

**Iowa Department of Education**

(CITE 20 as D.o.E. App. DEC 272)

IN RE: Alexander P., a child

Allen and Nadine P.,

Appellants

vs.

West Des Moines Community School  
District and Heartland Area Education  
Agency (AEA) 11,

Appellees

Decision  
(Admin. Doc. SE-247)

The above entitled matter was heard by Administrative Law Judge Carl R. Smith on March 25, 26 & 27, 2002 in West Des Moines, Iowa. The hearing was held pursuant to Iowa Code Section 281.6 of the Rules of the Iowa Department of Education, the rules of the State Board of Education found in 281-41 Iowa Administrative Code as well as the applicable regulations found within the Individuals with Disabilities Act (IDEA). A continuance in this matter was granted by the Administrative Law Judge in this until April 8, 2002 in response to a motion by the Appellants. At the conclusion of the Hearing the ALJ also requested that both parties submit to him additional materials related to the issues of vision therapy as a related service . Each party also submitted a one-page statement of their positions on the relationship of a behavioral intervention plans to the IEP and IEP process. The parties also agreed that the Appellees could add documentation to the record regarding Alex's performance on reading and related data for all students during the Academic Year 2000-2001 and Academic Year 2001-2002.

The Appellants in this matter were represented by Attorney Curt Sytsma of Des Moines, Iowa. The West Des Moines Schools and the Heartland AEA 11 were represented by Attorney Ronald L. Peeler of Des Moines, Iowa.

According to the appeal filed by the Appellants on February 11, 2002 there are two primary issues in these proceedings. First, the Appellants assert that Alexander has not

been provided an educational program adapted to meet his individual needs. Secondly, they oppose a current proposal by the West Des Moines Schools (hereafter referred to as the LEA) and the Heartland Area Education Agency (hereafter referred to as the AEA) that he be removed from his general education third grade classroom and be served in a specialized behavioral disorders or social skills program located at a different elementary attendance center.

The Appellants filed a more extensive statement of issues on March 21, 2001. Among the concerns brought forth in this statement regarding the rationale as to why a more restrictive placement would be inappropriate for Alexander (hereafter referred to as Alex) were:

- Alex is making significant progress in his current placement thereby negating the need for a more restrictive placement,
- There is a need to consider other appropriate supports and services within his current placement before considering more restrictive options,
- The contentions made by the Appellees in this matter that Alex is having a significantly negative impact on his class peers are the result of inadequate supports being provided in his program, such as structure during recess times, and can be alleviated by appropriate supports rather than removal of Alex, and
- A number of concerns regarding the proposed program in a more restrictive setting including the possibility of such a placement becoming long-term in nature, basically being inappropriate and implemented despite strong parental objections and possibly leading to more significant seriously negative outcomes for Alex.

In addition, the more extensive statement included more specific assertions regarding the perceived inadequacies of evaluations and services that have been provided up to this point for Alex. As stated by the Appellants:

From and after November of 1999, the LEA has denied Alex P. an appropriate education by failing and fully evaluating his disabilities, including the causes of his misbehavior, and by failing to offer and provide appropriate services and accommodations.

Alex is currently served as a third grade student in the West Des Moines Schools. He is eight years old (dob 3/31/93) and has been diagnosed with Asperger's Syndrome which is a part of the Autism Spectrum Disorders. All parties agree that Alex is an eligible child with disabilities who is entitled to the protections of the Individuals with Disabilities Act (IDEA) and corresponding protections as delineated in the Iowa Rules of Special Education (2000).

## 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 this Appeal. As stated above Alex P. is an eight year old child with significant disabilities. He is designated as an eligible student by the LEA and AEA and now is considered by all parties to have a condition referred to as Asperger's Syndrome. What follows is a summarized chronology of the programs and services provided for Alex that were discussed in these proceedings and the primary themes as perceived by this ALJ that must be addressed in this decision.

### 1998 – 1999 School Year

Alex entered Westridge Elementary School in the West Des Moines School District as a kindergarten student in the 1998-1999 school year. The record demonstrated a beginning optimistic expectation for his education. This was confirmed by his father (testimony of Mr. P.) who stated that Alex had a good year during this time and that he and his wife were not aware of any significant problems. These perceptions are noted by his kindergarten teacher who stated in her end of year report that "Alex is a nice little boy and I have enjoyed having him in my class. I feel that he has mastered the skills necessary for a successful first grade experience." (Appellants' Record, p. 2).

### 1999-2000 School Year

It appears that Alex experience significant behavioral problems soon after beginning first grade at Westridge Elementary. According to the first trimester report card from Mrs. Wilson, his teacher:

Alex has demonstrated growth in the academic area. My concern is that the behaviors . . . often interfere with his optimal learning and learning of his classmates. He has responded well to his work with Mrs. Stjernberg (guidance counselor) and our sticker incentive program. He is very proud each day that he is able to make four visits to Mr. Page's (principal) office to put a sticker on his chart! We are very helpful that the positive reinforcement Alex receives at school and at home will help him reach his full potential. (Appellants' Record, p. 5)

