ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

[redacted]
Student,

v.

[redacted]
Local School District.

CASE NO. 2007-0030

MARY SCHWARTZ
Impartial Hearing Officer

DECISION AND ORDER

Jurisdiction

This matter is before the undersigned hearing officer on the student's request for a due process hearing. This hearing officer has jurisdiction pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400 *et. seq.*, 105 ILCS 5/14-8.02a *et. seq.*, 23 Il. Adm. Code § 226.600 *et. seq.*, and her appointment as hearing officer on June 17, 2008. The parties have been fully advised of their rights pursuant to these statutes and regulations.

Procedural Background

The parents, through their advocate, filed a due process request on September 18, 2006. The Illinois State Board of Education ("ISBE") appointed Vivian Gordon as impartial hearing officer ("IHO") on September 21, 2006. Between the filing of the due process complaint and June 17, 2008, the date on which the ISBE appointed the undersigned as hearing officer, this matter underwent significant transformation. The parents amended their complaint at least five times, some of which were through prehearing memoranda rather than a formal amendment. The district filed a due process request on April 2, 2007, to contest the parents' request for an Independent Educational Evaluation ("IEE") at public expense. Student's counsel filed his appearance in this matter on July 15, 2007.

The parties filed numerous motions throughout the pendency of these proceedings. The parents' motions included, but were not limited to, requests for a stay put ruling, an IEE at public expense, partial summary judgment, discovery, and reconsideration of prior rulings. The district's motions included one to dismiss both the stay put request and the due process complaint and two other motions to compel annual IEP meetings. Shortly after the student turned 18 on August 4, 2007, the district filed a motion to realign the parties. IHO Gordon granted the district's motion on September 11, 2007, ruling that all parental rights under the IDEA had transferred to the student on her 18th birthday. The parents are no longer parties in this matter.

On April 30, 2008, IHO Gordon held the first day of hearing in this matter. During that

proceeding, the hearing officer expressed concern as to whether two allegations stated by student's counsel in his opening statement had been properly identified as issues for the hearing: the student's request for an IEE at public expense and her claim that the district had destroyed test protocols. Partial testimony was taken from one witness, after which IHO Gordon ruled that the student's January 17, 2008, pre-hearing conference memorandum could be filed *instanter* as an amended complaint. The hearing was adjourned to give the district an opportunity to respond to the newly amended complaint. (4.30.08 TR, 7-34, 97-118)[1]. The district filed its response on May 8, 2008. IHO Gordon recused herself from this matter on June 10, 2008.

After the undersigned was appointed in this matter, she dismissed the district's April 2nd due process complaint as moot, finding that IHO Gordon had denied the parents' IEE request. Shortly thereafter, the student graduated from high school with a regular diploma. The district then filed a motion to dismiss the case as moot because of the student's graduation. The undersigned denied the district's motion based on the student's request for compensatory education. The student then filed motions to reconsider the issue of parental standing and for an IEE at public expense. Both motions were denied.

The undersigned held a hearing in this matter on October 20, 21, 23, 24, 30, 31, and November 8, 2008. The record was held open until November 20th so that the parties could file written closing arguments. Area Wide Reporting and Video Conferencing provided court reporters throughout the hearing. Each party has requested that its entire evidence binder(s) be entered into evidence. As neither party objected to the opposing party's request, each party's evidence binder(s) is admitted.[2] The undersigned has reviewed the entire transcript of this proceeding, as well as the voluminous evidence binders, closing statements, and suggested case law submitted by the parties, in reaching her decision in this matter. This decision is issued within 10 days of the close of the hearing, as required by Illinois law. 105 ILCS 5/4-8.02a(g-55)(h).

Issues Presented and Remedies Sought

The issues identified for hearing in the amended complaint filed *instanter* on April 30, 2008, are as follows:

1. Did the district deny the student a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") by developing an IEP on March 13, 2006, that:
    a. Failed to state the extent of the student's participation in extracurricular and nonacademic activities;
    b. Failed to state the services required for the student to participate in those activities to the maximum extent appropriate; and,
    c. Failed to provide counseling or social skills training for the student as a supplementary aid or service.

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[1] This transcript is referred to by date and page number. The remaining transcripts are numbered sequentially and thus are referred to only by page number.

[2] Each party numbered pages in its evidence binder prior to the beginning of the hearing. The student has entered one binder into evidence. (PD 1-4, 675-913). The district has entered three binders. (Binders 1 and 2 are SD 1-865; Binder 3 is 1-328).

2. Did the district deny the student a FAPE by changing her placement through a cumulative suspension longer than 10 days, and by failing to convene an IEP meeting within 10 days of its decision to change the student's placement?

3. Did the district deny the student a FAPE by making a Manifestation Determination that:
   a. Was not completed within the first 10 days of the student's suspension, which began on September 7, 2006;
   b. Was predetermined by the district when it finally made the decision as part of an IEP meeting held on January 6, 2007;
   c. Followed improper IEP procedures by making the determination on January 6, 2007, including the misuse of majority votes rather than consensus, to resolve the disputed items comprising the manifestation determination; and,
   d. Was erroneous on the merits.

4. Did the district deny the student a FAPE in the LRE by its November 1, 2006, IEP, when it:
   a. Did not include any statement in the IEP of: the student's functional performance; a research-based reading program; or, any psychiatric, psychological, or social work services provided by the district;
   b. Refused to pay for the psychiatric and psychological services the parents were providing to the student;
   c. Did not contain a statement in the IEP of extracurricular and non-academic activities, or the services required for the student to participate in such activities with her non-disabled peers to the maximum extent appropriate; and,
   d. Refused to consider Extended School Year ("ESY") services for the student.

5. Did the district deny the student a FAPE in the LRE by its November 28, 2006, IEP, which:
   a. Failed to provide a research-based reading program for the student;
   b. Failed to provide a full curriculum and failed to specify the specialized instruction to be provided during the 7 hours/week that the district promised the parents, or to require more than 180 minutes/week of instruction;
   c. Failed to include a goal that the student would return to school;
   d. Failed to include sufficient social work services for to identify how such services would be provided (e.g., outside contractor, hospital staff, district staff, etc.);
   e. Failed to specify the agency responsible for providing the services specified in the IEP;
   f. Failed to include a statement of the extent of extracurricular and nonacademic activities and the services the student would need to participate in such activities;
   g. Refused to consider, and failed to provide, ESY;
   h. Failed to consider the full continuum of placement options, including the student's then-current placement at [redacted] and,
   i. Failed to provide any specialized instruction for the homebound placement for the student.

6. Did the district deny the student a FAPE by developing an IEP for the student on January 16, 2007, that:
    a. Did not include a Transition Plan;
    b. Did not include a research-based reading program;
    c. Did not include ESY and the IEP team refused to consider ESY; and,
    d. Did not pay for the costs of the student's Transition Services, from March 13, 2006, through January 6, 2007.

7. Did the district deny the student a FAPE by refusing her request for an Independent Educational Evaluation ("IEE") and by destroying the test protocols from its evaluation of the student.

As remedies for the above alleged violations, the student requests that:

1. The district provide compensatory education and related costs at [redacted], for the student to pursue a degree as a Registered Nurse, including any extra tutoring needed to allow her benefit from this compensatory education.
2. The district reimburse the parents for all costs for psychiatric and psychological services they provided to the student, including costs to replenish insurance benefits.
3. The district provide an IEE at public expense, including transportation costs.
4. The district reimburse the parents for out-of-pocket costs for all expenses the parents paid for the student's transition services.
5. The hearing officer find that the district violated the procedural rights and safeguards of the parents and student.

Burden of Proof

In a due process hearing, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 126 S. Ct. 528, 539 (2005). Therefore, the student has the burden of proof in this matter on each of the above seven issues. Under Illinois law, if at issue, the school district must provide evidence that it has appropriately identified the student's educational needs and that the special education and related services are adequate, appropriate, and available.105 ILCS §14-8.02a(g). This statutory provision requires the district to produce evidence but does not shift the burden of proof to the district. *Kerry M. v. Manhattan Sch. Dist. #14*, 106 LRP 5847 (N.D. Ill. 2006).

Findings of Fact

The student has received special education services since 1994, when she began school. Her first Case Study Evaluation ("CSE"), conducted when she was in preschool, included the Wechsler Preschool and Primary Scales of Intelligence ("WPPSI"). The student received a verbal scale IQ of 64 on the WPPSI. She was placed an Early Childhood Education program through kindergarten. The student's intellectual functioning and academic achievement was re-evaluated in 1996, when she was in first grade. On the Wechsler Intelligence Scale for Children, 3rd Edition ("WISC-III"), she achieved a full scale IQ of 70, a verbal scale IQ of 82, and a performance scale IQ of 63. The student was also given the Woodcock-Johnson Revised Tests of Achievement, on which she achieved standard scores of 83 in broad reading, 56 in broad math, and 85 in broad written language. Her reading and

written language scores were at a 1.1 grade level, and her math score was at a K.2 grade level. The student received special education services in a learning disabilities resource room beginning in first grade. (SD 284).

The student's first triennial re-evaluation was conducted in 2000. She was in fourth grade at that time. On the Oral and Written Language Scales ("OWLS"), she achieved an overall standard score of 70, and subtest standard scores of 87 in oral expression and 57 in listening comprehension. The examiner determined that the student had a deficit in auditory processing auditory and recommended 40 minutes per week ("mpw") of speech-language therapy to improve her auditory processing skills. (SD 281). The 2000 psychological evaluation consisted of the Wechsler Abbreviated Scale of Intelligence ("WASI") and the Wechsler Individual Achievement Tests ("WIAT"). The examiner gave the student two of the four WASI subtests, vocabulary and matrix reasoning. The student's overall IQ as measured by the WASI was 74. She received a T Score of 43 in vocabulary and 20 in matrix reasoning. (SD 285). On the WIAT, the student achieved the following standard scores: 100 in basic reading; 75 in mathematics reasoning; 101 in spelling; 90 in reading comprehension; and, 82 in numerical operations. Her composite standard scores were 94 in reading and 75 in mathematics. (SD 285). The examiner noted that the student's academic skills were significantly higher than expected, given her age and IQ. All the student's achievement scores were within the low-average to average range except math reasoning, which was in the borderline range. The examiner noted that the student "was so motivated to do well during this evaluation, that she willingly worked through her recess time." The examiner recommended small group support for reading and math. (SD 286). The student's IEP notes that she had severe deficits in organization skills and visual and language processing deficits. (SD 276). She was placed in regular education classes with accommodations and also received special education instruction in reading. (SD 274).

