BEFORE THE IOWA DEPARTMENT OF EDUCATION

(Cite as 22 D.o.E. App. Dec 313)

In re Bryan B. Bill B., and Janet and James Y., parents Appellants, vs. Iowa Department of Human Services, G&G Living Centers, Inc., Oelwein Community School District, Starmont Community School District, Guttenberg Community School District, Keystone Area Education Agency (AEA 1), and the Iowa Department of Education, Appellees	)	DECISION ON JURISDICTION SE #282

#140

The above entitled matter came on for hearing March 11, 2004, and Larry Bartlett served as Administrate Law Judge (ALJ). The Appellants were represented by Attorneys Curt L. Sytsma of the Legal Center for Special Education, and Mary Jane White. The Iowa Department of Human Services (DHS) was represented by Special Assistant Attorney General Ann Marie Brick, and G&G Living Centers, Inc. (G&G) was represented by Attorney Charles McManigal. Attorneys representing other Appellees were present as observers, but did not participate directly in this proceeding: Assistant Attorney General Christie Scase, on behalf of the Iowa Department of Education (Department), Attorney Ronald Peeler, on behalf of the Oelwein Community School District (Oelwein), and Attorney Mike Shubatt, representing Keystone Area Education Agency (AEA). Other Attorneys of record representing Appellees who were not present at this portion of the proceeding are Ralph A. Smith, representing G&G; Sue L. Seitz, representing the Starmont Community School District (Starmont); and Ann Tompkins and Matt Novak, representing the Guttenberg Community School District (Guttenberg). Subsequent to the March 11 hearing and oral argument, Attorney Judith O'Donohue became involved in briefing on behalf of G&G.

The hearing was held pursuant to Section 256B.6, Iowa Code, Chapter 281-41, Iowa Administrative Code, and Federal Regulations appearing at 34 C.F.R. Part 300. The hearing was closed to the public at the request of Bryan's parents.

By mutual agreement of the Parties, it was determined that the hearing in the above entitled matter would be bifurcated. The portion of the hearing heard on March 11, 2004, addressed the sole legal issue of jurisdiction. The question specifically at issue on March 11 was

whether the DHS and G&G are involved in the provision of special education and related services to Bryan so as to confer jurisdiction upon the Department and this ALJ under the authority of the Individuals With Disability Education Act (IDEA) 42 U.S.C. § 1401 et.seq. The adequacy of the programming provided Bryan at G&G to confer a "free appropriate public education" (FAPE) and other potential issues will be addressed at a subsequent hearing, if necessary.

The March 11 proceeding involved the introduction of well over a thousand pages of documentation and exhibits, brief testimony by two witnesses, and oral argument. The Parties mutually agreed to a briefing schedule: Appellants' brief was to be mailed on or about March 22, Appellees' reply briefs were to be mailed on or about April 15; Appellants' rebuttal brief, if any, was to follow a few days later. The final resolution of this matter had previously been set for April 30. In order to accommodate the briefing schedule and writing of a decision based on a lengthy record, a mutually agreed to continuance was granted until May 14, 2004. On or about April 8, G&G requested, and was granted, an extension on its time for reply briefs until June 1. The stated purpose of the request was to add Attorney Judith O'Donohue to the team writing the reply brief, and to provide additional time for party consideration of reaching an agreement "regarding alternative treatment options for Bryan B."

By mutual agreement of the Parties present at this phase of the due process hearing, the record was to remain open to receive the transcript and exhibits of Iowa Department of Inspections and Appeals (DIA) hearing regarding Bryan occurring in November 2003 with a decision rendered in December of that year. In a telephone conference call on May 17, 2004, the ALJ was advised that the DIA had initiated court proceedings to prohibit the introduction of the November 2003 transcript into the record of this proceeding. That DIA hearing record has not been received by this ALJ and is not currently part of the record.

On April 30, 2004, DHS filed a motion to dismiss the above entitled matter and its brief in support of the motion. On or about May 3, G&G filed its brief, along with a motion to dismiss, or in the alternative, a motion for summary judgment and dissolution of the stay put order issued on March 11. In addition, G&G submitted additional exhibits through affidavit.

On May 4, 2004, the Appellants filed a request to clarify the status of the record and to set a date for submission of their reply brief. A telephone conference call was held on May 17 to discuss these issues. It was determined by mutual agreement, as documented in a May 19 order, that Appellants' period to file a reply brief was extended to on or about May 24, the affidavit and materials filed by G&G on or about May 3 were largely duplicative of the record and would not be entered into the record, that resolution of the above entitled matter will continue in the absence of the DIA transcript of its November 2003 hearing regarding Bryan B., and at the initial request of the ALJ, the above entitled matter be continued until June 4, 2004.

Special Note on "stay put." From the date of first filing in November 2003 through the hearing on March 11, the Appellees have continuously requested that the "stay put" provision of the IDEA be applied to their filing of a request for this due process hearing. That provision,

found in 20 U.S.C. § 1415(j) is implemented through 34 C.F.R. § 300.514. That section of the federal regulations provides that "during the pendency of any administrative or judicial proceeding" regarding a request for due process hearing, unless the provider of special education and the parents for the child agree otherwise, "the child involved in the complaint [due process hearing] must remain in his or her current educational placement."

The urgency of the "stay put" issue on March 11 resulted from a formal notice having been provided Bryan's parents by G&G on March 10 that Bryan B. would be involuntarily discharged from its program the next day, March 12. Bryan's parents were instructed to cooperate in transferring Bryan to the Woodward State Hospital or one of two out-of-state residential facilities or come to the G&G home site on that date and remove him from the premises.

The undersigned ALJ invoked the "stay put" or "status quo" provision of 20 U.S.C. § 1415(j) at hearing for the following reasons:

a. Attorneys for the Appellants raised credible, but legally complex issues regarding the potential coverage of some of Bryan's G&G programming and services as "special education and related services" under the IDEA.

b. Neither the record nor oral arguments before the ALJ on March 11 established clearly that neither the Department nor the ALJ had IDEA jurisdiction over some or all of the educational and training components of Bryan B.'s program and services at G&G. Residential care and custody services provided by G&G were not directly at issue.

c. A change of the educational program provided by Guttenberg would most certainly come about with an involuntary termination of G&G services to Bryan. Whether both the Guttenberg and G&G educational programming, training and services are covered by the provisions of the IDEA, or even whether they are servable had not yet been determined.

d. Planning for an educational program and service change for Bryan, as would be anticipated by G&G's involuntary discharge on March 12, do not appear from this limited record to have been adequate under the IDEA, if the IDEA provisions apply to G&G's actions. G&G has made initial inquiries of general availability of services to fit Bryan's needs with three potential alternative placements, one in-state and two out-of-state. All three proposed alternative programs are distinctly different in terms of educational programming, philosophy, and delivery of services than those in place at G&G and Guttenberg. At the time of ruling on March 11, there was no indication of a planned continued implementation of Guttenberg's "special education and services" program or a similar new appropriate program at any of the three proposed sites. Neither the Guttenberg individualized education program (IEP) team nor the G&G individual habilitation plan (IHP) team appear to have determined the appropriateness of the proposed change of Bryan to any other program site. None of the three proposed alternative sites for Bryan's placement have yet formally determined the appropriateness

of their programs or placement for Bryan. Two of the proposed sites might deprive Bryan of any opportunity for educational programming with nondisabled peers.