Other data in the record suggest that Alex's behavior was perceived as problematic during this time frame. In November, the parents met with Mr. Page, the principal, Mrs. Wilson and Mrs Stjernberg. In correspondence following this meeting, dated November 17, 1999, (Appellants' Record, pgs. 6 & 7) it was noted that concerns were emerging regarding Alex's disruptive behavior when he wasn't earning the reinforcers provided. Mr. Page noted in this letter:

We are currently collecting data as to whether Alex might need an evaluation to determine qualification for Special Education. At this time, the interventions seem to be working. Alex is making good progress. If he were not progressing, that would be a clear indication there might be a need for additional support. Based on his current level of performance, he is not discrepant enough to qualify. We feel that although Mrs. Wilson may need to redirect Alex several times a day, she is getting enough support to allow her classroom to function according to expectations. Alex's off task behavior is going to affect his learning. However, as his report card indicates, he is making good progress at this time. (Emphasis added)

Despite this report suggesting that overall Alex was progressing satisfactory, shortly following this meeting (November 21, 1999) Mrs. Wilson sent to Alex's parents a fourteen page letter delineating the progress Alex was making in the first grade and also describing behaviors of concern such as yelling, name-calling, physical threats, kicking, screaming, pushing other children and other disruptive behavior (Appellants' Record, pgs. 9-23). This letter indicates that behaviors such as loudness, disruptiveness and jabbing another student with a pencil started as early as September 9, 1999. The following entry is from November 3, 1999:

I arrive early to meet the class after music and witnessed this incident. Alex got very angry in music because he lost his turn for not following the rules. At the end of the class Mrs. Kimpston announced that there was time for anyone who had missed their turn to have one and asked if anyone still needed a turn. Alex said nothing. Mrs. K. asked the class to line up. Alex evidently realized that class was over and that he hadn't had a turn. He began to scream at Mrs. K. and said she was the "stupidest teacher in the world". She said she would talk to Alex and I accompanied the class back to the room as it was dismissal time. She came to the room with him and he was under control. He went to my desk to get his sticker for the end of the day. When I told him that he would lose that sticker, he became very enraged. He started screaming and kicking the file cabinet. We were trying to calm him when a child came into the room and said "lollipooloo", something he had been saying all day and finding quite amusing. Alex grabbed a chair, and raised it over the child's head. The chair was on the downswing when I was able to take it from him. He then ran around the room knocking chairs off the desks and crying. I was able to calm him down and he went home.

Thus we see a confusing picture emerging regarding Alex's status in the Fall of 1999. On the one hand we see a detailed chronology including what appears to this ALJ as some significant behavioral incidents, atypical for a student his age, that would suggest a more intensive look at his behavior and needs. At the same time we see correspondence with the parents indicating that Alex's behavior is "not discrepant enough" to qualify for additional support.

This situation led an impasse between the parents and school personnel. The parents formally requested that Alex be placed in another classroom at Westridge and if not granted, a within district transfer to another elementary attendance center. (Appellants' Record, pgs. 24-26).

Mr. and Mrs. P. voluntarily transferred Alex to another elementary building (Western Hills Elementary) in December, 1999. From the record it appears that, despite a number of behavioral strategies attempted in his new class and building that Alex's behaviors continued to be a major concern. The parents consented to an evaluation on March 31, 2000. A report of a full and individual evaluation was shared at a staffing with the parents on April 21, 2000. Among the data delineated in this evaluation (Appellants' Record, pp. 32-35) was the extent to which Alex's on-task behavior was significantly different from his peers and a reported frequency of major behavioral incidents such as being angry, inappropriate physical contact with adults and children, arguing with adults and making loud disruptive comments at the rate of 3-4 times per week. It was noted that the typical first grader in this setting did not engage in such major behavioral incidents at all.

Significant behavioral incidents continued to take place at Western Hills such as screaming, kicking and losing control of his behavior (Appellees' Record, pgs. 38, 96). Alex's behavior led to physical restraint interventions by school staff (Appellees' Records, pgs. 160-161, 171). In addition, the record indicates that school staff used a time-out room for unacceptable behaviors that was strongly objected to by Mrs. P. (Appellees' Record, pgs. 233-234).

These observations and conclusions regarding Alex's behavioral needs were considered at the time of his initial evaluation for potential special education programs and services. Ms. Mowatt, the school psychologist involved in the initial special education related assessment, concluded:

... Alex will need a systematic behavior intervention system that differentially reinforces his appropriate behavior and compliance with a continuous amount of praise, while reducing his inappropriate behavior with proactive measures and responses that are efficient, effective and non-threatening. In addition, Alex is also in need of an anger management system with reinforced usage of techniques to help him control his anger which is linked in large part to the escalation of behavior that is displayed in school. (Appellants' Record, p. 34.)

The first Individualized Educational Program for Alex was developed in meetings on 4/21/00 and 4/25/00 (Appellants' Record, pgs. 36 - 41). Two goals were identified for him including:

1. Given anger management techniques, opportunities and reinforcement for usage, Alex will decrease his anger management outbursts to 0.

2. Given verbal and non-verbal prompts for classroom activities and student behavior, Alex will comply with the task or behavior related directions to initiate, change or discontinue a behavior on 90% of opportunities monitored.

A behavioral intervention plan that was largely based around a reward system was designed at this time.