The next IEP in the record was developed on 19, 2002. The student was in sixth grade at that time. According to the IEP, she received special education instruction in language arts, math, science, spelling, and study hall and was placed in regular education for reading, science, spelling, and special courses. (SD 266). Her eligibility as learning disabled was maintained. (SD 258, 259).

The student transferred into the district in seventh grade. Her initial IEP, developed on March 20, 2003, called for direct special education instruction in reading, language arts, mathematics, and special education. (SD 242). The district conducted a triennial re-evaluation in Spring 2003, when the student was in 7th grade. The examiner administered the WISC-III and the Kaufman Test of Educational Achievement ("K-TEA"). On the WISC-III, the student's full scale IQ was 68, which is at the 2nd percentile. (SD 218). Her verbal scale IQ was 78, and her performance scale IQ was 63. (SD 218, 219). The school psychologist noted that the test results might underestimate the student's potential because she often gave up on questions that were challenging. (SD 209). Her ability to sustain attention and concentrate were in the low average range. (SD 210).

The school psychologist's report indicated that the student obtained an overall standard score of 88 on the K-TEA, which was at the 33rd percentile rank. Compared to her age-level peers, the student's overall score was below average. The student's mathematics composite score was 83, which is at the 13th percentile rank, and her reading composite was

92, which is at the 30th percentile rank. (SD 208). Her spelling skills were in the high average range, with a standard score of 113 and an 81st percentile ranking. (SD 208-209). An IEP meeting was convened on May 22, 2003, to review the evaluation results and develop an IEP for the next academic year. (SD 202). The IEP team determined that the student remained eligible under the learning disability category and noted that her processing difficulties negatively impacted her achievement skills. (SD 213).

The student's next IEP meeting was held on March 10, 2004. The IEP indicates that the student was placed in a special education classroom for math, science, and guided study, for a total of 675 mpw. She also received special education services within the regular classroom in language arts and social studies for 450 mpw. (SD 179). The meeting notes report that the student continued to have problems with organization, including difficulty turning in her assignments. (SD 184).

The IEP team met again on October 6, 2004, to address the student's educational needs. (SD 160). The team noted that the student was struggling in some of her regular education classes and was receiving failing grades in English, health, and clothing. She had trouble keeping up with the fast pace of the classes and was unorganized. (SD 162). A conference note reports that the IEP team considered putting her back into direct instructional services for health and English. However, the student did not want to be taken out of either class. To help her try to bring her grades up, the team agreed to give the student an extra day to turn in assignments and to give modified exams in health. Her English teacher was going to oversee the student's organizational problems. The student's progress was to be re-evaluated mid-semester. (SD 170).

The next IEP meeting was convened on April 5, 2005. (SD 140). The IEP reports that the student "struggles with consistency, but has made progress toward her goals. She struggles with staying organized, basic math skills and math reasoning. (The student) has difficulty organizing her writing into logical paragraphs." As before, her slow auditory processing/low listening comprehension are noted. (SD 142). The student was placed in a special education classroom for science and guided study, for a total of 450 mpw. She also received 5 mpw of consult services in each of the following classes: language arts, math, social studies, and electives. (SD 146).

The district conducted a triennial evaluation in March 2006. The school psychologist administered the WASI to assess the student's cognitive functioning. The student was given three of the four WASI subsets. On the WASI, the student achieved a full scale IQ of 77, and a verbal scale IQ of 76. Her subtest T-scores were 29 in vocabulary, 38 in similarities, and 39 in matrix reasoning. Her verbal comprehension and reasoning scores, as well as her non-verbal reasoning score, were within the low average to borderline range. Based on these results, the school psychologist determined that the student has difficulties with abstract verbal reasoning, comprehension, organization and attention. She reported that while the student was eager to do her best, she lacked confidence and persistence when faced with difficult tasks. (SD 106). To assess the student's academic achievement, the school psychologist administered the K-TEA. The student achieved the following age based standard scores and percentile rankings: mathematics application, 93 and 32nd percentile; reading decoding, 99 and 47th percentile; reading comprehension, 87, 19th percentile; mathematics computation, 80, 9th percentile; reading composite, 93, 32nd percentile; and,

mathematics composite, 87 and 19th percentile. (SD 109). The student's basic reading skills were within the average range, and her reading comprehension was in the average to low average range. Her math applications and reasoning scores were in the average to low average range. Her math computation/operations score was in the low average to borderline range. (SD 107).

The mother and the student attended the IEP/triennial evaluation meeting held on March 13, 2006. (SD 102). The IEP reports that the student was taking Concerta for her ADD and Clonidine as needed for sleep problems. (SD 104). The document identifies the student's deficits as auditory comprehension, reading comprehension, written language, and math. (SD 121). The team noted that she needed "academic support in the small group setting for assistance with reading, math reasoning and writing" as well as modifications in the regular education classroom. (SD 113). According to the IEP, the student had passed all her first semester classes and was making satisfactory progress on her IEP goals. Her first semester grades were B in physical education, 92% in chorus, 74% in world history, 92% in science, 68% in English II, and 79% in general career math. (SD 116). The conference notes indicate that the student had 11.5 credits toward graduation. (SD 127).

The student's transition plan identifies community college and technical/trade school as post-secondary goals. (SD 124). Her transition/vocational PLOP states that she has difficulty with organizational skills, is easily distracted, and wants to give up on material that is too difficult for her. The annual goal is to attend class, bring necessary materials to class, and complete assignments to maintain passing grades of 70% in high school and 75% in the [redacted] The goal has one objective: to listen carefully when assignments were given and then to write the assignments in her assignment notebook and ask for clarification when she did not understand the expectations. (SD 117).

The student's reading goal PLOP states that she has difficulty with vocabulary, abstract reasoning, and inferential comprehension, all of which impact her ability to read at grade level and hinder her academic and vocational progress. The annual goal is for her to locate, organize, and use information from various sources to answer comprehension questions. The objectives to help her achieve this goal include identifying appropriate resources to solve problems or answer questions through research and textbooks, asking to have tests read to her so that she will not misunderstand directions or misinterpret what is being asked, and asking to have written material read to her when it is too difficult to read or comprehend. (SD 118).

The PLOP for a goal addressing the student's organizational problems states that she has difficulty with organizational skills, is easily distracted, and wants to give up on material she finds difficult. The annual goal calls for her to attend class, bring necessary materials to class, and complete assignments so that she can maintain passing grades at the 70% level in high school and 75% level at the career center. (SD 117).

The IEP includes a written language goal, which states that the student's PLOP in this area is "difficulty organizing her thoughts in writing" and not using correct sentence structure, grammar, and mechanics. The annual goal states that she will write for a variety of purposes and receive at least 70% on written assignments. The goal's objectives include the following: write paragraphs that include a variety of sentence types, appropriate use of the eight parts of

speech, and have accurate spelling, capitalization and punctuation; write compositions that contain complete sentences and effective paragraphs; and, edit and proofread a term paper, on which she must receive a passing grade. (SD 119).

The IEP calls for 225 mpw of direct special education instruction in language arts and 225 mpw in guided study, and 5 mpw/class of consult services in math, social studies, science, fine arts, and electives. (SD 120). According to the IEP, the placement options considered by the IEP team were LD consult ion alone and an LD self-contained classroom. (SD 121).

The student's progress on her IEP goals was reviewed on May 31, 2006. On the goal for a computer applications class, the IEP notes that the student dropped the class. (SD 129). The review of the math goal states that she had achieved all objectives. (SD 130). The written language objectives report that the student had received an 85% on her 10th grade term paper. (SD 131).

On September 1, 2006, shortly after the beginning of the student's junior year in high school, an incident occurred that was the catalyst for the parents' original due process complaint. At that time, the student attended a cosmetology program at the [redacted] as part of her vocational program. District students attending the [redacted] rode a school bus to and from the district to the [redacted] The parties have vehemently contested what occurred on the bus since September 2006. The record indicates that on September 5, 2006, the parent of another student met with the principal and told him that her daughter had taken some pills on September 1st and was acting "really strange" when she arrived home after school. (SD 365). On September 6th, the principal and the dean of students interviewed the five students identified as participants in the incident. One of those five students is [redacted] One of the students told the principal that she had bought some "Xanies" and had sold them to other students, including [redacted] on the [redacted] bus. Another student stated that she had seen [redacted] take the pills. The students' parents were notified of the incident, and all the students involved received a ten day out of school suspension. (SD 347, 348, 365, 368).

The school's drug policy applies to all students at the high school. Pursuant to that policy, a student may not possess, carry, distribute, or consume illegal drugs on school premises or on school-provided transportation. "Illegal drugs" includes prescription drugs that are possessed, used, or dispensed without a proper medical prescription. (SD 55). Students are not allowed to attend school while under the influence of drugs, and students under the influence are treated in the same manner as if they had drugs in their possession. The penalty for a first offense of the drug policy may include immediate suspension from school and all school activities for up to ten school days, forfeiture of participating in all school-sponsored activities, forfeiture of school driving privileges, and forfeiture of attending the next formal school dance. The parents of a student who has violated the drug policy must meet with school personnel during the first five days of suspension to develop a plan for monitoring the student's subsequent behavior, including participation in a drug abuse/rehabilitation program. If the student does participate in such a program, the suspension may be reduced by five days. (SD 56).

The student had a drug screen done on September 7, 2006. The drug screen did not

detect any Xanax. (SD 345). The mother and the student addressed the Board of Education on September 7th, during a special Board meeting held at a local restaurant. (SD 324, 325). The note from the closed session of the meeting states that the mother and student addressed the board on the student's suspension. The note does not indicate that any action was taken or decision made regarding the student's suspension. (PD 795-797; SD 326).