Findings of Fact

The ALJ finds that he and the Department have jurisdiction over the parties and subject matter involved in this proceeding for the purpose of determination of jurisdiction from a factual context.

For the purposes of this ruling, documents referred to by the Parties in oral and written arguments, in addition to several hundred other pages of documentation in the record, have been reviewed by this ALJ.

The following description of the facts is for the sole purpose of determining the question of jurisdiction based on the current record. Should this matter involve additional evidentiary proceedings, these findings of fact may of necessity need to be revised accordingly.

Bryan was born on November 2, 1987, and is currently sixteen years of age. It was noted at birth that Bryan was born with Down syndrome, and about two weeks later Keystone was notified of his potential need for educational services. About five weeks after birth, Bryan began to receive educational services from Keystone and Oelwein. Through subsequent assessments it was determined that Bryan was severely mentally disabled, ADHD, exhibited autistic tendencies, experienced a hearing loss, experienced speech patterns which were intelligible to the average listener less than 15% of the time, exhibited aggressive and noncompliant behavior, and experienced stereotypical body movements with self-injurious behavior. On adaptive behavior assessments, Bryan was determined to be in the "severe" range. Medications have been a regular and constant part of his life.

Throughout most of his life, adults have noted and attempted to resolve Bryan's problem behaviors. There are many references in the record to his aggressive behaviors (kicking, pushing, spitting, and biting) being related to his lack of communication skills and his efforts to gain adult or peer attention or to "terminate demands" placed upon him by others (escape). Behavioral and social educational goals have been omnipresent throughout his educational experiences, as have early reports of ineffective efforts to modify his behavior.

At five years of age, Bryan spent two weeks at the University of Iowa Hospitals School Division of Developmental Disabilities with a major emphasis on identifying the causes of his continued behavior problems, the development of a behavior management plan, and the development and delivery of consultation and training for Bryan's parents and local educational staff working with Bryan. The seven page detailed report dated September 28, 1993, provided specific recommendations and strategies to improve Bryan's behavior.

Item nine of the 1993 recommendations highlighted the importance of consistent behavioral expectations and strategies "across all of his environments." At that time those

environments included home, school, and daycare. Numerous subsequent reports and recommendations regarding Bryan's behavior have emphasized the importance of consistent behavioral expectations and strategies across environments, whatever they were at the time.

A year later, Bryan underwent another inpatient education evaluation at the University of Iowa Hospitals, this time for about a month in the Department of Educational Services of the Child Psychiatry Services. The result was a 23 page report outlining in detail Bryan's strengths and areas of concern. Again, the focus of Bryan's behavioral concerns was his inappropriate aggressive and noncompliant behavior believed to be his attempts to communicate his needs and wants. Page four of that report recommended the following: "view all behavior as having communicative intent. Try to determine what Bryan is attempting to communicate when he has a tantrum or is aggressive. Teach him alternative, socially acceptable methods of getting what he wants" (emphasis in original). Specific and detailed strategy recommendations were provided. The report acknowledged that Bryan "is a challenging little boy in terms of planning and implementing positive management strategies." Like the 1993 report, the second one also emphasized the need for "consistency between all of the people who work with him and support for one another will be critically important to the success of any strategy used" (emphasis added). The 1994 report strongly recommended that the parents and school staff work closely together and support one another as they worked on Bryan's behavior problems. The report concluded with a commitment from the Clinic to provide consultation in the home and at school.

In the fall of 1994, Bryan's school IEP incorporated many of the recommendations of the University Hospital School staff. In November 1994 Bryan and his parents were approved for state Medicaid Services. Bryan's parents fully and actively participated in his educational and medical programming, planning, and implementation.

Christmas of 1994 was the last holiday together for Bryan and his family. Bryan's parents' marriage was dissolving, and the previous structure of the home was no longer available. As a result, Bryan was placed in an intermediate care facility for the mentally retarded (ICF/MR) residential placement under contract with DHS. Bryan continued to attend public school, but in the community where his ICF/MR was located. Bryan's parents' divorce became final in the fall of 1995. Both parents have remained active in planning and programming for Bryan's education and life style. They alternate weekends for visitations with Bryan and the record indicates their visits are therapeutic and beneficial for Bryan. Bryan's step-father, Jim Y., participates regularly in planning programming for Bryan in both the public school and current ICF/MR residential arenas. Both natural parents have regularly and actively advocated for Bryan since their divorce. Both were present at the hearing on March 11.

The Residential Care Facility Perspective

The first ICF/MR placement facility for Bryan conducted a meeting to discuss Bryan's adjustment to his residential placement a month after his admission. Bryan's noncompliant, aggressive, and self-injurious behaviors were addressed in detail. He was not apparently involved in any behavior treatment program in the ICF/MR environment at that time, but modified

behavior was an expressed goal on his residential "Individual Program Plan" (IPP). The February 9, 1995, ICF/MR staffing report included a two page, nineteen item "School Priority Needs List." The record is not clear who was involved in the development of that list, or what role, if any, the local school district had in the development of that list. The report identified traditional school activities such as "recess" and "specials" but is clearly part of the ICF/MR February 9 thirty-day review. Nearly one hundred percent of the listed goals in that document are of the type that might normally appear under an IDEA developed IEP. The report concluded that his "school placement" should be continued (combined record, pp 181-82 and p. 191). Neither the first ICF/MR placement or the school district in which it was located are parties to this proceeding.

During the next five years, the first ICF/MR placement continued to be involved to some degree in Bryan's education and training, as well as his residential care. The record indicates a continued working relationship between the ICF/MR residential placement and the local school district. Both appear to have continued to work on Bryan's behavior needs and educational goals. For example, Bryan's IPP at the ICF/MR conducted in February 1997, contains a 15 item "School Priority Needs List," dated November 1, 1996. Many items of an "educational" nature are included throughout the document (combined record, pp. 339 and those surrounding). An employee of the residential care facility attended and participated in the school's IEP planning meetings. It is not clear from the record whether school staff members were directly involved in planning at Bryan's residential care facility.