Alex was assigned a one-to-one associate to work with him in the general education classroom at this time. The appropriate use of forms of physical restraint continued to be an issue. In a noted dated April 25, 2000, Sue Cross (guidance counselor) wrote the following to Dr. Werner (the school principal):

Alex was restrained today by Paula Buhr on the playground. Kate (the one-to-one associate) commented to me that Paula shared with her some restraints but that she has no training; as we already know. I'm concerned for Kate's safety. (emphasis added) (Appellees' Record, p. 296)

The record later suggests that further physical aggression occurred as the school year was concluding, in one instance leading to the parent of his one-to-one associate writing a letter to Dr. Werner stating a serious concern regarding the enforcement of a zero tolerance policy related to the physical aggression being shown by Alex (Appellees' Record, p. 318).

Shortly after the initial IEP was generated another meeting was held (5/1/00) at which time it was agreed that Alex would also receive 20 minutes each morning in social skills instruction. According to the record (Appellants' Record, p. 43) this social skills instruction was to address the skill areas of how to follow instructions, how to use body basics, how to gain a teacher's attention, how to use appropriate voice tone, how to accept criticism, and how to accept "no" for an answer. In the notes from this 5/1/00 meeting it was also stated that, "Parents were informed about therapeutic program options outside of the public schools. Orchard Place's Phoenix Day Treatment Program and Des Moines Child Guidance Day Treatment Program were described." (Appellants' Record, p. 44)

The IEP team met again on 5/23/00 and increased his social skills instruction. Notes from this meeting also indicate Alex was making some progress and responding to the point system that had been put in place. Notes from this meeting describing the social skills instruction noted:

Working on accepting "no" for an answer, and accepting consequences. They are doing role-playing, social story-type of activities that involve writing and drawing. Alex has done a good job of participating. Crisis times are less intense now. (Appellants' Record, p. 47).

The records and testimony indicate that Alex had a difficult first grade year. He went from being described as a student whose behavior was not discrepant enough to warrant

special education to a student for whom the school was sharing with his parents possible day treatment options. He attended schools and regular education classrooms in two attendance centers. His parents appeared at different times to be in considerable disagreement with school officials regarding what his needs exactly were. It was also noted in testimony by Mr. P., Alex's father, that Alex was initially diagnosed by a physician as having an Attention Deficity/Hyperactivity Disorder, prescribed medication but that his response to the initial medication was quite negative.

### **2000-2001 School Year**

During the summer of 2000 Alex was evaluated by Dr. Jeannie Sims, a licensed clinical psychologist in West Des Moines, Dr. Sims provided testimony during these proceedings. She completed what appears to be the first test of Alex's individual cognitive abilities and reported that he obtained a verbal IQ of 144 (99.8<sup>th</sup> percentile), a prorated nonverbal IQ of 104 (61<sup>st</sup> percentile), and a Full Scale IQ of 127 (96<sup>th</sup> percentile). (Appellants' Record, p. 54). In her report, which reflected five hours of work with Alex across 7/12/00, 7/19/00 and 8/8/00, Dr. Sims noted that Alex demonstrated some characteristics of children with Asperger's Syndrome, AD/HD, lowlevel aggression and Oppositional Defiant Disorder. In Dr. Sims testimony in these proceedings she indicated that at this time she would be confident in her diagnosis of Alex as having Asperger's Syndrome despite her initial reservations in the Summer of 2000 as to this being his primary diagnosis.

Dr. Sims also made several recommendation for the 2000-2001 school year which included involving an autism consultant in program planning, social skills training, ongoing monitoring of his social skills and carefully planned academic programming in light of Alex's strengths. She also indicated that she did not believe that a BD classroom would be appropriate for Alex. Dr. Sims followed up on her original report with a letter to Frances Budrick, the school psychologist assigned to Westridge Elementary School, outlining several considerations in programming for Alex. Among the recommendations contained in this letter were:

- Providing academic work to address his giftedness and carefully providing challenging work to engage Alex and reduce the behavioral issues.
- Adapting recess to allow for stress reduction.
- Training for Alex's one-to-one associate in working with children with Asperger's Syndrome and giftedness. (Recommendations as paraphrased by ALJ)

Alex returned to Westridge Elementary School for the second grade assigned to the general education second grade classroom with a full-time one-to-one associate assisting with his program. This associate, Mrs. McCall, continues to work with Alex and provided testimony during these proceedings.

In the second grade the behavioral concerns noted in first grade apparently continued. This led to the initiation of a functional behavioral assessment by Ms. Budreck, which will be discussed in greater detail in a subsequent section of this decision.

Alex's IEP team met on three dates in the Fall of 2000 to review and revise his IEP. It should be noted that his parents had submitted quite a few suggestions for consideration by the IEP team (Appellants' Record, pgs. 66-67, 70-72). A multiple page IEP was developed with a crisis intervention plan. The two goals that are the focus on this IEP deal with the areas of responding appropriately and compliance with teacher/adult instructions. There was testimony presented in these proceedings ( Ms. Budrick., for example) that while team members remember receiving the written parental input regarding aspects of Alex's program they were unsure of how such input was considered and uncertain as to how this input was reflected in the final IEP document.