The district sent a certified letter to the student's parents on September 8, 2006, formally informing them that the student had violated the school's drug policy and thus was suspended out of school for 10 days and was not allowed to participate in school functions or activities. The letter also informed them of their right to appeal the suspension by filing a written request for a hearing with the Board of Education by September 12, 2008. (SD 288-290; PD 754). On September 12th, the parents filed an appeal with the Superintendent. In their appeal request, they also authorized the district to receive only the Xanax portion of the drug screen as "any other records/labs are confidential and do not pertain to this." (SD 295, 296; PD 752, 753). The disciplinary hearing was scheduled for September 25, 2006. (SD 315).

The parents, through their advocate, filed a due process request on September 18, 2006. As relevant to the suspension, the due process request states that the student was denied a free appropriate public education by being suspended from school for allegedly violating the school drug policy. The due process request also alleges that the suspension changed the student's placement and states that the student denied violating the drug policy. (IHO Schwartz Administrative Record, Tab 2). On September 24, 2006, the parents informed the district that they were withdrawing their request for an appeal of the disciplinary violation because "the forum for appeals for Special Education is thru (sic) the Due Process." (SD 317).

The district conducted a Manifestation Determination Review (MDR) on September 18, 2006. The parents and their advocate attended the meeting. (SD 787). According to the meeting notes, the parents and advocate stated that the suspension was unwarranted because the student had not violated a school rule and thus there was no need for a MDR. The parents and advocate also stated that the suspension notice did not clarify the violation on which the suspension was based. The meeting was adjourned without a MDR determination. (SD 789).

The student's next IEP meeting was held on November 1, 2006, approximately six weeks after the parents filed their due process request. The student, her mother, and their advocate attended the meeting, as did the district's attorney. (SD 72). The conference notes indicate that the IEP team discussed whether the student's behavior had a negative impact on her educational performance. While no behavioral problems were reported, the notes indicate that the team discussed the impact of the student's organizational problems on her academic progress. (SD 83, 84, 88-90). The team discussed the student's progress in her vocational program, and the accommodations and modifications she received in her regular education classes. (SD 85, 86). The student's reading skills, particularly relating to comprehension, were also discussed. One of the student's advocates requested that the student receive specific instruction in reading comprehension through the Lindamood Bell program and that her reading goal require increasing her reading level rather than just receiving passing grades. (SD 87).

The IEP team also discussed whether the student needed social work services, either as direct or consult services. The mother stated that the student was "experiencing some trust issues" at school and informed the team that the student was receiving private counseling. The mother agreed to ask the student whether she wanted direct or consult social work services; in the interim, the district agreed to provide social work services on a consult basis. (SD 88). A social work goal was added the student's IEP. The PLOP states that while the student has appropriate peer relations, her parents are concerned that she has emotional difficulty related to school and family stressors. The annual goal is for the student to develop self-awareness and self-management skills. Two objectives were developed: the student will seek out the social worker for help in analyzing how her thoughts and emotions affect her decision-making and behavior, and the social worker will consult with the student's teachers to ensure that she is using appropriate coping mechanisms. (SD 77).

The team also discussed ESY. Because the cosmetology program continued through the summer, one of the student's advocates stated that the cosmetology program should be included as part of the student's special education program and considered as ESY. Transportation to the [redacted] over the summer was discussed, and the parents requested reimbursement for transportation expenses. After-school tutoring was added to the student's IEP. (SD 90, 91). The IEP provided that the student would receive 225 mpw/class of direct special education instruction in language arts and guided study, 5 mpw/class of consult services in social studies, fine arts, and electives, and 15 mpw of direct social work services. (SD 78).

The student was psychiatrically hospitalized from November 10 to 12, 2006. (PD 798, 799). After she was discharged from the in-patient unit, she began attending the hospital's partial hospitalization program ("PHP"). She attended the PHP from November 14 through November 22, 2006. (PD 791, SD 440). On November 17, 2006, the parents requested an emergency IEP meeting to discuss a recommendation for homebound services made by the student's psychiatrist and private counselor. (SD 320, 409). The student's psychiatrist had recommended homebound services because of the student's severe anxiety, stress, and inability to function in school. He recommended homebound services until the end of the school year. (SD 408). The student's counselor also requested that the student receive homebound services and transition back to school as her coping skills increased. (SD 409).

An IEP meeting was held on November 28th to discuss homebound services for the student. (SD 440, 451). The team discussed the student's recent progress, noting that she had failing grades or D's, due to her absences and work not being turned in during her absence. The homebound instructor was to help the student catch up on her work. The parents requested that the student receive direct social work services for 60 mpw, rather than consult services. The district agreed to provide direct services in the homebound placement at the 15 mpw level that was in the student's prior IEP. The school social work services were to focus on helping the student function within the academic environment, rather than having a "therapeutic" focus. (SD 451, 452). The district requested consent to communicate with the student's private counselor, and the mother consented to verbal communication only. (SD 454). Homebound services, provided by a special needs teacher, were to begin immediately, at 1.5 hours/day for five days/week. (SD 453).

On December 8, 2006, the parents filed a written dissent to the November 28th IEP. In their dissent, the parents stated that the amount of homebound instruction was insufficient and asked the district to consider the [redacted] program as an alternative to [redacted] instruction. They also contended that the IEP was deficient because: it did not include extracurricular and/or nonacademic activities, a research based reading program, a goal to return to school, transportation, or ESY; the homebound social work services were insufficient; and, the goals were too low. The parents questioned why the homebound services were not delivered during the school day, the name and qualifications of the person who would provide the homebound social work services, and why IEP meetings were not held at a time when the father could also attend. (SD 321). The parents requested another emergency IEP meeting to discuss alternative placements to homebound "per the hearing officer's order" on December 12, 2006. (SD 328).

The district responded to the questions raised in the parents' December 8th and 12th letters on December 13, 2006, and offered three dated in January 2007 to discuss issues raised by the parents. (SD 329-332). The district sent another letter to the parents on January 3, 2007, setting the IEP date for January 16th and requesting documentation from the student's psychiatrist that the student was ready to return to school. (SD 456). On January 9th, the parents provided written consent for the student's psychiatrist to communicate with the district's psychiatrist regarding the psychiatric status of the student. (SD 411).

The student's psychiatrist and counselor provided written releases for her to return to school on January 16, 2007. The counselor reported that one of the student's therapy goals had been to prepare her to return to school and they had addressed her "fear of negative responses by her principal and peers" in their work on this goal. The psychiatrist's letter states that the student had required homebound because of stressors at school and home "with the home stressors actually contributing a lot to her problems and affecting her ability to attend school and perform well in school." The psychiatrist reported that the home stressors had been resolved, the student's depression had improved, and she was not a danger to herself or others. (SD 412-416; PD 808).

Pursuant to an oral order by IHO Gordon, the district convened a MDR meeting on January 16, 2007, prior to the scheduled IEP meeting. The parents and their advocate attended the January 16th meetings, as did the district's attorney. (SD 458). The MDR notes indicate that the parents and their advocate answered "yes" to the questions of whether the student's conduct was caused by or had a direct and substantial relationship to her disability and whether her conduct was the direct result of the district's failure to implement her IEP. The district personnel who attended the MDR responded "no" to both these questions. Based on these responses, the district determined that the student's behavior was not a manifestation of her disability. (SD 464, 470).

The IEP portion of the January 16th meeting addressed the student's return to school and updated her IEP goals. After some discussion, the IEP team decided that the student would return to school full-time. (SD 471,472). The parents again requested that the district provide 60 mpw of social work services, delivered in 15 minutes session/ day, to monitor the student's return to school. District personnel were concerned about pulling the student out of class. The team adopted the homebound social worker's recommendation of 30 mpw, with more time if needed. The team agreed to re-evaluate the social work services in four weeks.

(SD 473, 474). The parents also requested 60 mpw of tutoring and a research based reading program. (SD 473, 477). The development of the transition plan was delayed so that the student could participate in the discussion. (SD 475). It was suggested that the student have guided study each day to help her with her organizational skills. (SD 476).

A goal was developed to address the student's comprehension problem. The PLOP and objectives for this goal are the same as in her March 13, 2006, IEP. The annual goal is the essentially the same as that in the March 13th IEP, except that it adds that the student will maintain a 75% in her classes, and gain at least six months in reading comprehension as measured on a standardized reading test. (SD 460). Both the writing and organizational skills goals, PLOPs, and objectives are the same as those in the March 13th IEP except that the mastery levels are increased to 75%. (SD 461). The social work goal and objectives are identical to those in the November 1, 2006, IEP although the PLOP is changed to reflect the transition from homebound to school. (SD 463). The student's direct special education instruction services were increased to include 425 mpw of guided study and 225 mpw of language arts. Consult services of 5 mpw/class in social studies, fine arts, and electives remained the same. (SD 465).

The student was given the K-TEA in April 2007. She achieved standard scores of 95 in reading comprehension, 100 in reading decoding, and a reading composite of 99. Her percentile rankings for these scores were 50th percentile in reading decoding, 95th percentile in reading comprehension, and 99th percentile in reading composite. (SD 792).

An IEP meeting was scheduled for May 3, 2007. The parents' advocate notified the district that he would file a due process request if the district held the meeting without the parents. (SD 857). The team met briefly on May 3rd but adjourned after it determined that the student and parents would not attend the meeting. (SD 527,563). The meeting was reconvened the following school year, on October 18, 2007. The student's father, advocate and attorney attended the meeting, as did the district's attorney. (SD 605). Per her IEP, the student was receiving 213 mpw of direct services in each of the following classes: language arts, functional transition skills, math, functional Spanish, and guided study. She also received 30 mpw of social work services. (SD 617). The IEP reports that the student was working at a retail store, drove herself to and from her job, and participated in school spirit activities. The student had taken the K-TEA in April 2007 and achieved the following grade equivalency scores: math applications, 8.6; math computations, 6.7; reading decoding, 11.9; reading comprehension, 10.6; and, spelling, 12.9. (SD 607).