In September and October 1997, a Biobehavioral Service Consultation was conducted at the University of Iowa Hospital School focusing on Bryan's behavioral concerns. Detailed recommendations were provided in a six page report. That report again stressed the importance of "the structure and consistency of [behavior] management across care providers," including his group home setting. The ICF/MR care provider indicated in an October 15 letter to Bryan's mother that the University of Iowa recommendations "seem to be helping some" (combined record, p. 385).

A few months later Bryan underwent evaluation at Woodward State Hospital School. The school district and area education agency of Bryan's residence, at that time, participated in the evaluation process. Special attention was given Bryan's behavior needs. As a result, a new IEP was developed for Bryan by the school district and area education agency with two ICF/MR residential care setting staff members in attendance. Four months later, in April 1998, the residential care facility conducted an individual program review for Bryan with Bryan's school district special education teacher participating. The planning report notes that Bryan's noncompliance and aggressive episodes had increased, and adjustments in his behavior modification program were made. While in the residential care facility, specialists in speech, occupational, and physical therapy, and behavior strategies were involved in program planning and review. In the summer of 1998, Bryan was provided an extended school year (ESY) program under an IEP. The school's teacher involved in the ESY program had been on Bryan's residential care program planning committee.

In a letter dated May 19, 2000, an attorney for the first ICF/MR placement notified Bryan's parents that the ICF/MR would either voluntarily or involuntarily dismiss Bryan from their services. The reason given by the ICF/MR was the perceived dissatisfaction of Bryan's parents with the ICF/MR and an atmosphere of existing distrust. Bryan's parents explored a number of existing ICF/MR facilities in the state and identified G&G living centers near their respective residences as a potential new ICF/MR placement for Bryan.

G&G was founded in 1992 as a residential provider for individuals with mental retardation. There are currently six G&G homes that are community based and licensed as ICF/MRs. Each home has approximately six residents and fifteen support staff plus one program manager to provide round-the-clock care and supervision for residents. There are no licensed teacher employees of G&G, and G&G does not received direction or supervision from the Department. Each ICF/MR home is individually licensed by the DIA, and the DIA conducts regular "surveys" (audits) of compliance with Medicaid regulations.

The G&G staff conducted a pre-admission assessment of Bryan on November 22, 2000, with seven staff members participating. All Bryan's strengths and needs were considered, including behavior and aggression. The team indicated that he would attend school full-time. The team recommendation read "After review of current .... D&E, the Preadmission Evaluation staffing Team feels the resident's needs can be adequately met by placement at G&G's Group Home." The anticipated home was Westside-H3 (Exhibit A, p. 90). Notes of staff members clearly indicate an acknowledgment and acceptance of responsibility for Bryan's behavior needs from the beginning: "will be programming for aggressive behaviors upon admission" (Exhibit A, p. 99). Intake information considered by the team included a history of 172 to 412 noncompliance incidents, 28 to 206 aggressions, and 17 to 82 disruptions at meals per month during the preceding eleven months. A G&G psychologist's report available and used by G&G staff at acceptance recommended that Bryan's medications be monitored, Bryan be taught appropriate forms of greeting others, that staff be instructed to maintain correct social distances, and that staff provide Bryan with training to improve his communication so that his needs could be better expressed and his behavior improved (Exhibit A, p. 105).

On November 27, 2000, Bryan was formally admitted to G&G. From that date to the current time, DHS monthly payments to G&G for Bryan's care have averaged more than $7,500.00. DHS administers the Medicaid program for the state of Iowa. Medicaid is a joint cost sharing program of the federal and state government designed to provide medical services to indigent persons, including those to the mentally retarded residency in intermediate care facilities. Federal funding contributions are contingent upon compliance with federal statutory provisions. See 42 CFR § 483.410, .420, .430, .440. DHS enters into contracts with ICF/MR facilities to comply with the Medicaid program for eligible clients in the facility.

The Individual Habilitation Plan (IHP) developed by G&G staff and Bryan's parents on December 22, 2000, included behavior goals related to aggressions, behaviors during transportation, noncompliance behaviors, inappropriate sexual touching, and acquisition of

laundry, cutting food, tying shoes, and leisure skills. The plan concluded that Bryan would continue schooling (apparently in the local school district) on a full-time basis.

State agency investigations of ICF/MR facilities conducted by the Department of Inspections of Appeals, sometimes called "surveys," result in "report cards" for those facilities. They are placed on the DHS website and are available for public review. Copies of report cards for G&G's Westside facility where Bryan was first placed established a history of clients leaving the residential facility without escort or permission ("elopement") at least as early as May 2000, before Bryan was placed there, and continuing during Bryan's residence there.

A "report card" survey form dated May 17, 2001, indicated that a Guttenberg teacher serving Bryan had complained to DIA that G&G did not "routinely invite school staff to meetings held relevant to [Bryan]," including an IHP meeting on March 6, 2001. The DIA Corrective Action form dated July 1, 2001, indicated that school staff will be invited "to all IHPs involving the student" (Bryan).

A 28 page "report card" survey completed on May 30, 2002, identified seventeen deficiencies related to G&G clients abusing each other at Westside. The report was highly critical of G&G staff for not following Bryan's behavior management plan, using unauthorized force against Bryan, which "only make things worse," and not providing adequate supervision of Bryan. Bryan was one of three clients in the six client residence with formal plans to reduce aggression. Bryan was the victim of assaults by other clients and perhaps staff on a number of occasions. Numerous episodes of client elopement from the facility were noted in detail in the May 30 document. G&G was expressly cited for not providing Bryan a behavior management plan which specified replacement of inappropriate behaviors with appropriate behaviors. G&G's plan "lacked a teaching component designed to teach [Bryan] appropriate, alternative behaviors to achieve the [client's] purpose of the inappropriate behaviors..."(Exhibit B, pp. 64-65). Several other staff actions were noted as not being in compliance with Bryan's behavior plan, including the use of inappropriate invasion of Bryan's "space" which exasperated Bryan's aggressive behaviors. Assurances of compliance by G&G, dated August 24, 2002, provided that G&G staff would review client behavior plans for "positive/teaching aspect and reduction plan" twice a year, and training for all staff on clients' behavior plans. All behavior plans were to be reviewed "to ensure that a teaching component will be included" (Exhibit B, p. 89).