During the latter part of second grade there was the beginning of at least two behavior support plans developed for Alex. One plan focused on the target behavior of "talk outs" (1-12-01) (Appellants' File, p. 86) and a second form of this was started on 5/9/01 (Appellant's File, p. 95) In listening to the testimony present by two of the witnesses called by the LEA and AEA (Ms. Budrick and Dr. Rankin) there seems to be considerable confusion as to whether either of these plans were ever put in place and any data gathered to document the success of either plan.

#### **2001-2002 School Year**

During the summer of 2001 Alex's parents pursued additional evaluations of Alex's areas of needs. This included a vision examination completed by an optometrist (Dr. Triebel) that led to a regimen of developmental vision therapy that was used with Alex during the summer months by his parents. A follow-up vision report was provided by Dr. Triebel in September, 2001 (Appellants' Record, pgs. 123-124) indicating that Alex had successfully completed this vision therapy program. According to Mr. and Mrs. P. this intervention assisted Alex in greatly improving his reading skills as he entered third grade.

Alex began the third grade again being served in the general education classroom with a one-to-one associate. A more elaborate functional behavioral assessment was conducted under the direction of Dr. Rankin from the Area Education Agency. As described in the report from this assessment:

On September 12, 2001 we conducted a functional analysis within a concurrent operant paradigm in an attempt to identify the environmental factors that were maintaining or reinforcing problematic behavior. In other words, we wanted to know whether attention or escape served as the primary reason for Alex's display of problematic behavior. (Appellants' Record, p. 116)



This analysis used very controlled circumstances to assess Alex's responses to conditions such as adult attention vs. no attention and preferred vs. non-preferred activities. This analysis led to the current recommendation of school personnel regarding Alex's program needs and special education placement. This program would be provided within the behavioral disorders or social skills class at Western Hills Elementary School and would provide for a very structured program that would not allow Alex to escape undesirable tasks. At various times during the hearing this program was referred to as compliance training or a Premackian program. Alex's parents testified that they are strongly opposed to such a program and would not allow him to be served in such a program. They cited several questions regarding the appropriateness of the approach overall and their fears regarding unintended outcomes for Alex such as a sense of failure and potential depression.

Alex was evaluated by Dr. Sims again in October, 2001. Dr Sims noted that Alex had made significant gains since her earlier work with him. She also continued to suggest that Alex should be considered for gifted and talented programming.

Mrs. McCall, the one-on-one associate who has worked with Alex since the second grade, noted the progress she believes Alex has made since the second grade. She testified regarding a number of academic and behavioral gains that he has made which are delineated in Appellants' Record pages 145-146. Examples of the specific behavioral gains from the 18 items listed are:

- Beginning work with no prompts or only 1 prompt, many times.
- Blurting out far less frequently.
- Often using the right volume of voice (as opposed to rarely, last year).
- Completing his work, much more often, and within the given time.
- Working on timed-tests, without becoming overly frustrated.
- Doing much better in the lunchroom than last year.
- Doing much better at recess than last year.
- Rarely leaving the classroom without permission.
- Apologizing more sincerely and more readily to fellow students.
- Being able to de-escalate when upset, calming down and quickly becoming willing to discuss an issue rather than just continuing to escalate.
- Walking to Mr. Page's office in a calm manner, when that is the consequence of his actions, rather than threatening and fighting and requiring Mr. Page or Mr. Peterson to come and get him.

A somewhat conflicting appraisal of progress was reported in the testimony of Dr. Meade, Director of Special Education for the West Des Moines School District and Mrs. Vicki Woodward, who up until recently served as Alex's third grade teacher. Both of these witnesses described examples of why they believe that Alex's behavior continues to worsen. They noted examples of disruptive behavior which they believe interferes with the functioning of the third grade classroom, aggressive acts toward Alex's peers and a growing concern, in their opinion, regarding the perceived planfulness of the aggressive behaviors that Alex exhibits toward his peers.

A series of IEP meetings were held in the Fall of 2001 that attempted to revise Alex's IEP. The primary goals proposed in these IEPs deal with compliance and responding appropriately. These goals, as proposed, are:

1. When given implied or stated directions with one or fewer prompts, Alex will comply 85% of the time.
2. When given prior instruction on how to communicate appropriately, Alex will generalize those skills into his daily life by responding appropriately at school with 1 or fewer prompts.

It should be noted that Mr. and Mrs. P. did not agree to this IEP and began their pre-appeal process at this time. The IEP team, with the parents choosing not to participate, met again in February, 2002 to develop an IEP for Alex that included more detail regarding the behavioral plan being proposed by the school staff. Dr. Rankin, a member of the Challenging Behavior team from the Area Education Agency, testified about the details of such a plan and how this plan was designed to implement the findings of the functional behavioral assessment conducted in September, 2001. According to the testimony of Dr. Rankin, she and other members of the team feel that it is a critical time for the behavioral area of compliance to be dealt with for Alex and that any failure to deal with this in a highly controlled setting would not bode well for Alex's future. The parents do not agree with such a picture and believe that serious negative consequences are likely if such a program is implemented.

## II.

### Conclusions of Law

The Appellants in this matter have brought forth two domains of challenge to Alex's special education program and services. First, they assert that the proposed program to serve Alex in the behavioral disorders/social skills program at Western Hills Elementary School with the implementation of the compliance training program is inappropriate, and violates the tenets of least restrictive programming and will, in their opinion, lead to significantly negative outcomes for Alex. Second, they contend that a variety of supports and services, including timely evaluation of needs, have been denied Alex up to this time. We will consider each of these two dimensions separately.

