b)].

An IEP meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. The public agency must keep a record of attempts to arrange a mutually agreed on time and place, such as 1) detailed records of telephone calls made or attempted and the results of those calls; 2) copies of correspondence sent to the parents and any responses received; and 3) detailed records of visits made to the parent's home or place of employment and the results of those visits [34 C.F.R. § 300.345(d)].

The issue of conducting an IEP meeting without parents in attendance was addressed in the Analysis of Comments and Changes [64 *Federal Register*, No.48, 12587 (March 12, 1999)]:

Section 300.345(d) is a longstanding provision that is intended to enable a public agency to

proceed to conduct an IEP meeting if neither parent elects to attend, after repeated attempts by the public agency to ensure their participation.

An analysis of case law reflects the level of effort required to justify holding an IEP meeting without parents. First, notice must always be sent, even when the district anticipates the parents' refusal to attend [*Norton Pub. Sch.*, 16 EHLR 832 (SEA MA 1990)]. Second, simply sending notice and accepting the parents' refusal is insufficient. The LEA is required to "convince" parents to attend [*Jefferson County Pub. Sch. Dist.*, 19 IDELR 1112 (SEA CO 1993)]. Most important, procedural requirements are balanced with substantive requirements. In *Cordrey v. Euckert*, [17 EHLR 104 (6th Cir. 1990)] the circuit court refused to invalidate an IEP developed without parents in attendance since the record as a whole clearly showed the parents' unwillingness to participate.

No specific timelines are imposed for the IEP notice. A standard of reasonableness is applied in determining whether a notice is timely [*Letter to Constantian*, 17 EHLR 118 (OSEP 1990)]. The notice requirement must balance the parents' right to participation with the school district's need to adequately respond to serious behavioral situations.

It is clear that the school district was attempting to reconvene the IEP team on 10/29/01 to address Damian's severe and escalating noncompliance. Mr. Van Hemert testified that he contacted the appellants on October 23, 2001 to schedule the 10/29/01 meeting. Mr. S. agreed to meet on 10/19/01 (Exhibit O). However, on October 25, 2001 Damian was suspended for 3 days for using inappropriate language with his principal, Dr. Judas. The appellants did not attend the 10/29/01 meeting. However, they did participate in the subsequent 11/02/01 meeting and the IEP document was modified based on their suggestions. MCCSD contacted the appellants and arranged a mutually agreed time for the meeting. The appellants agreed to attend. The purpose of the meeting was provided. MCCSD cannot be charged with a procedural violation in response to the appellants' choice not to attend the 10/19/01 meeting.

"Prewritten" IEP

The appellants assert the 10/19/01 IEP was "prewritten" without their input. A "draft" IEP was prepared for the 10/29/01 meeting (and for the 9/19/01 and 11/02/01 meetings as well). The word "draft" stamped on these documents indicated the documents contained recommendations to be reviewed and discussed with the parents. This practice is permissible, providing "parents have the right to bring questions, concerns and recommendations to an IEP meeting as part of a full discussion of the child's needs and the services to be provided to meet those needs before the IEP is finalized" [64 *Federal Register*, No.48, 12478 (March 12, 1999)]. The record supports the conclusion that the parents have been active participants in finalizing IEP's for Damian on 9/18/01 and 11/02/01. They were notified and confirmed their intent to participate in the 10/29/01 meeting, but chose not to attend. The draft IEP prepared for the 10/29/01 meeting is neither a procedural violation nor impermissible practice.

Signatures on the IEP

The appellants note that they did not sign the 9/18/01, 10/29/01 or 11/02/01 IEP's. Informed parental consent must be obtained before initial evaluations or reevaluations and before the *initial* provision

of special education and related services [Iowa Administrative Rules of Special Education (IARSE 281-41.103(2) Iowa Administrative Code (IAC)]. There is no requirement that written consent by signature be provided on subsequent IEP's. Although the IEP form includes places for the signatures of IEP team members - including the parents - it may be viewed as documenting the composition and participation of team members. More important, there is evidence that the parents participated in the development of the IEP on 9/18/01 and 11/02/01. Had Damian not been suspended immediately before the 10/19/01 meeting, it appears the appellants planned to attend and to participate in that meeting as well. Lack of signatures on the 9/18/01, 10/29/01 and 11/02/01 IEP's does not violate the procedural requirements of IDEA.

Typographical Errors

The appellants note several typographical errors on Damian's IEP's. These errors appear to be minor and do not invalidate the IEP documents.

Decision

The appellees (MCCSD and NTAEA 2) prevail on all issues. The evidence shows that the appellees met the procedural and substantive requirements of the IDEA. The conclusion that Damian has been denied a FAPE has not been established.

All motions not previously ruled upon, if any, are hereby overruled.

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

12/13/01
December 13, 2001