DIA "report cards" prior to July 2002 had cited G&G for inadequate supervision of clients and frequent elopement of clients, including Bryan. After May 12, 2002, Bryan was assigned one-on-one staff supervision. Even so, Bryan again left the facility without permission or supervision on July 11, 2002. His first attempt at leaving the facility was discovered and he was sent to his room. Approximately ten minutes later G&G staff realized Bryan was absent from the facility. Bryan went to a neighborhood home and climbed behind the steering wheel and started two vehicles. He drove one of the vehicles through the rear of a garage. Records indicated that Bryan had previously left the residence unattended six times in the previous two months and no program plan had been created to teach Bryan alternatives. G&G was fined $2,500 for the July 11 elopement incident. After these events G&G developed programs to teach Bryan skills to

meet his goals, including reducing negative behavior and replacing it with positive behavior (Swears testimony in DIA transcript of 8-12-02, p. 20). These incidents of July 2002 were considered a "defining event" by G&G in its first decision to discharge Bryan (Id., p. 16).

On July 10, 2002, Bryan was seen as an outpatient at The University of Iowa Hospital School. The July 23 report of the visit indicated Bryan's behavior episodes had decreased to 100 per week, about half what he had experienced when first arriving at G&G. His behavior episodes were noted to be only about 20 per week when he was supervised one-on-one. Some of the improvement in behavior was credited, by the report, to yet another change in Bryan's medications. The report recommended that Bryan be provided functional communication training (FCI) in order to provide Bryan with "appropriate communication to gain access to attention and replace problem behavior." The report recommended using FCI at the residential facility 2 to 3 times each day for 20 minutes each time and to incorporate reinforcement throughout the day. A detailed description of the appropriate implementation of FCI was provided in the report.

In a legally required notice (of approximately July 17, 2002, one or two days after being cited by the DIA) G&G notified Bryan's parents of an "Emergency Involuntary Discharge or Transfer." The notice stated that G&G was no longer able to provide Bryan with residential services due to his behavior which threatened the safety of other residents and staff. The effective date of discharge was to be August 17, 2002. Neither Bryan or his parents participated in the July 17 decision to discharge Bryan from G&G. This point is interesting due to the fact that DHS interpretive regulations appearing at 481-64 I.A.C. provide at §483.440(b)(4)(i) that "The family and the individual should be involved in any decision to move an individual, since this decision generally, should be part of a team process that includes that individual or guardian." Bryan's parents claimed that with "proper training, support, and assistance," Bryan would benefit from his stay with G&G and would not be a danger to himself or others. Bryan's parents filed an appeal with the Iowa Department of Inspections and Appeals (DIA). The discharge or transfer was clearly related to Bryan's July 11 elopement from supervision, the theft of a neighbor's vehicle, and driving the vehicle through the back of a garage. The Chief Executive Officer (CEO) of G&G testified that the DIA had threatened G&G with closure of that house and revocation of its license if Bryan was not relocated.

The DIA hearing was held via telephone conference call on August 12, 2002. The proposed decision of the hearing officer dated August 20, 2002, upheld G&G's decision to involuntarily transfer Bryan to another facility. G&G involuntarily transferred Bryan to another of its own residential care facilities in a neighboring community on a temporary basis. Bryan's parents requested and obtained a review of the hearing officer's decision.

G&G developed an Individual Habilitation Plan (IHP) for Bryan on September 10, 2002. Bryan's special education teacher from Guttenberg participated. Two different documents are in the record, dated September 10, 2002 called "Individual Implementation Procedures" (combined record, pp. 1065 and 1067). They are similar, but not identical. They both provide for positive "teaching" approaches and strategies for behavior management at the G&G facility. These documents tend to support the implementation of an educational behavior philosophy assured by

G&G in a written statement to the DIA to decrease the number of citations G&G received from DIA (Ex. B, pp. 76-93), including its previous failure to develop and implement "teaching" components designed to teach Bryan alternative appropriate behavior (Ex. B, pp. 64-66). Five behavioral goals and subgoals along with three or four educationally related goals regarding domestic skills, leisure skills, and increasing independence skills were included. On October 3, 2002 Guttenberg held an IEP meeting regarding Bryan. It was attended by a G&G staff member. The behavior goal on the IEP provided that Bryan was to reduce his then current "five" acts of aggression (hitting, scratching) at school per week to no more than one per week in the next calendar year. The school was apparently having greater success at modifying Bryan's behavior than G&G was experiencing. It is not clear from the record that G&G had implemented any of the previous medical recommendations as the school had done.

A document dated October 16, 2002, is a G&G document developed by G&G staff in the presence of Bryan's high school special education teacher (combined record, p. 787). It addressed behavior in the school setting and provides a behavior modification plan for school only.

On November 11, 2002, Bryan eloped from the residential facility, eluded G&G staff and again attempted to start two vehicles belonging to a neighborhood resident. Bryan was "pulled" from the vehicles after being able to start both. As a result G&G developed an elopement prevention plan for Bryan.

On November 22, 2002, a review of the DIA hearing requested by Bryan's parents was completed and the previous ruling affirmed. A second request for rehiring was denied. A petition for judicial review was filed by Bryan's parents in the District Court in Polk County.

On April 18, 2003, a Polk County District Court Judge issued a stay in several DIA actions involving the involuntary discharge of Bryan from G&G. The Stay Order directed Bryan's mother and G&G to continue seeking an alternative residential placement for Bryan. The ruling concluded with an order directed to G&G to "fully cooperate and participate in Bryan's care ... including cooperation and attendance in school planning sessions and providing information to his parents in a timely manner."

G&G incident reports for March 4 through May 8, 2003, indicate what appears to be significantly reduced behavior problems for Bryan (combined record, pp. 928 and 928A). Perhaps the programming, medications, or one-on-one aide were working. Only 20 reported incidents involving Bryan were noted by G&G and half of those were in the early morning hours.

A G&G letter to parents dated April 22, 2003, indicated that an institutional management restructuring at G&G was being implemented. A new Director and several new staff members were later hired.

On July 3, 2003, the District Court for Polk County reversed the DIA decision upholding G&G's involuntary dismissal regarding Bryan and remanded the matter to DIA to correct

deficiencies in its previous ruling and to review subsequent developments in Bryan's improved behavior.

A second notice of intent from G&G dated September 12, 2003, to involuntarily discharge Bryan due to behavior which threatens him, other residents, and staff was received by Bryan's parents. The planned effective date of discharge was October 12, 2003. The discharge was appealed to DIA. A hearing set for September 26 was rescheduled to November 24-26.