### Proposed Program/Least Restrictive Environment Considerations

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 related federal legislation in the 1970s. The Individuals with Disabilities Act (IDEA) 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 schooling 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 satisfactorily. (CFR 300.550)

The Iowa Rules of Special Education (2000) build on this basic foundation and add the expectation that, “. . . Whenever possible, hindrances to learning and to the normal functioning of eligible individuals within the general school environment shall be overcome by the provision of special aids and services rather than by separate programs for those in need of special education (emphasis added) (Iowa Rules 41.37(2)(b)).

In situations in which the behavior of a child is perceived as impeding his or her learning or that of others the IEP team is expected to consider, if appropriate, positive behavioral interventions, strategies, and supports to address that behavior (Iowa Rules, 2000, 41.67 (4)). In a recent hearing decision in Iowa (Mason City Community School District, 36 IDELR 50) ALJ Susan Etscheidt notes, that while federal statutes and regulations fail to specify the components of behavioral intervention plans (BIPs) necessary for implementing such strategies, an analysis of administrative and judicial decisions would suggest that the following criteria should be examined in reviewing the appropriateness of such plans:

- The BIP must be based on assessment data
- The BIP must be individualized to meet the child's unique needs.
- The BIP must include positive behavior change strategies.
- The BIP must be consistently implemented as planned and its effects monitored.

The Iowa Rules of Special Education (2000) also provide guidance regarding the various considerations that are to be considered related to LRE in the IEP process with an expectation that the team has looked carefully at the accommodations, modifications and adaptations required and why these cannot be delivered in the general education environment. The IEP team is also required to review the supports needed to assist the teacher and others, and the impact of serving the student in the general education classroom for both the student and his or her peers (Iowa Rules, 2000, 41.67 (6)).

This ALJ certainly recognizes that there are limitations in the extent to which a child with disabilities can be served in the general education classroom. In a Texas hearing involving a student with autism, the hearing officer concluded:

While the requirement to accommodate children with disabilities in the regular education program is broad it is not limitless. School districts need not provide every conceivable supplementary aid or service to assist the child. Furthermore, the law does not require regular educators to devote all

or most of their time to one student or to modify the regular education program beyond recognition. If a regular educator must devote all or most of his or her time to one child, he or she is then acting as a special education teacher in a regular education classroom. Moreover, the teacher's attention is drawn from the rest of the class, including possibly other students with disabilities, who also require extra attention. (Houston Independent School District, 1999, 30 IDELR 321).

In these proceedings we have to consider the question of whether the presence of Alex in the general education classroom creates such a changed environment so as to significantly change the climate of the third grade classroom and subsequently impair the learning of his peers in this class (Iowa Rules, 41.67 (6)) and whether the supports provided for Alex have been provided to meet a standard of reasonableness in the school's obligation to provide supplementary aids and services. Several witnesses (Dr. Meade, Mrs Woodward ) testified to the negative impact Alex is having on his classroom peers. Other testimony suggest that the discrepancy between Alex and his peers is actually decreasing (Mrs. McCall ).

The record also contains letters from several parents (Appellees' Record, pgs. 2039-2051) expressing their concerns regarding the impact of Alex on the education of their children. These letters represent parents of students who are current classmates as well as parents of students who were in Alex's class during the first or second grade. Although some of this record indicates correspondence that occurred earlier in the chronology of Alex's education (Appellees' Record pgs. 2039-2042), the majority of these parental concern letters (Appellees' Record pgs. 2043-2051) appear to have been received and added to the record subsequent to the filing of this Appeal. While these proceedings did not shed light on the process that elicited these recent letters, this ALJ is deeply concerned regarding any process that led to the solicitation of such letters. One of the critical components of providing a supportive environment for both Alex and his peers, in this ALJ's opinion, is work toward an inclusive setting in which all students are valued and individualized needs are met while balancing the rights of all learners. Any efforts to solicit letters from parents would seem to work against the development and maintenance of such a supportive environment.

These statements are not meant to minimize the seriousness of dealing with unacceptable physical aggression in the classroom. The provisions of appropriate positive behavioral supports, the ongoing assessment of the success of such supports and the consideration of more intensive alternatives, if indicated, for students with significant behavioral needs must always be among our options in student planning. These concepts are at the core of providing for individualized needs while maintaining safe school environments for all. It is a challenge for all educators to commit themselves to the provision of such environments for all children and to do what can be done to support the parents of all children.

This question of whether Alex is progressing within his current program and services is pivotal in these proceedings. The position taken by the Appellants is complex. On the

one hand they assert that Alex has made significant progress since the first and second grades and thus placement and service delivery in a more restrictive setting would be contraindicated. On the other hand they point to a number of deficiencies across his instructional and support needs which they assert have not been provided for and are standing in the way of Alex's growth and progress. We have heard different interpretations of changes in Alex's behavior this year. According to the testimony of Mrs. McCall he is more prone to verbal aggression rather than lashing out physically when frustrated. On the other hand, this has been described by others (Dr. Meade, for example) as being evidence of more playful aggression.