The student's math PLOP reports her K-TEA scores and states that she has difficulty with multi-step problems and more advanced number concepts. Her annual goal is to complete assignments and projects, participate in class activities, and maintain a C average. The objectives include explaining her economic roles concerning consumer rights and responsibilities, explain and demonstrate the use of a realistic budget for living independently, and work with school personnel to apply to [redacted] and make an appointment to take the baseline/level test. (SD 608). A second math goal, developed for her transitional math class, states that she will demonstrate and apply a sense of numbers, patterns, ratios and proportions with 80% accuracy, and will take the math Compass test at [redacted] There are three objectives to implement the goal. (SD 609).

The student's goal for organizational skills states that she will improve her organizational skills so that she can participate in some regular education curriculum with support and maintain a C average. Her PLOP for the goal indicates that she continues to struggle with getting assignments, books and materials to class, writing assignments down, and turning assignments in on time. Despite these organizational problems, the student maintained a schedule outside of school that included employment in a retail store and driving herself to/from her job. (SD 611).

Her reading PLOP reports an increase in her K- TEA scores between 2006 and 2007 and notes that her reading comprehension might be impacted by her ADD. The student's reading goal states that she will apply reading strategies to improve her understanding, develop compensatory skills to manage the reading required in high school, use the Teenbiz 3000 reading program at least twice a week, and improve her lexile score from a 5.2 to a 6.2 grade level. Three objectives were developed to help the student meet the goal, including previewing reading materials, identifying text structure and creating a visual representation, and clarifying for understanding while reading. (SD 612).

The student's social work goal is for her to continue developing self-awareness and self-management skills and maintaining a passing grade in her Adult Living class. The PLOP reports that she is easily upset and distracted by non-school related issues but generally able to handle her frustration and anger in appropriate ways. (SD 614). The student's transition plan goal is to apply to [redacted] or [redacted] or pursue a career as a retail buyer. The student wanted to live in an apartment with friends while attending college. (SD 606). The need for ESY was to be evaluated in May 2008. (SD 619).

The final IEP meeting for the student was held on May 29, 2008. The student and her mother, as well as their advocate and attorney, attended the meeting. (SD 820). The document indicates that the student had passed all her first semester classes and was on target to graduate in June 2008. It also notes that she was disciplined in February 2008 for having alcohol at a school dance. (SD 824). The team reviewed the student's progress on her IEP goals and indicated that she had achieved two of her organizational goals, three of her reading goals, one of her writing goals, and all of her social work goals. (SD 826-834). The student graduated from high school with a regular diploma in June 2008. (SD 852).

Conclusions of Law

Change of Placement

The student contends that the district changed her placement in September 2006 when, as part of a disciplinary measure, it suspended her for 10 days out of school and prohibited her from participating in extracurricular and nonacademic activities for the rest of the school year. She argues that her out-of-school suspension and ban from participating in extracurricular activities is the equivalent of an in-school suspension that bans a student from such participation. The latter, she contends, is not allowed pursuant to U.S. Department of Education ("DOE") policy. *Analysis of Comments and Changes to 2006 IDEA Part B Regulations,* 71 Fed. Reg. 46715 (August 14, 2006) ("Analysis"). Having fully reviewed this document, the undersigned finds that it does not support the student's position.

The policy document referenced by the student states that an in-school suspension is not considered part of the 10 consecutive school day total as long as the student is able "to continue to participate with nondisabled children to the extent they would have in their current placement." *Id.* The student apparently takes this to mean that an out of school suspension must continue to allow students to continue to participate with their non-disabled peers to the extent they would have in their current placement; otherwise, she argues, a change of placement has occurred. The referenced DOE policy applies to in-school suspensions. It is the student, not the DOE, that expands the policy to out of school suspensions.

The reading the student suggests would render other portions of the regulations and DOE policy invalid. The DOE policy document clearly states that "disciplinary measures are to be applied to children with disabilities to the extent they are applied to children without disabilities." *Id.* A student with a disability who violates a code of student conduct may be suspended for such violation to the extent the same discipline would apply to a student without a disability. 34 C.F.R §300.530(b)(1); Analysis, 71 Fed. Reg. 46715. The district's code of student conduct applies to all students at the high school. (SD 52, 53). Pursuant to that code, a student who violates the district's drug policy may be suspended for up to 10 days and may also be prohibited from participating in "any and all school-sponsored activities." (SD 56). The dean of students testified that each of the students involved in the incident was suspended for 10 days. (TR 663, 716). His testimony is supported by the notes he took during his interviews with the students in September 2006. (SD 347, 348). The dean further testified that one student's suspension was reduced to five days because she entered an approved drug rehabilitation program, as is permitted in the district's policy. (TR 663; SD 55). No testimony or evidence was presented showing that the student herein was disciplined in a way that was not congruent with discipline for non-disabled students.

Assuming *arguendo* that the student's interpretation is correct, the question remains as to what the student's placement was at the time of her suspension. The student's placement, i.e., her educational program, on September 7, 2008, was that identified in her March 13, 2006, IEP: 450 mpw of special education in a separate classroom and 25 mpw consult services in each of her regular education classes. (SD 120, 121). The discipline imposed by the district did not change the student's educational program because her March 13th IEP did not require related services or accommodations and modifications for participation in extracurricular and nonacademic activities.

The student also contends that the prior IHO assigned to this case had determined that the student's cumulative suspension constituted a change in placement and, *sua sponte*, issued an oral order to this effect. Therefore, the student argues that IHO Gordon's oral order is now part of the "law of the case." The student has offered no authority for applying this doctrine to this IDEA administrative proceeding, and the undersigned has found none. There is, however, authority holding that the doctrine does not apply to due process hearings. *Lillbask v. State of Conn. Dept. of Educ.*, 397 F.3d 77, 94 (2nd Cir. 2005); Gregory-*Rivas v. District of Columbia,* 2008 WL 4126329 (D.D.C. 2008) ("Gregory-Rivas"). Even if the doctrine does apply to such proceedings, it is not mandatory. *Gregory-Rivas.* In this instance, where there is no written record of IHO Gordon's order and where federal and state regulations support an opposite conclusion, the undersigned finds that the facts of this case do not lead to a conclusion that the student's placement was changed by the discipline imposed by the district. Given this finding, it is not necessary to decide whether the district

failed to convene an IEP meeting within 10 days of it decision to impose a "cumulative" suspension. Such a meeting is required when a student's placement has been changed, and that did not occur in this instance.

Manifestation Determination Reviews: September 18, 2006 and January 16, 2007

The student contends that the district did not complete a MDR within the first 10 days of her suspension, which began on September 7, 2006. The district conducted a MDR on September 18, 2006. A district must conduct a MDR within 10 school days of its decision to change the student's placement. 34 C.F.R. 300.530(e)(1); 23 Ill. Adm. Code §226.410(b). As found in the prior section, the district did not change the student's placement. Therefore, the district was not legally required to conduct a manifestation review in September 2006.

Mrs. [redacted] who was the district's director of special services during the relevant times in this matter, testified extensively regarding both the September and January MDRs. She testified that although the September meeting was not legally necessary, she held it because she thought it was in the student's best interest to do so. (TR 578, 854). Mrs. [redacted] testified that she convened the MDR so that the IEP team could proactively address any necessary issues "before any other episodes occurred." (TR 854). The MDR was convened within 10 school days of the first day of the student's out of school suspension. (SD 432, 786).

The parties spent considerable time eliciting testimony on the September MDR. The student's witnesses testified that the MDR was not necessary because the student had not violated the district's drug policy. (TR 92, 216, 283). The meeting was adjourned after the parents and their advocate stated that the student had not violated the school's drug policy and thus the suspension was unwarranted. (SD 789). Mrs. [redacted] testified that she was "caught off guard" when the student's advocate insisted that the MDR should not be held. (TR 578). She further testified that she thought that the meeting was important and wanted to continue it if possible, but "acquiesced" to the advocate's insistence. *Id.* The student's contention that the MDR was not completed seems disingenuous given the parents' and advocate's insistence that the MDR was not necessary. Since the September 2006 MDR was not legally required, the fact that the meeting was ended prematurely is not a violation of the IDEA.

When a student with a disability is suspended for 10 school days or less, the forum to appeal the suspension is the district's Board of Education. 105 ILCS 5/10-22.6(b). The district informed the parents of their appeal right in a letter dated September 8, 2006. (SD 288). The student's mother testified that she appeared at a Board meeting and presented a note from the physician, which stated that the student did not have Xanax in her system. (TR 912). The mother further testified that the Board wanted to review the statement and speak with the doctor. She testified that gave consent for the Board to talk with the doctor regarding only the Xanax portion of the drug screen. (TR 913). The superintendent testified that she had told the mother that she could appear at the Board retreat to provide information on the student's suspension because the regular Board meeting was not until late September. (TR 873). There is no indication that a disciplinary hearing was held during the Board retreat or that the Board made any decision regarding the suspension. (SD 326.) After appearing at the retreat, the parents requested an appeal of the student's suspension with the Board of Education. (SD 295). The mother signed a written release on September 18th, permitting the

district to speak with the physician about the Xanax portion of the drug screen. The disciplinary appeal hearing was set for September 25, 2006. (SD 315).

The parents withdrew their disciplinary appeal on September 24th, stating that they would appeal the discipline in a due process hearing. (SD 317). Then, on December 12, 2006, the parents sent a letter to the Superintendent, stating that they had appealed the discipline by appearing before the Board on September 7th. The December 12th letter directly contradicts both the parents' September 24th letter and the superintendent's September 21st letter. It is clear from the parents' letters that they requested an appeal to the Board and later changed their minds and withdrew their appeal. The undersigned will not speculate as to the purpose of the December 12th letter. it is sufficient to say that the December 12th letter, which was written after the parents had withdrawn their disciplinary appeal before the Board, cannot undo that withdrawal. The proper forum to dispute the allegation of whether the student had taken Xanax was the Board of Education. The evidence clearly shows that the parents chose not to pursue their appeal in the proper forum.