Due to G&G staff concerns that behavior issues were escalating, on September 11, 2003 an evaluation was conducted of Bryan at Mayo Clinic in Rochester, Minnesota. G&G had told Mayo staff that previous recommendations for dealing with Bryan's behavior had not been followed due to need to have him supervised one-on-one for safety reasons. This ALJ doesn't understand why that person supervising Bryan one-on-one would not be able to implement the behavior plan.

A detailed behavior plan was developed by Keystone and Guttenberg staff on October 2, 2003, for use by Bryan's school, which incorporated G&G's school behavior plan from a year earlier (combined record, pp. 1124 and 1125).

The DIA issued a decision upholding of G&G's second discharge of Bryan on December 19, 2003. The Hearing Officer noted that the school district had experienced improved behavior, but that Bryan's behavior documented at G&G had not improved. That DIA decision was appealed for review and a request for continued stay was made on December 26, 2003.

A "report card" from DIA dated September 18, 2003, cited G&G staff for failing to implement a client's (not Bryan) "specialized teaching schedule/program(TEACCH) during all waking hours" (Exhibit B, p. 133). The Corrected Action document filed by G&G indicated that G&G revised the TEACCH program for administration four times per day, but at shorter intervals (Exhibit B, p. 142).

Several times in the record, brief discussions and considerations of alternative residential care replacements for Bryan are evident. It does not appear, however, that a serious and coordinated effort at planning a change in location of Bryan's residential care ever occurred. There are inconsistent and indeterminate statements in the record as to what was available at the three alternate sites considered for Bryan. One or more sites may have required that Bryan's parents forfeit their parental rights in order to secure his placement at those sites. Funding, length of stay, available services, including education and related services, and vacancy are not explained in the record. If there is any planned and organized approach to aligning Bryan's needs to the services offered at the three sites, they do not appear in the record. The situation appears to be one of disregard of the interests of Bryan and/or his parents in seeking an alternative site to meet his needs.

The School District Perspective

Bryan's school behaviors were inconsistent over time, but apparently the schools working with Bryan during school hours experienced a better long-term response to their efforts than the three ICF/MR facilities serving Bryan, the latter two managed by G&G.

School district records at Bryan's first residential placement exhibited concern over escalating behavior problems, and the school conducted a functional behavioral assessment and as a result, implemented a behavior intervention plan. The behaviors of concern (aggression) included pulling hair, kicking, slapping, pinching, spitting and biting. Some time later, Bryan was assigned a one-on-one aide at school to assist in controlling his in-school behaviors. By November 2000 the school district considered his behavior "greatly improved" (combined record, p. 582). Documentation indicates the existence of an ongoing and continuing communication between the school district and the ICF/MR residential care provider.

In November 2000, when Bryan was voluntarily transferred to G&G, he changed school districts to the Garnavillo Community School District and area education agencies to the Keystone AEA. All service agencies, school and residential, prepared for Bryan's transition. In preparation for the development of Bryan's individual habilitation program (IHP), a Keystone staff member requested input from Bryan's mother. The input was sought to identify therapeutic interventions for working with Bryan so that they "will then be taught to G&G so appropriate programming can be implemented" (combined record, p. 610). The communication was copied to G&G. A G&G representative attended a school IEP meeting on February 4, 2001, and another G&G representative attended a meeting on February 23 to consider an extended school year program for Bryan (combined record, p. 612). The Record indicates Bryan's behavior at school improved for a time in the spring of 2001; as did his academic progress.

In regular communications between parents and school, lack of consistent approaches to behavior between the school and G&G were identified. The School identified Bryan as having a "rough week for the first time in February 2002" (combined record, p. 687). March was apparently better.

Representation from G&G was invited to an extended school year meeting on March 27, 2002. The Record does not identify attendees at the meeting.

In a letter dated February 24, 2003, Bryan's parents, through their Attorneys, requested "Extended day and extended week support services" of a one-on-one behavioral aide to be funded by "Medicaid drawdowns of up to $40,000.00 per year. The letter suggested that all staff at G&G working with Bryan be invited. This "extended day and extended week" services request appears to be the Appellants' effort to obtain support for G&G staff in their supervision of Bryan. That IEP meeting was scheduled for March 21. On the same day of the request, Bryan's parents' Attorneys requested that DIA grant a stay in its ruling allowing G&G to terminate its services to Bryan. Bryan's parents turned down an unspecified offered placement and were told

by G&G that Bryan had to be picked up by them on or before March 14, 2003. A temporary stay in its decision was rendered by DIA on March 21, 2003.

On March 21, 2003, an IEP meeting was held to discuss extended school day and extended school week services for Bryan. G&G staff were invited but did not attend. A subsequent meeting was held on April 16, 2003. Two G&G staff members attended but left the meeting early after they disclosed that G&G would not accept a school funded one-on-one aide to assist Bryan during, before and after regular school hours at the G&G site. In a refusal notice to parents dated April 21, Keystone indicated that a one-to-one behavioral aide to assist Bryan during waking hours, but out of school hours, was not necessary to provide Bryan with a free appropriate public education (FAPE). The notice stated that G&G staff had acknowledged that G&G had been providing Bryan with one-on-one assistance in the residential setting. It stated further that the school provides efforts "to ensure consistent application of behavioral principles across environments (e.g., nonviolent crisis intervention training provided by G&G for school staff, frequent telephone and written contact between school personnel and G&G staff)." The notice acknowledged that a school social worker was involved in providing "a connection between school and the current residential setting to assist/maintain consistencies in behavior plans and interventions between the two entities."

Bryan's parents requested a "preappeal" mediation conference provided by the Department to mediate Guttenberg and Keystone's refusal to provide extended day and weekend aide services to Bryan. A preappeal mediation conference was scheduled for June 17, 2003. G&G staff refused to attend, and persons attending requested a continuance.

An FBA was conducted by the Guttenberg and Keystone staff regarding Bryan's aggressions at school in preparation for an October 2, 2003, IEP meeting. It was noted that Bryan's behavior was "more positive than last year." Three G&G staff members did attend that IEP meeting.

Documentation of the Annual Report of Goals for the October 2 meeting indicated that Bryan had met his aggression goal of "no more than one act of aggression per week." Incorporated into the IEP at that meeting were the school objectives for Bryan developed by G&G (combined record, p. 1124). The new annual goal for Bryan at school was to have no more than two aggressions per month by October 2, 2004, a reduction of half over the previous year.

At all times relevant here, the Oelwein school district assumed financial responsibility for Bryan's school provided education programs. The Mason City Community School District, the Garnavillo Community School District, and Guttenberg provided Bryan school based educational programming under IEPs through annual contracts with Oelwein.