On the question of supplementary aids and services testimony was presented regarding the menu of accommodations that have been provided to Alex in the general education classroom. Well intentioned and committed professionals have, in this ALJ's opinion, made significant efforts to serve Alex. Personnel from the AEA (specifically Bindy Brown) have provided training specific to issues related to meeting the needs of students with Asperger's Syndrome to the entire faculty at Westridge Elementary. Mrs. McCall also described how Ms. Brown had provided demonstration teaching for several days at the beginning of this school year.

A significant issue in these proceedings is the extent to which an individualized behavioral plan, involving the active participation of Alex's parents, has been put into place for Alex with progress monitoring data gather regarding the effectiveness of such a plan. The U.S. Department of Education (2000) has outlined in their Annual Report to Congress a number of components which are asserted as being necessary components of behavioral support plans including a careful consideration of factors that may be contributing to the behavior of concern, consequences applied for unacceptable behaviors, a specific implementation plan (including crisis intervention plans, if necessary), and program monitoring (U.S. Department of Education, 2000, Applying positive behavioral supports in schools. 22<sup>nd</sup> Annual Report to Congress on the Implementation of the Individuals with Disabilities Act, III-7 – III-31, Washington, D.C.).

What needs to be more carefully reviewed in this situation is the extent to which needed positive behavioral supports have been provided for Alex. This includes a well understood behavioral intervention plan with progress monitoring to demonstrate the success or lack of success of such a program. As stated in Light v. Parkway, 1994, 21 IDELR 933:

Before exercising its equitable authority to remove a disabled child from any placement, a district court shall be satisfied that the school district has made reasonable use of "supplementary aids and services" to control the child's propensity to inflict injury.

Throughout these proceedings there have been numerous references to the extent to which school personnel perceive Alex as exhibiting dangerous behavior. In Light v. Parkway the Eighth Circuit has described potential criteria for

determining the circumstances under which a child can be removed from a current placement because of such perceived dangerousness:

In sum, a school district seeking to remove an assertedly dangerous disabled child from her current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury.

At the crux of the decision to move a child into a more restrictive setting in order to receive his or her special education is the extent to which such reasonable accommodations have been made for such a child in the general education classroom in such a manner as to assure benefit for the student with disabilities while not jeopardizing the educational benefit for his or her peers. Within this latter consideration is embedded the question of whether the accommodations required for the student with disabilities are so extensive as to change to substance of what the general education classroom is. As this ALJ attempts to weigh these factors there is also a recognition of the substantial efforts that have been made by Alex's parents, teachers, support personnel and peers to help him both achieve and have his behavioral needs met.

To be contrasted with the consequences of Alex remaining in the general education classroom are the serious factors associated with placement in a more restrictive setting and the potential negative consequences of an intensive compliance based program such as described in the behavioral plan currently being proposed by school personnel. Working within the basic foundation of set forth by the U.S. Supreme Court (Board of Education of Hendrick Hudson Central School Dist. Westchester Cty. V. Rowley, 458 U.S. 176, 192 (1982)), we are expected to offer a program "reasonably calculated to confer educational benefit". Dr. Rankin testified that Alex's negative behaviors will most likely intensify with the application of this compliance oriented program whether it be done in the general education classroom or in the specialized setting. She did suggest that the dangers of such would, in her opinion, be greater if applied within the general education classroom. When questioned, she affirmed that Alex's negative behaviors could reach the point of requiring physical intervention by the adults implementing such a program. Dr. Rankin was also asked if she were aware of any research on the application of such compliance training with students with Asperger's Syndrome and could not cite such.

In summary, this ALJ is concerned that the compelling reasons to require Alex to be served in the more restrictive setting proposed by school officials have not been established, particularly when compared to potential negative outcomes. It would seem that if Alex requires more intensive interventions that there are other, less restrictive, alternatives that need to be considered. There are some data, particularly as noted by Ms. McCall, that Alex is making progress, both behaviorally and academically. His achievement levels are impressive (Appellants 'Record, p. 162). There are, in this ALJ's opinion, significant concerns which have been brought forth in these proceedings

regarding the proposed compliance training model in the behavioral disorders/social skills classroom. In weighing these factors it would appear that the proof necessary to override the Appellants' concerns has simply not been established.

### **Issue of Appropriateness**

#### **Evaluation/Early Identification Issues**

According to the Appellants' Statement of Issues:

. . . the LEA has failed to fully and fairly evaluate Alexander, including the causes of his problematic behaviors, and that it has also failed to provide the supports and services necessary to an individualized program.  
(p. 24)

It is expected, that among other considerations, that children who are experiencing significant learning and/or behavioral problems in school will have potential special education needs assessed. Within in the Iowa Rules of Special Education (2000), in the section dealing with the Identification Process (Section 41.48(2)), state that "If the referring problem or behaviors of concern are shown to be resistant to general education interventions or if interventions are demonstrated to be effective but require continued and substantial effort that may include the provision of special education and related services, the agency shall then conduct a full and individual initial evaluation." From the record and testimony presented in these proceedings it appears that Alex demonstrated significant behavioral concerns for an extended period of time before a more comprehensive evaluation took place.