The testimonial and documentary evidence shows that the January 2007 MDR was held pursuant to an oral order made by IHO Gordon. The student argues that the MDR team could not have "logically or legally" determined that her conduct was substantially caused by her disability and that its decision was erroneous on the merits. (Student's Closing Statement, p. 8). This is a convoluted way of saying that she disagrees with the allegation that she took Xanax and believes the evidence supports her contention. The student contends that this hearing officer has authority to determine whether the alleged conduct - possessing and/or using Xanax - actually occurred and cites [redacted] Docket No. 2008-009 (Mich. SEA 2008) ([redacted] in support of her position.[3] *South Lyons* involves a student who was suspended and then expelled for an alleged violation of the school's drug policy. In that case, however, the student was re-instated at school after the parents sought review at a school board disciplinary hearing. The expulsion, however, remained on the student's record.

The district offers *Omak School District,* 45 IDELR 54 (WA. SEA 2005) ("Omak") in support of its contention that a hearing officer does not have the authority to decide if a violation of the school's code of conduct actually occurred. In *Omak,* the issue was whether the IDEA hearing officer had the authority or jurisdiction to decide if a violation of the school's code of conduct had actually occurred. The student in *Omak* had been disciplined for smoking marijuana at school. Both he and his parents insisted that he had not done so. Two other students stated that he had. The state law specifically gave the local school board the authority to hear discipline proceedings. The IDEA hearing officer held that she had no authority or jurisdiction within the context of a due process hearing to determine whether the alleged behavior had actually occurred. The proper forum to challenge the factual basis of the behavioral allegation was at the Board disciplinary hearing. Thus, in the IDEA proceeding, the hearing officer's role is to determine whether the alleged conduct was caused by the student's disability.

Although other hearing officers' decisions are not precedent, their reasoning may be

[3] This case appears to be unpublished as the decision provided by student's counsel does not reference any official reporter or the IDELR.

persuasive, particularly when well written and researched. The undersigned finds that *Omak* is such a case. The Illinois statute regarding disciplinary hearings is similar to the Washington statute in *Omak.* The Illinois law provides that a student's parents may request review of the discipline by the local school board. Depending on a local school board's procedures, the disciplinary review will be conducted either by the board or by a hearing officer appointed by the board for such review. 105 ILCS 5/10-22.6(b). Because the student in this matter was suspended for less than 10 school days, her recourse as to the alleged conduct was through a disciplinary hearing before the school board. Her parents chose not to pursue that avenue of review. Based on the foregoing reasoning, the veracity of the allegation that the student used and/or possessed Xanax is not the issue before this hearing officer. The standard applicable to the January 2007 MDR issues is whether the student's alleged use or possession of Xanax was caused by her disability.

The student contends that the district predetermined the result of the MDR meeting by completing the MDR form prior to the meeting, except for the answer boxes and vote totals. (TR 419, 420). Mrs. [redacted] testified that she had completed the portions of the MDR form that were based on facts from the student's records and the disciplinary infraction prior to the meeting. (TR 728, 733). She testified that these portions of the report were not going to change as a result of the meeting. (TR 728, 745). She further testified that she reviewed why the student was suspended, the student's disability, and her IEP. (TR 733). The meeting notes corroborate her testimony. (SD 470). The school psychologist testified that district staff had not discussed how to vote prior to the January meeting. (TR 98). Both the mother and student's advocate, on the other hand, testified that no discussion of the underlying incident took place at the meeting. (TR 419, 491- 496, 957-964).

It is apparent that at the time of the January MDR, relations between the parties were strained, at best. The district had already attempted to hold one MDR, which ended when the advocate insisted that the meeting should not take place. Given such discord, it is not surprising that the accounts of the January meeting differ greatly. The district's testimony that there was discussion in persuasive. It is probable that it was not the kind of discussion that the parents and advocate wanted, as their point was to show that the student had been falsely accused. However, as stated above, the veracity of the allegations is not the issue before this hearing officer. The undersigned gives no weight to arguments that the district did not discuss the evidence regarding the underlying allegations or the truth of those allegations as that is not the issue before this hearing officer. The fact that the MDR form was filled out in advance is not evidence that the meeting was predetermined. *Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 46 IDELR 32 (6th Cir. 2006); *Fitzgerald v. Fairfax Cnty. Sch. Bd.* ("Fitzgerald"), 556 F. Supp. 2d 543, 50 IDELR 165 (E.D. Va. 2008). The student has not shown by a preponderance of the evidence presented that district predetermined the MDR decision by completing portions of the MDR form prior to the meeting.

The student also argues that the MDR meeting procedures were flawed because a vote was taken on the two MDR questions. Witnesses for both parties testified that a "vote" was taken. The real issue is the process used to reach a vote, not the votes *per se*. The mother testified that the team had discussed the violation and asked if the violation was a result of the student's disability. She testified that each person was asked to respond yes or no. (TR 963). The student's advocate testified that the copy of the MDR form that the parents were given at the end of the meeting did not have hash marks on it, but the copy they

received in the mail did record the vote. (TR 352). He also testified that consensus is required at a MDR and that the parents would have brought more people if they had known that a vote was going to be taken. (TR 413-416).

Mrs. [redacted] testified that she went around the table and read the questions to each individual and asked each individual for a response. (TR 727-729, 733-735, 743). She further testified that the hash marks on the document were her way of tracking that information. (TR 734-744). The school psychologist also testified that a vote was taken on the manifestation questions after a discussion had occurred. (TR 78-79, 97). District staff, each of whom knew the student, voted that her behavior was not a manifestation of, or substantially related to, her disability. (TR 79, 745, 746, 1419). The student's case manager testified that there was no "reason to think that she didn't know that was not something she should do." She also testified that the student had no conduct problems so there was no reason to think she could not control her behavior. (SD 1171). Parents do not have the right to veto a district's ability to discipline a student. If consensus cannot be reached at a MDR meeting, the district must decide whether the student's conduct was a manifestation of her disability. *Fitzgerald; Questions and Answers on Discipline*, 47 IDELR 227 (OSERS 2007). Clearly, the parties disagree as to whether the student took and/or possessed Xanax. That, however, was not the question addressed at the January MDR, and it is not the issue before this hearing officer. The student has not shown by a preponderance of the evidence that the January MDR was flawed because a vote was taken. When consensus could not be reached at the meeting, the district's responsibility was to make a determination on the two manifestation questions. That is what they did.

The student's complaint that the district abdicated its responsibility to decide the MDR questions in September 2006 juxtaposed with her complaint that the district reached a decision in January 2007 suggests that the student's complaint is not really about the district's MDR determination. Rather, it is about the fact that the district did not review the evidence of the alleged Xanax usage and/or possession at the MDR. Unfortunately for the student, the parents did not pursue their appeal in the proper forum. The mother testified that the student's drug screen, which the board had requested, was positive for marijuana. She also testified that the student had told her that she had tried marijuana but had not done so at school. (TR 980, 981). Whether this was the reason the parents did not purse their appeal to the school board is unknown; the fact is they did not, and this hearing officer has no authority or jurisdiction over the disciplinary offense itself. The student has not shown by a preponderance of the evidence that the vote taken at the January 2007 MDR meeting was an impermissible flaw in the meeting or that such a vote denied her of a free appropriate public education.

Extracurricular and Nonacademic Activities

The student asserts that the district denied her a FAPE by not including a statement of the extent of her participation in extracurricular and nonacademic activities in her IEPs dated March 13, 2006, and November 1 and 28, 2006. She also contends that these IEPs did not include the services necessary for her to participate in such activities. The student cites *Bend-Lapine School District v. K.H.*, Opinion and Order, (D.C. Or. 2005) ("Bend-Lapine"), in support of her argument.

The IDEA and its implementing regulations require that a student's IEP contain a statement of the "special education and related services and supplementary aids and services....and a statement of program modifications or supports for personnel that will be provided to enable" a student to participate with students with and without disabilities in school activities. 20 U.S.C. §1414(d)((1)(A)(i)(IV)(bb); 34 C.F.R. §300.320(4)(iii). This provision requires such a statement when a student needs supports and modifications to participate in extracurricular activities. There is no requirement for such a statement if the IEP team has not determined that a student needs supports to participate in activities. *Bend-Lapine* does not hold otherwise. At issue in *Bend-Lapine* was whether the student required residential placement. The court held that the IEP did not contain a statement "as to why full participation with nondisabled kids in a *regular classroom* was not possible." *Bend-Lapine* at 24 (emphasis added). Participation in extracurricular activities was not mentioned in that case.

The mother testified that the student participated in Students Against Drunk Drivers, the FCCLA, and the speech team in March 2006. She further testified that the student liked participating in extracurricular activities. (TR 902). The school psychologist testified that no deficits in self-esteem or social isolation were noted at either the February 2006 domain meeting or the subsequent March 2006 IEP meeting. (TR 105, 106). The school psychologist testified that both the mother and student had attended the March IEP and that neither had raised social/emotional concerns. (TR 105, 106). The school social worker who had conducted the social/emotional assessment prior to the March 2006 IEP testified that the student told her that she had friends and participated in FCCLA and puppy club. She also testified that the student appeared happy and positive about school. (TR 1388, 1390). No testimony was presented showing that the student needed services and supports to participate in extracurricular activities in March 2006. In fact, the testimony and evidence shows the opposite – she was able to participate in activities of her own choosing without any special support.

The undersigned notes that the March 13th IEP was added as an issue in the due process complaint on September 18, 2007, one year to the day on which the parents filed their original due process complaint and two months after student's present counsel filed his appearance. The record contains no explanation as why the March 13th IEP suddenly became an issue more than a year after the complaint was filed or why the parents were permitted to so amend their complaint. It is worth noting that if the March 13th IEP required supports, modifications and/or accommodations for the student to participate in extracurricular activities, it is likely that the student's placement would have been changed by the disciplinary measures imposed in September 2007.