When the undersigned ALJ asked the chief executive officer (CEO) of G&G at hearing whether G&G has considered any "current educational approaches" to change Bryan's behaviors, such as the schools had implemented, rather that use of the physical, mechanical or medical approaches used by G&G in the past he responded in a telling manner:

"...but in my personal opinion is there is not a direct benefit because it doesn't address specifically the safety and security issues head-on, and that's the paramount issue with us now" (trans. pp. 158-159).

While this response indicated clear and correct attention to the immediate safety and welfare of others in Bryan's vicinity, his response did not reflect any understanding of long-term benefits of appropriate educational approaches, such as functional behavioral assessments, cognitive behavioral therapy, and positive behavioral interventions.

The G&G ICF/MR manager and qualified mental retardation professional (QMRP) for Bryan testified, as did the CEO, that in her experience the IEP and special education were clearly related to schools and specific academic skills "such as counting." Active treatment plans were considered broader based in aiding a client in the gaining and maintaining of life skills, such as personal hygiene, dressing, washing, brushing teeth, fixing meals, leisure skills, self help skills, and communication. The IEP is related to happenings within the school days. The active treatment plan would involve what happens outside the school day. She indicated that coordination of the two would be in the client/student's best interest.

The current ICF/MR manager testified that G&G is currently working with Bryan on learning alternative and more appropriate behaviors, including communication skills, a safety program that includes social story preview process, sorting skills for laundry, and leisure activity choice making. She stressed the need for a "coordinated" behavior program during waking hours.

Conclusions of Law

The factual and contextual background of this situation is complex. Perhaps, for that reason, more of the detail has been included here than was necessary. The legal issues present here are deceptively straight forward. They are in reality also exceedingly complex.

The primary issue to be resolved in this bifurcated portion of the hearing is whether portions of the services provided by G&G to Bryan B., pursuant to a contract for Medicaid services with DHS, constitute "special education and related services" under the IDEA. If the answer is that portions of Bryan's active treatment plan do constitute IDEA services or programs, the Appellants can continue on in this proceeding to challenge the plan components and implementation of the plans developed under Medicaid regulations. If the Medicaid law under which those plans were developed is a totally and distinct authority from the IDEA, the Department and this ALJ have no legal authority to be the conduit which allows the Appellants an opportunity to challenge the Medicaid originated plans.

The Appellants argue correctly that the IDEA purview over education programs and services provided persons with disabilities between the ages of three and twenty-one is broad. As 42 U.S.C. § 1412 (a)(11)(A)(ii) provides, the Department and state officials must assure the federal government that IDEA Part B requirements are met and:

> all educational programs for children with disabilities in the state, including all such programs administered by any state or local agency – (I) are under the general supervision of individuals in the state who are responsible for educational programs for children with disabilities; . . . (emphasis added)

This statutory requirement is clarified in rules found at 34 C.F.R. § 300.2 and § 300.600. The rule found at § 300.2(c) is especially relevant here:

> (c) Private schools and facilities. Each public agency is responsible for ensuring that the rights and protections under Part B of the Act are given to children with disabilities – (1) Referred to or placed in private schools and facilities by that public agency; . . . (emphasis added)

Rule § 300.22 defines "public agency" in part as ". . . any other political subdivisions of the State that are responsible for providing education to children with disabilities."

It is clear to this ALJ that some, but far from all, of the activities and services carried out by DHS in the state may fall under the scope of these cited federal statutes and regulations. The undersigned ALJ undertook an extensive review of the legislative history and case law in 1999 in In re Richard U., [30 IDELR 326, 332-334 (SEA Iowa, 1999)], and again in 2000 in In re Iowa Department of Human Services [33 IDELR 260, 967 (SEA Iowa, 2000)]. The inescapable conclusion of the review was that state agencies, such as corrections, boards of regents, mental health, and human and social services are subject to the jurisdiction of the IDEA when they provide education programs and services to children with disabilities. E.g., Kerr Center Parents Assoc. v. Charles, 842 F. 2d 1052, 1061 (9th Cir. 1988). Unlike schools, however, the education of children by these state agencies is not usually the primary function the agencies attempt to provide children in their care. It is a function merely incidental to other provided services, such as care and custody and medical and mental health treatment. Yet, the Governor of this state and other state officials have assured the federal government, through required state plans, submitted to and approved by the federal government, that all children with disabilities receiving education in the state, directly or indirectly as a result or responsibility of actions by governmental entities will be provided special education and related services in a manner mandated by the IDEA. To the extent that children with disabilities are provided services not falling within the meaning of special education and related services under the authority of governmental agencies, the agencies are not subject to IDEA authority and responsibility.

DHS here again argues that its programs are not subject to the jurisdiction of the IDEA. It argues that the IDEA and Iowa statutes establish a single line of authority and responsibility for monitoring IDEA provisions solely in the Department. That is exactly what this ALJ has repeatedly determined. In order to assure that the education of all children with disabilities under the direct and indirect purview of governmental agencies is covered, the IDEA and state law require that the Department exercise jurisdiction over all those programs including those provided by DHS. To do otherwise would result in exactly the type of disjointed responsibility for provision of programs and services that the IDEA seeks to prevent.

DHS argues that the case law is unanimous on the point that only state and local education agencies are proper parties to disputes arising under the IDEA. This argument ignores the long line of cases to the contrary discussed at length in the 1999 and 2000 decisions. Eg. Petties v. District of Columbia, 894 F. supp. 465 (D.D.C. 1995); King v. Pine Plains Central Sch. Dist., 918 F. supp. 772 (S.D. N.Y.); Mrs. C. v. Wheaton, 916 F 2d 69 (2nd Cir. 1990); Kerr Center Parents Assoc. v. Charles, 842 F 2d 1052 (9th Cir. 1988).

The DHS argument relies in part on Fetto v. Sergi, 181 F. Supp. 2d 53 (D. Conn. 2002) a decision rendered subsequent to the 1999 and 2000 decisions previously discussed. That reliance is on shaky ground. The ruling in Fetto found that services provided by a state agency similar to DHS under a school district IEP were not subject to IDEA jurisdiction, because the court's jurisdiction under that law reached only those noneducational agencies "obligated to provide those services" under state law. The court concluded that IDEA jurisdiction did not reach the social services agency "under the circumstances here" (at p. 71). The school district that developed the IEP was responsible for providing the IEP services. In dicta, the court implied that the social services agency obligation under the IDEA would be different for "children in its residential facilities" (at p. 70).