The Appellants contend that Alex should have been evaluated at an earlier point in his school experience (Testimony of Mr. P.). This position seems logical and critical in dealing with behaviors that are asserted to be significantly disruptive to the classroom. As stated in a policy memorandum from the U.S. Department of Education (Letter to Williams, 2000, 33 IDELR 249), which dealt specifically with questions posed regarding a child with Asperger's Syndrome:

It is critical for school officials and parents to respond appropriately and promptly to signs of misconduct when they first appear, since doing so could avoid the need for more drastic measures. We are committed to helping schools respond appropriately to a child's behavior, promoting the use of appropriate behavioral interventions, and increasing the likelihood of success in school and school completion for some of our most at-risk students.

During much of Alex's first grade the records and testimony present a real pattern of "mixed messages" regarding the seriousness of his behavioral needs and the effectiveness of the program modifications being attempted. His principal, in the correspondence of November 17, 1999 (Appellants' Record, pgs. 6 & 7) seemed to express a hard line

position of “the discrepancy is not enough” at the same time Alex’s teacher is recording a series of what appear to be serious behavioral incidents. Much of the what appears to be very relevant information in program planning for Alex (assessment of cognitive abilities, issues regarding clinical diagnoses, affirmation of social skills needs, structural planning in areas such as recess) have largely come through the external evaluations that have been sought by the parents apparently after being frustrated with their work with school personnel.

The Iowa Rules of Special Education (2000) permit each Area Education Agency to establish the means by which assessment and evaluation practices are put in place. There is nothing that requires the use of specific diagnostic entities such as autism spectrum disorders or Asperger’s syndrome. This case, however, illustrates, in this ALJ’s opinion, possible problems associated with such an approach. Much of the testimony in these proceedings confirmed the elements of Alex’s behavior that seem to be related to his diagnosis of Asperger’s Syndrome. While it is important to always question the educational relevance of any diagnostic entity, it does appear that an ongoing awareness of the characteristics of students with Asperger’s Syndrome is significantly important in planning for Alex’s educational needs (Auburn School Department, 1998, 102 LRP 7289) Recently the Ninth Circuit (Amanda J. v. Clarke County, 2001, 35 IDELR 65) dealt with a particular situation in which they determined that the recognition of a diagnostic condition such as autism may be required in order for an IEP team to design an appropriate program. Alex is certainly a unique child. It would also seem important to take into account his “giftedness” in planning for his educational program yet the records of IEP meetings seem to give scant attention to this domain.

The Appellants in this matter are also asserting that Alex requires more structured instruction in the area of social skills instruction. Testimony presented does seem to support the need for such services, the provision of such seems to be particularly relevant for students with diagnoses such as Aspergers (Letter to Williams, 2000, 33 IDELR 249).

### **Support or Related Services**

The Appellants in this matter assert that certain other support or related services have not been provided for Alex that should be. The record and testimony reflect different opinions expressed by the occupational therapist and speech and language pathologists evaluating Alex from school versus clinical perspectives. In reviewing these various evaluations there does not seem to be sufficient data to suggest that such services are required in order for Alex to benefit from his education.

The Appellants’ have asserted in these proceedings that Alex demonstrated substantial benefit from the vision therapy program provided by his parents during the Summer of 2001 and are due reimbursement for the costs associated with this evaluation and program. They suggest that this program was needed as a result of the school failing to adequately assess the “tracking” problems Alex was experiencing during his second grade year. The Appellees assert that there is a lack of evidence that Alex required such a program in order to receive benefit from his special education and that it is questionable



if any observed improvements in his reading during his third grade year are, in fact, a result of the developmental vision therapy program provided. By agreement with the Appellants', the Appellees' provided documentation following the hearing regarding Alex's performance in reading across the 2000-20001 and 2001-2002 academic years.

On the question of whether vision therapy can qualify as a related service, the Appellees have not asserted otherwise and this ALJ is inclined to agree that it could qualify as such. As stated in a 1996 decision from Vermont (In Re: Student with a Disability, 24 IDELR 612):

The District repeatedly omitted vision therapy from its IEPs on the grounds that it was a medical service. This was clearly in error, since it was not a service provided by a licensed physician. Furthermore, vision therapy seems to fit in with the type of services listed in the federal register. The proper inquiry should have been whether such services were those required in order to assist student [to] benefit from special education . . . (emphasis added)

It would seem reasonable that a similar inquiry shall be applied in the present case. Controversial or not, the need for vision therapy in order to benefit from his special education has not, in this ALJ's opinion, been established in these proceedings. From the data submitted by the Appellees' and other related records such as Dr. Sims's report from summer of 2000 (Appellants Record, p. 55), IEP document from 5-23-00 (Appellants' Record, p. 46) it would appear that Alex has been making meaningful progress in the reading area over an extended period of time.