The student also alleges that neither her November 1st nor November 28th IEP included a statement of her participation in extracurricular activities. Because of discipline imposed by the district in September 2006, the student was prohibited from participating in extracurricular activities for the remainder of the 2006-07 school year. The IEPs could have included a statement that the student was prohibited from participation due to violating the code of student conduct; however, the lack of such a statement is not a significant procedural violation in this instance. The November 1st IEP meeting notes indicate that both advocates who attended the meeting asked that the IEP include a statement specifying that the student should socialize and participate in extracurricular activities. (SD 83). The student's advocate

testified that the team did discuss the student's participation but did not include a statement as to whether the student would participate in extracurricular activities. (TR 305).

Between the November 1st and November 28th IEP meetings, the student took an overdose of one of her prescription medications and was psychiatrically hospitalized. The mother testified that the student was very depressed when she came home from school and felt that no one cared about her. The student was taken to the emergency room, where she received immediate medical treatment, and then psychiatrically hospitalized. (TR 939-943). The mother testified that the psychiatrist and in-patient mental health team recommended that the student attend the hospital's PHP program prior to returning to public school. (TR 943). The mother testified that the student left the PHP program when the insurance company would no longer pay for the program. (TR 945).

The November 28th IEP meeting was held to develop a homebound program for the student pursuant to her parents' request and a physician's order. (SD 447). As indicated above, the student was still under the disciplinary prohibition on participating in extracurricular activities. She also was unable to attend school per a physician's order. The IEP was not required to include activities in which the student could not participate. The student has not shown by a preponderance of the evidence that the omission of a statement in her IEPs regarding participation in extracurricular activities denied her a free appropriate public education.

Extended School Year

The student next claims that the district denied her a FAPE when it refused to consider and/or provide ESY in her IEPs dated November 1 and 28, 2006, and January 16, 2007. According to the student, the district's decision not to consider ESY in these three IEP meetings effectively denied her ESY services in the summer of 2007. The student's closing statement argues that ESY is not limited to summertime services and therefore the district should have provided her psychological counseling as an extended day service after falsely accusing her of taking and/or possessing Xanax. The student asserts that such services would have limited her risk of suicide and prevented her falling behind in her cosmetology course. However, this request was not set forth prior to the hearing. (Closing argument, p. 13). At least part of reason for the untenable length of time this case has been pending is the numerous amendments that were permitted throughout this matter. It would be unfair to the district to allow an issue to which it has never had the opportunity to respond. The ESY issue is as stated in above, in the Issue section of this decision. The requests for psychological services are addressed below.

A district must ensure that ESY services are available to students with disabilities as necessary to provide them with a FAPE. However, ESY services must be provided only if the IEP team determines that an individual student requires ESY to receive a free appropriate public education. 34 C.F.R. §300.106(a). Both special education and related services are part of ESY, in accordance with a student's IEP and if required, must be provided at no cost to the student's parents. 34 C.F.R. §300.106(b)(1). Neither the IDEA nor its implementing regulations provide a standard for determining when ESY is necessary. If a student will lose skills or regress in skill level over the summer, ESY is required. *Lawyer v. Chesterfield Cnty. Sch. Bd.*, 19 IDELR 904 (E.D. Va. 1993). There must be a reasonable basis for concluding

that regression would occur without the provision of ESY. *Letter to Anonymous*, 22 IDELR 980 (OSEP 1995). The testimonial and documentary evidence is examined in light of these principles.

The IEP team discussed both the summer cosmetology program and after-school tutoring at the November 1st IEP meeting. The team agreed that the student would attend the cosmetology program. The only disagreement, according to the meeting notes, was over the parent's and advocates' request that the program be considered a related service or ESY. The district stated that the cosmetology program is a regular education program. (SD 90, 91). The team added after-school tutoring to the student's IEP. (SD 91). The student's next annual IEP review was to be held in the spring of 2007, and the IEP team determined that it would make a final ESY decision at the spring meeting, when it would be better able to determine the student's current needs. The student contends that the district's decision to determine her ESY needs in the spring effectively denied her ESY for summer 2007. *Reusch v. Fountain*, 872 F. Supp. 1421, 1424, 21 IDELR 1107 (D. Md. 1994) ("Reusch"). *Reusch* was a class action that involved allegations of several IDEA violations by a local Maryland school district. In *Reusch*, 75% of the district's ESY eligibility decisions were made by May 1st and all denials of ESY were made after that date. While matters of timing are usually left to a district's discretion, the *Reusch* court found that the district had abused its discretion through use of the two-step process and by delaying ESY decisions for no legitimate reason. *Reusch*, 21 IDELR 1107. There was no proof in this matter that the district delayed its ESY decision for this student for an illegitimate reason.

Because ESY is intended to prevent regression rather than advance educational goals, it is not unreasonable for a district to wait until spring to make an ESY decision for a student. *Reinholdson v. Sch. Bd. of Independent Sch. Dist. No. 11*, 44 IDELR 42 (Minn. 2005), aff'd. 46 IDELR 63 (8th Cir. 2006). There is no evidence that the student regressed in her skills over the summer. What is clear is that the student's advocates wanted the cosmetology program, which is a regular education program, as ESY or a related service so that the district would bear the cost. The student has not sustained her burden of proof on this issue.

Functional Performance

The student asserts that her November 1st IEP did not contain a statement of her functional performance and that the lack of such a statement denied her a free appropriate public education. According to the student, her IEP should have included a statement of the level of her daily living skills. (Closing Statement, p. 11).

An IEP must include a statement of the student's level of functional performance. 20 U.S.C. §1414(d)(1)(A)(i)(I); 34 C.F.R. §300.320(a)(1). The student's expert witness, [redacted] has a doctorate in psychology and is a licensed clinical professional counselor and a licensed school psychologist. (PD 1). Dr. [redacted] testified that functional performance refers to an individual's daily living skills, including self-care skills, ability to make transitions, knowledge of routines in the community or school. She testified that a functional performance statement is important for this student because her variable IQ scores raise questions as to her ability to function on her own and the level of her daily living skills. (TR 1320). District staff testified that the student had no deficits in motor functioning or communication. (TR 107, 120, 1161). The district's school psychologist testified that the

student did not demonstrate below average adaptive skills. (TR 120). The interview for the social/emotional assessment in March 2006 notes that the student's chores at home included cleaning her room and doing her laundry. (SD 132). The student has a driver's license and drives herself to places in the community. (TR 193). The student testified that she held a job in a retail store in a neighboring city. (TR 226). She also testified that she had friends and did activities with her friends in the community. (TR 228).

While the student is correct that her November 1st does not contain a statement of functional performance, there is no evidence showing that she had deficits in functional performance. No one reported that she had problems with her daily living skills. She was able to hold a job, drive, attend school, and develop and maintain friendships. The student had not sustained her burden of proof on this issue. The omission of a functional performance statement did not deprive the student of a FAPE.

Research-based Reading Program

The student argues that a research-based reading program was not included in her IEPs dated November 1 and 28, 2006, and January 16, 2007, and that the omission of such a program denied her a FAPE. The IDEA requires that a student's IEP contain "a statement of the special education .... based on peer-reviewed research to the extent practicable, to be provided to the child." 20 U.S.C. 1414(d)(1)(A)(i)(IV). One of the student's advocates requested that the district use the Lindamood-Bell reading program with the student. (TR 997, 1027).

The student had solid decoding skills. (TR 1073, 1107) Her deficit was in comprehension and abstract verbal reasoning. (TR 1050,1060). At the beginning of high school, the student was in a regular education English class. Her parents requested that she receive direct instruction in reading because she struggled with the regular education curriculum, so the district provided direct instruction. (TR 1084). The student's teacher, Mrs. [redacted] testified regarding the reading materials and program that she used with the student. Mrs. [redacted] testified that a student's learning styles and preferences must be assessed when determining how to address comprehension problems. She testified that the student learned "particularly well" by using visual cues, graphic organizers, going from the concrete to more abstract reasoning, and asking questions. (TR 1064, 1135-1142). She testified that she used the American Guidance Service ("AGS") reading program with the student in November 2006 and stated that AGS is designed for students with learning problems. According to Ms. [redacted] the AGS program is particularly helpful in vocabulary development, which was a deficit area for the student. She further testified that she used an "eclectic" approach with the student to individualize the program for her. For example, one technique that helped the student with vocabulary was to divide a piece of paper into quarters and write a word in one section, then a definition, and then draw a picture or mnemonic device to help her remember the word. (TR 1067). The student also benefited from writing down comprehension questions before reading so that she would know what to look for in her reading. (TR 1068). Mrs. [redacted] testified that she tried to teach the student strategies that she could use for comprehending materials in all her classes, not just reading class. She did this by helping the student recognize her individual learning preferences and develop accommodations for those preferences. (TR 1068, 1069). One accommodation the student learned was to write down what she had learned after a lesson. (TR 1085).

Mrs. [redacted] testified that the student had made progress in reading. In 2005, the student's reading comprehension score was at a 7.5 grade equivalency level ("GE"); in 2006, it was at a 9.0 GE. Her total reading score was at a 7.9 GE in 2005 and 8.6 in 2006. (TR 1112). Mrs. [redacted] testified that on the ACT, the student scored at the 1st percentile in reading in September 2005; in October 2007, she scored at the 8th percentile. (TR 1114). Mrs. [redacted] further testified that on the K-TEA the student received a standard score of 87 in reading comprehension in 2006 and a 95 in 2007. (TR 1122, 1123). The standardized achievement test given to the student corroborate this testimony: the student's reading comprehension score on the K-TEA increased from 87 in 2006 to 95 in 2007. (SD 107, 792). Her reading comprehension scores on the Stanford Achievement Test showed an increase in grade equivalency from 7.5 in September 2005 to 9.0 in September 2006. (PD 788, SD 853; TR 1109-1113). On the ACT, the student's national percentile in reading increased from the first percentile in October 2005 to the eighth percentile in October 2007. (PD 788, SD 853; TR 1109-1113).

The student asserts that a review of the district's IEPs must be limited to the terms set out in the IEPs themselves. *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001) ("Knable"). *Knable*, however, deals with a proposed IEP. The 2006 and January 2007 IEPs at issue in this matter had been implemented long before this matter ever went to hearing. Thus, *Knable* is not controlling, and the testimonial and documentary evidence will be considered. A review of the student's reading goals shows that they are lacking in several respects. The reading goal and objectives could certainly be more individualized to the student's needs. The IEP should have identified the AGS program and supplementary material used to address the student's comprehension deficit. However, a hearing officer may only find that a student did not receive a FAPE if the alleged procedural inadequacies impeded a student's right to a FAPE or caused a deprivation of educational benefit. FAPE. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2).