The undersigned ALJ continues to conclude that both educational and noneducational public agencies in the state, such as DHS, which provide educational programs to children with disabilities are subject to IDEA jurisdiction; at least, until it is established that the particular services at issue are not educational in nature, intent, or purpose. Medical treatment under Medicaid active treatment plans, as discussed later, can involve elements of both an educational and a noneducational nature.

The second issue to be addressed is whether the Department and this ALJ have jurisdiction over G&G.

The Appellants argue that G&G is subject to IDEA jurisdiction as a result of its contract with DHS to provide Medicaid services to Bryan B. in exchange for state and federal Medicaid payments. The amount is approximately $90,000.00 annually. They rely on regulations found at 34 C.F.R. §300.2(c)(1) as authority for this argument:

> (c) Private schools and facilities. Each public agency in the state is responsible for ensuring that the rights and protections under Part B of the Act are given to children with disabilities—(1) Referred to or placed in private schools and facilities by that public agency; . . . (emphasis added)

The Appellants go on to cite 34 C.F.R. §300.401(c), which mandates that the Department must ensure that a child with a disability "placed in or referred to a private school or facility by a public agency . . .[h]as all the rights of a child with a disability who is served by a public agency."

As discussed earlier by this ALJ, DHS is a "public agency" as defined by 34 C.F.R. §300.22, and is subject to Department jurisdiction under the IDEA regardless of whether DHS receives federal funds under the IDEA. 34 C.F.R. §300.2(b)(2).

The more difficult question is whether G&G is a "private school or facility" such that IDEA jurisdiction extends from DHS because DHS action "placed" or "referred" Bryan at G&G. For the purposes of Medicaid, through contract with DHS and federal and state law, G&G is an Intermediate Care Facility for the Mentally Retarded and is a "facility" under Medicaid provisions.

DHS "contracts" with G&G for Medicaid services for Bryan B., and DIA licenses G&G and monitors for Medicaid services complaince. It is the DIA which maintains G&G as a licensed Medicaid provider as an ICF/MR for persons like Bryan B. But, it is only through the contract between DHS and G&G that G&G services were expressly provided for Bryan B., and G&G received payment for services expressly provided for Bryan B. Any commonly accepted usage of the terms "referred to " or "placed in" would apply to the contracting between DHS and G&G regarding Bryan B. In the absence of the DHS contract, Bryan B. would not be provided Medicaid services at G&G and G&G would not be paid for these services provided Bryan B. This ALJ has not been shown that the commonly accepted usage of "referred to or placed in" has a different meaning in the law. See 34 C.F.R. § 300.142(b)(1); and § 300.341. An IDEA implementation rule at 34 C.F.R. § 300.341 requires the Department to ensure that an IEP is developed for children in situations where public agencies placed or referred children to a private school or facility. State agencies that provide special education and related services "either directly, by contract, or through other arrangements" (emphasis added) must see that an IEP is developed for each child. E.g., Kerr Center Parents Assoc. v. Charles, 842 F. 2d 1052, 1061 (9th Cir. 1988).

The thrust of G&G's argument is that state law places all the responsibility for special education in educational agencies and does not anticipate any role in special education to be played by ICF/MR facilities. This ALJ does not agree. But, even if he did, state law contrary to federal law in this area would be superseded under the Supremacy Clause of the Constitution. E.g. Paul Y. v. Sengletary, 979 F Supp. 1422, 1426 (S.D. Fla. 1997).

We now come to the "real issue" in this dispute. That issue is not whether DHS and G&G must comply with IDEA provisions; they must when providing special education and related services to children with disabilities. The real issue is whether an active treatment plan can be special education and related services under the IDEA; or it is a program provided under the Medicaid laws and not subject to IDEA jurisdiction.

The Appellants present a novel and "creative" argument favoring their position. They argue accurately that an active treatment plan, established under Medicaid for a client in an ICF/MR, can be nearly as broad and varied as the individual needs of the client demand. It can be solely medical or health oriented in nature. It could be solely behavioral in nature. It could be solely self-help or life skills in nature. Or, it can be, and probably is usually, a multifaceted active

treatment plan designed to meet the multiple and often times intersecting needs of clients. In that same respect, IEPs are developed to meet the varying multiple educational needs of students, which also often times intersect. There is only a subtle distinction between some components of an active treatment plan under Medicaid and those in an individualized education program (IEP) under the IDEA. Under the IDEA, "special education" is defined at 34 C.F.R. § 300.26 as:

> Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including (1) instruction conducted in the classroom in the home, in hospitals and institutions, and in other settings; . . . (2) the term includes each of the following, . . . (ii) travel training; (3) specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction – (1) To address the unique needs of the child that result from the child's disability; . . . (4) Travel training means providing instruction as appropriate to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to . . . (ii) Learn the skills necessary to move effectively and safely from place to place...

Clearly, many of the components of Bryan B.'s active treatment plans under Medicaid rules, as provided by G&G, fall into these same understandings. The active treatment plans included teaching Bryan behavioral skills, social skills, self-help skills, communication skills, and travel training skills. The record clearly documents these specialized instruction programs for Bryan under his written active treatment plans (sometimes identified as an individual habilitation plan, or other name). The record is replete with recommendations from outside evaluators saying that a behavior improvement plan for Bryan must be consistent across all environments. G&G was chastised by the DIA for not maintaining Bryan's behavior training as outlined in G&G's program planning for Bryan. Sometimes, school staff members were present at G&G planning meetings, and sometimes, more frequently of late, G&G staff members participated in the District's educational planning for Bryan.

DHS argues that Medicaid is a "medical welfare program" and not an IDEA "educational program" as if the two were mutually exclusive. In reality, they appear to be. Even though some of the programs and services provided a child like Bryan under Medicaid are similar to IDEA education programs and services, their medical and educational distinctions are maintained. On the face of situations such as this, the maintenance of these distinctions is not always easily accomplished. There are, however, important distinctions in the laws that can not be ignored. Medicaid has financial eligibility requirements (Iowa Code § 249 A.3., IA Admin Code 441-75.1) where the IDEA eligibility has no relation to financial status; facility requirements exist under Medicaid (42 C.F.R. § 483.410-.480), but not under the IDEA. Unlike IDEA procedures, persons wishing Medicaid assistance must make a formal application for medical assistance and provide evidence of eligibility. Program monitoring procedures are totally different (42 U.S.C. § 1396a(1)(31)). The Medicaid and IDEA statutes each require authority and responsibility to rest in "a single state agency." In Iowa those are different agencies; DHS for Medicaid and the Department for the IDEA. Each federal statute has a separate established review and hearing process, again under the authority of the separate agencies.