### **Behavioral Intervention Plans**

An area that appears to be significantly deficient in meeting the needs of Alex is the lack of a coherent behavioral intervention plan short of the intensive compliance training suggested by the school at this time. This ALJ is concerned that there appears to be much confusion regarding the specificity and outcomes of specific behavioral plans that have been used with Alex up to this point. The record contains an abundance of behavioral report data on a day-to-day basis but a dearth of evidence of the careful analysis of such data and the means by which such data have been tied to progress monitoring, particularly in relationship to specific behavioral intervention plans. It is obvious that Alex requires a carefully crafted and monitored behavioral intervention plan. Based on the U.S Department of Education (2000) document cited above it would seem that such a plan needs to consider a number of elements including attending to antecedents and consequences, providing behavioral supports and carefully monitoring progress. Several witnesses (Ms. Budrick, Dr. Rankin) described the plans that have been used up to this point as "in process", "ever changing" or "works in progress". While this ALJ can appreciate the need for some degree of flexibility, there also comes a point where everyone needs to have a clear understanding of what the behavioral plan is and who has responsibility for what aspects. It would seem that Alex is certainly at such a junction in his school career where such accountability and specificity is necessary. As cited earlier,

the criteria for behavioral intervention plans include the integration and interpretation of data used to construct such plans and the careful monitoring of the implementation of such plans (Mason City Community School District, 2001, 36 IDELR 50). The written behavioral intervention plans that have been used with Alex up to this point, do not, in this ALJ's opinion, meet such a criteria. It should also be noted that the consequences of such a lack of specificity and progress monitoring has, in this ALJ's opinion impacted the appropriateness of Alex's program and goes beyond an issue of methodology. It cuts to the core of all parties to assess what is or is not working with a student whom everyone has agreed is dealing with significant behavioral challenges. This lack of specificity would also likely impact the role that parents can play as meaningful participants in the IEP process.

Another question that seems relevant to these proceedings is the extent to which the functional behavioral assessment applied with Alex was comprehensive enough in exploring all options related to possible causes of this behavior. For example, sensory stimulation avoidance has been suggested as a relevant consideration in situations involving students with Asperger's Syndrome (Poway Unified School District, 200, 34 IDELR 79). Earlier records of aspects of a functional behavioral assessment with Alex (Appellees' Record, pgs. 238 - 242 ) had suggested such functions as the need for a sense of control. It would seem important that a full array of possible functions be examined in relation to Alex. It would also seem important that the extent of contribution of his clinical diagnosis of Asperger's Syndrome and his giftedness need to be considered in both evaluating the functions of his behaviors, the behavioral intervention plan put into place and the individualized educational program deemed appropriate for Alex.

### **Meaningful Parental Participation**

While not listed as separate concern in the Appellants materials, the issue of whether opportunities for meaningful involvement by Alex's parents in his program are throughout the record of these proceedings. The expectation for meaningful parental participation was recently described by the Ninth Circuit:

Not only will parents fight for what is in their child's best interests, but because they observe their children in a multitude of different situations, they have a unique perspective on their child's special needs . . . An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed (Amanda J. v. Clark County, 2001, 35 IDELR 65).

As discussed above, there appears to be a significant schism between the parents and educators regarding the program needs of Alex. Legitimate differences are likely in complex situations such as this. This ALJ is concerned, however, regarding the extent to which the record and testimony does not reflect how the input and suggestions from the parents were integrated within the planning process for Alex. There also appeared to be numerous meetings to discuss the elements of a behavioral intervention program for Alex

that did not include the parents. It would seem that Alex's best interests are better served through closer collaborative work between the family and school.

### **III. Decision**

The Appellants prevail in both of the substantive matters in this case. In the matter of Alex being placed into the specialized behavioral disorders/social skills program, the need for such a program is not supported. Quite simply, the AEA and LEA have not demonstrated that Alex requires this program, that the outcomes of such a program are likely to lead to meaningful benefit or that the proposed benefits outweigh the significant concerns voiced by the parents. Furthermore, the AEA and LEA have not presented data to offset the opinions of other professionals from outside of the school setting who have observed and worked with Alex.

In the matter of the extent to which Alex has received an appropriate program up to this point the Appellants also prevail on the overall issue. There are significant issues regarding the extent to which Alex's special education needs were identified in a timely manner. There is a need to address several deficiencies in his current program. This includes a more intensive look at providing social skills instruction, a need to look at a range of behavioral interventions that seem appropriate for students with Asperger's Syndrome and the need for a carefully constructed behavioral intervention program to be carried out in the general education classroom based on an expansive functional behavioral assessment. There may also be the need to consider other special education programs and services that can be provided for Alex within his current attendance center.

This decision, however, does not support the need for reimbursement of the vision therapy costs associated with Alex. The Appellants' have not established the need for speech and language services or occupational therapy services for Alex. This ALJ is concerned with the need for close monitoring of Alex's fine motor skills as described in these proceedings and while the record has not established, in his opinion, the need for occupational therapy services at this time, that it is important to carefully monitor Alex's progress in this area.

It would seem appropriate to reconvene the IEP team with the above cited considerations in mind. It would also seem appropriate that any newly constructed IEP more carefully incorporate Alex's strengths in designing his needed academic and behavioral accommodations.

Meeting the needs of Alex will continue to be a complex process. This ALJ expressed his appreciation of the productive and positive attitudes demonstrated by the attorneys representing the parties in this Appeal. It is hoped that this will carry forward as you continue to work on meeting Alex's needs. If there is any need to clarify any aspects of this decision the parties are requested to notify the Department of Education and a conference will be convened by this ALJ for this purpose.

Apr. 18, 2002  
Date

CR A. SR  
Carl R. Smith, Ph.D.