A student's potential is relevant in determining the educational benefit that the student received. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. V.* Rowley, 458 U.S. 176 ((1982); Ridgewood *Bd. of Educ. v. NE*, 172 F.3d 237, 247 (3rd Cir. 1992); *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 36 IDELR 153 (N.D. Ill. 2002). The cognitive ability of the student in this matter has consistently been assessed as at the low end of average. Despite having a low average, or even borderline IQ, the student has always received special education and related services as a student with a learning disability.[4] The testimony and evidence shows that the student made more than minimal progress in reading comprehension, which was her identified area of deficit. Clearly she struggled at times in her regular education classes and, at one such time, the district responded to the parents' request to move her back to more special education classes when she seemed overwhelmed. The district was attentive to the student's learning needs and preferences in regard to comprehension, and the record shows that she made consistent progress in reading comprehension as measured by standardized assessments. The fact that her reading

[4] Student's counsel stated at hearing and in his closing statement that the student is mentally impaired, while emphasizing that the student's eligibility category was not challenged in this hearing. The student's expert proffered the same opinion.

comprehension did not progress as quickly as counsel may have wanted it to is a reflection of her potential, which must be considered in this decision, rather than of a deficiency in the district's programming.

Student's counsel also argues in closing that the fact that the student's comprehension score on an assessment given in Fall 2007 was at a 8.1 GE shows that the student did not benefit from the district's reading program. (Student's Closing Statement, p.12). However, the student's reading teacher testified regarding that assessment and the difficulty the student had taking assessments on a computer. (TR 1203-1208; SD 607, 620). Thus, the student's argument here is not persuasive. Based on the foregoing reasons, the undersigned finds that the student has not sustained her burden of proof on this issue.

Psychiatric, Psychological, and Social Work Services: IEPs of March 13 and November 1, 2006

According to the student, the district violated her right to a FAPE by not including psychiatric, psychological, and/or social work services in her March 13th and November 1st IEPs. She also contends that the November 28th IEP provided an insufficient level of social work services and did not identify who would provide the services.

As to the March 13th IEP, there is no evidence showing that the student needed counseling or social skills training at that time. The fact that the parents sought out counseling in the fall of 2006 is not evidence that the district should have identified such a need or provided counseling six months earlier. The evidence, set forth above, shows that at the time the March 2006 IEP was developed, the student was participating in school activities and was able to develop and maintain appropriate relationships with both peers and adults within the school environment. Although the student argues in closing that the district had an effective policy and practice of not providing psychological counseling, she offers no real proof that such a policy or practice existed. Moreover, the evidence that the district later provided social work services to the student clearly negates this contention.

The meeting notes from the November 1st IEP state that the team discussed social work services. According to the notes, the mother reported that the student was experiencing "trust issues" with the school and that the mother would discuss with the student whether she wanted direct or consult social work services. The student's advocate testified that the student had emotional problems due to the suspension. He testified that when she returned to school, she felt ostracized and shunned by school administrators and staff. (TR 309-311). The mother also testified that the student felt shunned at school. (TR 913). District staff testified that their behavior toward the student did not change after she returned from her suspension. (TR 1403-1408). The student's private counselor testified that the student's feelings of social isolation and rejection were her perception of the actions of others. (TR 814). The team felt that the student had the skills necessary to seek out support as needed because she had done so in the past. (SD 88). Despite the student's contention otherwise, the November 1st IEP does include a social work goal: "(Student) will develop self-awareness and self-management skills in order to achieve school and life success." (SD 77). The IEP goal was reviewed at the November 1st meeting. (SD 88). The evidence clearly shows that the November 1st IEP included social work services for the student.

On November 28th, the IEP team met to develop an interim IEP. (SD 439). The social work goal developed on November 1st is included in the November 28th IEP. (SD 445). The type of social service was changed from consult to direct. (SD 446). According to the meeting notes, the IEP team discussed the difference between psychotherapy and school social work services, which are provided to facilitate a student's educational functioning within the school setting. The district offered 15 mpw, stating that the services did not have to be limited to that amount. The student's parents requested 60 mpw. (SD 452).

The district's social worker who provided the homebound social work services testified that the services were provided to help the student transition back to school. (TR 1391). She worked on helping the student recognize available supports within the school environment, such as the social worker, teachers and friends. (TR 1395). The social worker testified that she met with the student three times over the course of the homebound IEP. The social worker had to cancel one appointment due to a death in her family. Another appointment was rescheduled because the student had other obligations at the last minute. The social worker was unable to meet with the student over Christmas because the student and her mother had gone on a cruise. (TR 1392-1394). The social worker testified that the student made progress over the course of the homebound social work treatment. According to the social worker, the student changed from initially feeling that she did not have friends at school to wanting to return to school where she had friends she could trust. (TR 1395, 1396). The testimony shows that the student made emotional progress during the course of her homebound program.

The IEP does not identify the person who would provide the homebound social work services. The student provided no testimony or facts as to how this technical violation denied her a FAPE. The district provided the services set forth in the IEP. This procedural violation does not amount to a substantive violation of the student's right to a FAPE.

As with many issues in this matter, the parties disagreed as to how a particular service should be provided. Such disagreement does not, by itself, lead to a conclusion that the student was denied a FAPE. Based on the foregoing testimony and evidence, the undersigned finds that the student made emotional progress and benefited from the social work services provided by the district. After her homebound placement, the student was able to successfully transition back to public school. The student has not shown by a preponderance of the evidence that the amount of social work services in the November 28th IEP was insufficient.

Finally, the student contends that the district refused to pay for the psychiatric and psychological services that the parents were providing for the student at the time the November 1st IEP was developed. The record indicates that the student had seen a psychiatrist for some time prior to November 1st for her ADD and/or ADHD, for which she was prescribed medication. There is no evidence that as of November 1st, the student was receiving any other psychiatric services than those related to medication management for ADD/ADHD. (PD 808). The student provides no legal reason why the district should bear the costs for this expense, and the undersigned is not aware of any. The student has not sustained her burden of proof on this issue.

The student began receiving private counseling in September 2006, from [redacted]

(TR 781). Ms. [redacted] has a master's degree and is a licensed clinical professional counselor. (TR 779). Ms. [redacted] testified that the student showed symptoms of anxiety and depression when she began counseling. (TR 781). She testified that the student reported that she had conflicts with peers at school and felt that her teachers and the principal were ignoring her. (TR 782, 783). According to Ms. [redacted] the student's depression interfered with her ability to concentrate at school and also made her feel sad. (TR 784, 785). Ms. [redacted] testified that the suspension contributed to the student's feelings of rejection and low self-esteem. (TR 791). However, as noted in the prior section, Ms. [redacted] also testified that the student's perception that others were shunning or rejecting her was an internal reaction and expression of her feelings.

Ms. [redacted] saw the student individually and also in family therapy, with the mother. (TR 795). Ms. [redacted] testified that the student was very close to her brother and that his incarceration, which occurred around the time she began working with the student, contributed to the student's anxiety and depression. (TR 796, 797). Other family issues included arguing between family members, which resulted in the student's feeling caught in the middle and responsible, and her father's drinking. (TR 796, 799). Ms. [redacted] testified that these family conflicts contributed to the student's anxiety and depression. (TR 799). The student testified that her brother was incarcerated in October 2006 and that she was very upset about that. (TR 219, 220).

Undoubtedly, the fall of 2006 was an extremely difficult time for the student and her family. The suspension was one piece of that difficulty. This testimony shows that in her private counseling sessions, the student dealt with issues related both to home and school. However, that does not mean that the district is responsible for paying for her outside mental health treatment. The student does not provide a legal reason why, as of November 1st, the district should have paid for her private counseling sessions. The undersigned does not find any reason why it should have done so. The student has not shown that the district's refusal to pay for her private counseling denied her a free appropriate public education.

Homebound Services: November 28, 2006 IEP

The student complains that the November 28th IEP did not provide a full curriculum, specify the specialized instruction she would receive, require more than 180 mpw of instruction, include a goal that she would return to school, or consider a full continuum of services, including maintaining the student at the Riverside PHP.

A school district must provide a continuum of placement options to meet the needs of students with disabilities who receive special education and related services. 34 C.F.R. §§300.39, 300.115; 23 Ill. Adm. Code §226.300. A student may receive homebound instruction when she is unable to attend school elsewhere due to a medical condition that will cause an absence of two or more consecutive weeks. 23 Ill. Adm. Code §226.300(a), (b). The IEP team must have a written physician's statement, which states the student's condition and its impact on the student's ability to participate in education and the anticipated duration of the student's absence from school. 23 Ill. Adm. Code §226.300(b). The amount of instructional or related services provided in a homebound program is determined by the student's educational needs and physical and mental health needs. The amount of instructional time must not be less than five hours per week unless a written physician's

statement specifies otherwise. 23 Ill. Adm. Code §226.300(d).

The November 28th IEP requires 450 mpw of special education services and 15 mpw of social work services. This is the same amount of special education instruction that the student received pursuant to her prior IEP. (SD 446). The meeting notes state that the student "will need to have at least 1 ½ hour per day 5 days per week – at times it will need to be increased to more than that." (SD 453). The homebound instructor testified that she started out providing homebound instruction 1 ½ hours per day five days a week. At some point, the time changed to two hours or more three days per week unless the student cancelled. (TR 1414, 1425, 1426). The teacher testified that the mother cancelled approximately three instructional periods. (TR. 1430, 1431). The basis of student's allegation that the IEP called for only 180 mpw of instruction is unclear. The evidence and testimony show that the district provided much more instruction than that, usually at least 450 mpw unless the student cancelled the instructional time.