A little over a decade ago it could be said with greater certainty that the IDEA and Medicaid were separate entities. They were so interpreted by the federal agency implementing Medicaid. Subsequently, Congress enacted amendments to both laws which result in a slight overlap of the two in some areas, particularly the areas of active treatment services under Medicaid and related services under the IDEA.

Medicaid, for instance, was amended to allow for payment for some active treatment services that also qualify as related services for some children receiving them under the IDEA. Medicaid payments under active treatment plans were prohibited only for "formal educational services" which included "training in traditional academic subjects." "Traditional academic subjects" were limited to "science, history, literature, foreign languages, and mathematics," (42 C.F.R. §441.13, See U.S. Dept of Health and Human Services discussion of its final Medicaid rules (11-20-92 Appellees Exhibit 2, p. 5.) Pre-academic activities, such as instruction in shapes and colors (counting and sorting?) would not be excluded from authorized Medicaid payments because they do not specifically fall within the definition of "educational services (Id. at 6). Acquisition of behavior skills are funded by Medicaid, when part of an active treatment plan. Thus, the previous interpretation of Medicaid statutes that prevented any Medicaid payment for costs of services provided in a child's IEP were "invalidated" by Congress. Interpretive regulations under Medicaid now encourage ICF/MR staff to actively participate with staff in other programs (i.e., schools) in the development of intervention strategies and dual implementation of programs in both environments. Behavior plan sharing was expressly mentioned as an example. That regulation, at 64-483.410(d)(3) I.A.C. provides as follows:

> The facility [ICF/MR] must work closely with the outside program to ensure a comprehensive, integrated, consistent, and efficient program of intervention suited to each individual's needs (emphasis added).

The Medicaid interpretive rule 64-483.440(c)(1) I.A.C. provides an interesting insight to the degree of cooperation between an ICF/MR and a school:

> The facility must make every effort to coordinate the IEP . . . (if any) with the IPP process. They may result (but it is not required) in a single IPP/IEP document.

The IDEA was amended by Congress to assure that potential funding and other conflicts, including Medicaid would be dealt with appropriately by the states (42 U.S.C. § 1412(a)(12)). The IDEA amendments also made clear that noneducational agency obligations under other federal laws, such as Medicaid, are not altered by an educational agency's responsibility to provide various related services and supplementary aids and services under the IDEA (§1412(a)(12)(b)).

Regardless of Congressional efforts to better coordinate some Medicaid services with some IDEA services, the obvious result is that there remains two separate and distinct federal programs. One focuses on health/medical issues and the other focuses on educational/disabled

issues. Sometimes, the two are very similar, nearly identical, but more importantly, in very clear and important ways they are distinct and different. Had Congress meant the two laws to provide more than coordination and collaboration on some services, it could have easily done so. It has not.

We know that the concept of education under the IDEA is broader than areas of traditional academic subjects, (e.g., behavior, life skills, social skills). We know that the concept of medical treatment under Medicaid is broader than traditional physical health issues. What we do not always know is where school education duties end and social services/health duties begin. It can be tempting to shift the burden from one to the other in order to "get the job done" for an individual child. If that was Congress' intent, greater legislative clarification of policy is needed.

Bryan is receiving Medicaid services at G&G through an entirely different system of eligibility, monitoring responsibility and different due process safeguards than are provided under the IDEA. The G&G active treatment plan for Bryan B is not subject to Department or ALJ review. Only Guttenberg's IEP and placement provided Bryan are subject to the Department's and this ALJ's jurisdiction, and they are not at issue here. It would be interesting to speculate regarding a situation where a Medicaid client is provided an active treatment plan in an ICF/MR, but does not attend school at another location under an IEP.

It does not appear to this ALJ that the IDEA is intended to substitute for state provided Medicaid services to young people. Neither does it appear that Medicaid is intended to substitute for the IDEA. They are separate and distinct federal and state programs.

Personal Privilege Note: (The following comments are not meant to include the current G&G management and staff who have recently been employed.) It seems aberrant that a school which receives about $17,000 annually to provide educational services to students like Bryan is required to monitor and show improvement in a child's areas of identified need, but that a private agency contracting for Medicaid services at about $90,000 annually is not. The record of this proceeding establishes the need for consistency of behavior programs across all environments. It shows equally that the effort of consistency of behavior programming has not always been participated in by G&G. The schools involved with Bryan, which followed recommendations from experts and using well established educational methods for bringing about change in behaviors have achieved significant progress in improving his behaviors while at school. G&G, on the other hand has seen fit to adopt but not implement behavior improvement programs consistent with school behavior programs. As a result of its failure to follow expert advice, G&G wishes to remove itself from accountability by unilaterally terminating its responsibility for Bryan. When schools attempt to exclude students who are not successful in the school environment as a result of the schools' failure to implement best practices, courts do not allow those schools to abandon their responsibilities to the student or the taxpayers. Oberti v. Board of Education, 995 F. 2d 1204 (3d Cir. 1992).

Decision

The undersigned ALJ hereby determines that neither the Department of Educatin or he have jurisdiction under the IDEA over Bryan B.'s active treatment plan at G&G Living Centers, Inc. Therefore, G&G's motion to DISMISS it as a party is hereby granted.

The Department of Human Services motion to dismiss is denied. While allegations regarding DHS responsibility for Bryan's active treatment plan at G&G have effectively been dismissed, the Appellants' request for due process hearing included other issues which have not yet been the subject of review. Allegations regarding the other Parties have not yet been addressed.

The "stay put" order rendered at the time of hearing in this matter will be dissolved at such time as this decision becomes final.

The Appellees G&G and DHS are prevailing parties in this portion of the proceeding.

The undersigned ALJ continues to believe and have confidence in a concluding comment he made in In re Richard U. Unfortunately, that philosophy was not adhered to in the facts involved in this proceeding:

> All the foregoing [discussion] is for the benefit of children with disabilities and for the various agencies designed to serve their needs. The IDEA legal process and procedures provide state and local agencies with considerable authority and resources to collaboratively plan and carry out educational programming for children with disabilities. Working together, rather than unilaterally, makes all agencies serving children stronger, wiser, and richer (in terms of shared resources) and leads to a universally improved effort to meet the needs of children.

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

Parties wishing to challenge this decision may do so in either state or federal court (20 U.S.C. § 1415(i)). The law regarding the time frame for such challenges should be consulted so as to not preclude an appropriate review of the issues determined here.

Larry D. Bartlett, J.D., Ph.D.
Administrative Law Judge

June 3, 2004
Date