The homebound instructor testified that she responded to the student's individual needs by helping her with her reading comprehension problems. She used a number of techniques to help the student including reading with her, asking questions to check her understanding of the material, explaining the material or having the student explain it to her, and working on vocabulary development. (TR 1413, 1414, 1427). The homebound instructor implemented lesson plans that the student's teachers had developed. (TR 1414). She further testified that she always left homework for the student, and they reviewed it during the next lesson. (TR 1428). The instructor testified that the student needed less direction from her over the course of the homebound instruction. She testified that the student told her that she had learned a lot. She also testified that the student's attitude and behavior showed that she benefited from the instruction. (TR 1428). The student testified that she became "pretty close" to the homebound instructor and that the instructor "knew all my learning levels, she knew how to work with me." (TR 222).

This IEP is unclear as to what instruction was to be provided to the student over the course of her homebound program. The student's contention that the IEP does not include a goal that she would return to school is also correct. But, as above, the question is whether these deficiencies denied the student a free appropriate public education. Based on the evidence and testimony above, the undersigned finds that they did not.

The student's final contention as to this IEP is that the IEP team did not consider a full continuum of placements options. The IEP notes state that the meeting was called to prepare an interim IEP for homebound services. (SD 451). Mrs. [redacted] testified that a homebound program is "very typical" for students coming out of a hospital placement and that the district has offered these services successfully to both special education and regular education students. (TR 642). She also testified that the district did not consider the PHP program as a placement option for the student. (TR 766). The mother and advocate testified that the IEP team did not consider any program other than homebound. (TR 508-510, 947, 951). The mother testified that she had requested homebound because that was the only option she knew. (TR 1005-1008).

The IEP team considered the letters from the student's psychiatrist and private counselor, both of whom had recommended homebound instruction, in making its decision to

provide homebound instruction. Dr. [redacted] letter recommends homebound instruction because of the student's "clinical condition," which includes "severe anxiety while in school and stress and inability to function while in school." (SD 408). Ms. [redacted] letter requests homebound instruction because the student was "not ready to return to school." (SD 409).

Based on the above testimony and evidence, the undersigned finds that the district did not consider a full continuum of options. The district's argument that they were reacting to the parents' request for homebound and the recommendations by student's mental health providers for such placement does not excuse the district from complying with the requirement to consider a full range of options. However, that the district did not consider the PHP program is not the same as saying that the PHP program would have offered the student a FAPE in the least restrictive environment.

The student argues that she needed the psychological services offered in the PHP to benefit from her education. See, *Dale M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 237 F.3d 813 (7th Cir. 2001) (holding that a district need not pay for psychological services if a student's emotional needs are segregable from the learning process). Dr. [redacted] opined that the stressors that the student experienced at home contributed "a lot" to her problems and affected her ability to attend school and perform well in school. (PD 808). Ms. [redacted] testified that she had recommended homebound because the mother had requested it. (TR 817). She further testified that homebound was not as beneficial as the PHP program, in which the student would receive therapy, socialize with other students, and receive an education. (TR 816).

The law does not require a district to provide the most beneficial educational program. Rather, a district must provide the special education and related services necessary for a student to receive educational benefit. Ms. [redacted] testified that she thought homebound was an appropriate recommendation at the time she recommended it. (TR 818). Her later testimony that the PHP would have been more beneficial is not relevant to the determination at hand. No testimony was presented showing that the student required the level of psychological services offered in the PHP after she was discharged from that program.

The mother testified that student was socially isolated during her homebound placement and only socialized with her parents. (TR 946, 947). This testimony is directly contradicted by both the student and the homebound instructor. (TR 947). The student testified that she went out with a friend on Friday nights during her homebound period. (TR 228). She also went to movies occasionally. (TR 229). The homebound instructor testified that the student told her about activities and plans she had with friends. (TR 1441, 1454). . Both the student and the homebound instructor, as set forth above, testified that the student benefited educationally from her homebound placement. The student also benefited from the social work services, the goal of which was to help her transition back to public school successfully. The student has not shown by a preponderance of evidence that the district denied her a FAPE by not considering the PHP as an option when it developed her November 28th IEP.

At to the student's contention that the IEP did not contain a goal to return to school, district staff testified that they did not know when the student would be cleared medically to return to school. Her psychiatrist recommended homebound until the end of the school year,

and Ms. [redacted] recommended that she transition back as her ability to cope with stress increased. (SD 408, 409). There is no evidence that the student was denied a FAPE because of the omission of such a goal. The student has not sustained her burden of proof on this issue.

Transition Services

The student claims that the January 16, 2007, IEP did not include a transition plan. A district must provide transition services to a student with a disability. Such services must be results-oriented to assist the student in improving academic and functional skills so that the student can move from school to post school activities, including postsecondary education and vocational education. 34 C.F.R. §300.43(a). The transition services must be based on the student's individual needs and include instructions, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, the acquisition of daily living skills and the provision of a functional vocational evaluations. 34 C.F.R. §300.43(a)(2); 23 Ill. Adm. Code §226.75.

The January 16th IEP was developed after the student returned to school from her homebound program. (SD 459). The special education director testified that the student's transition plan had not changed and would be discussed with the student when she returned to school. (TR 726, 727). The student's transition plan begins on page six of her IEP. (SD 468). It identifies two post-school vocations – a beautician and a speech pathologist. Goals are identified for employment, post-secondary education, and community living. The cosmetology program and LIFE classes are mentioned in a section on transition supports. (SD 468). The meeting notes show that the IEP team discussed the cosmetology program, whether the student would return to it, and if so, when she would return. As the student did not attend the IEP meeting, the team had no input from her on these issues. (SD 472). The meeting notes state "Transition Plan – Need to discuss with (student) & find out more about career center." (SD 476). The student testified that she did not want to go back to the [redacted] but understood that she could have gone back and had the opportunity to make up the work she had missed. (TR 231). Ms. [redacted] testified that after the student returned to school, she did not want to go back to [redacted] and so other classes were set up for her at the high school. (TR 1173). The student took Foods I, LIFE, and Parenting. (SD 483, 484).

The transition plan does not meet the requirements set out in the IDEA and the regulations. The question, however, is whether this procedural violation denied the student a FAPE. The transition plan was developed without the student's input, and the district's plan to obtain her input is certainly valid. The student decided not to return to the cosmetology program, which had been an integral part of her prior transition plan. The district then placed the student in classes to fill the openings in the student's schedule. No evidence was presented on how these particular classes were chosen. Clearly, the district's focus – and undoubtedly that of the parents also – was to assure that the student made a successful transition back to school. Mrs. [redacted] testified that the district spent considerable time helping the student transition b back to school. (TR 1143-1146). The student has raised important questions about her January 16th transition plan. However, her allegation is that her January 16th IEP did not include a transition plan. That she had not proved.

The student also asserts that the district did not pay for her transition services between

March 13, 2006, and January 6, 2007, and thereby denied her a free appropriate public education. Between March 2006 and January 2007, the student was enrolled in the cosmetology program at [redacted] as part of her transition program. The parents were charged fees for the program.

A district must provide special education and related services at public expense to eligible students with disabilities. "At public expense" means at no cost to the parents of students with disabilities. The term, however, applies to specially designed instruction that is the student's special education, as well as any required related services. Parents may be charged incidental fees that are normally charged to non-disabled students and their parents as part of a regular education program. Letter to Anonymous, 20 IDELR 1155 (OSEP October 8, 1993). The cosmetology program is a general education program located in the [redacted] Because the cosmetology program is a general education program, the parents can be charged for the program and such charges do not deny a student a free appropriate public education.

Independent Educational Evaluation and Test Protocols

Finally, the student argues that the district denied her a FAPE by refusing her request for an IEE and by destroying the test protocols from its evaluations of the student. In her closing argument, the student states that "because the District actually filed a Complaint regarding its denial of an IEE Request, a decision is required on that Complaint that has never been withdrawn by the district." (Student's Closing Statement, p. 18). This statement ignores what has happened procedurally with the IEE request.

Parents have a right to an IEE at public expense if they disagree with the district's evaluation and submit a written request for an IEE at public expense to the district's superintendent. 34 C.F.R. §300.502(b); 23 Ill. Adm. Code §226.180(b). When a district receives a request for an IEE at public expense, it must provide the IEE at public expense or file a due process complaint to show that its evaluation was appropriate or provide an IEE at public expense. 34 C.F.R. §300.502(b)(2). In Illinois, the district's due process request must be filed within five days of the parents' written IEE request. 105 ILCS 5/14-8.02(b). As part of a parent's due process hearing rights in Illinois, a parent may ask the hearing officer to determine if an IEE is needed. 23 Ill. Adm. Code §226.625(a)(2). A hearing officer may order an IEE if such is necessary to inform the hearing officer of the services to which the student may be entitled. 34 C.F.R. §300.502(d); 23 Ill. Adm. Code §226.660(e).

The parents, through their advocate, requested that IHO Gordon order an IEE at public expense. (PD 840). The request was faxed to IHO Gordon on March 23, 2007 and a copy was sent to the district's attorney. (Gordon, File 2). The district filed a due process request with the ISBE on March 30, 2007. On April 2, 2007, the parents' advocate filed a response, asserting that their IEE request was to the hearing officer and that "(t)he District is not entitled to a Due Process Hearing unless we ask the District for an IEE. At this time, we have not asked the District." (Gordon, File 2). Then, on April 25, 2007, the parents' advocate argued that the district's due process complaint on the IEE issue was not timely because it had not been filed by March 28, 2007. (Gordon, File 2). IHO Gordon issued an order on the IEE request on May 12, 2007, which stated in relevant part: "In this case, the request for an IEE was not made to the School District. The facts of the case indicate the Parents requested an

IEE so the Hearing Officer could receive the help the Parents believe the Hearing Officer needs to determine issues related to FAPE. Therefore, the School District agreement or disagreement was not triggered by the Parents' Request for an Independent Educational Evaluation. The fact that the School District shortly thereafter cross claimed on an issue related to its own educational evaluations doe not mean that legally the Parents have a right to an IEE because the School District filed its cross claim seven calendar days after the Parents requested the Hearing Officer order herself and IEE for her own deliberations." (Gordon, File 2). The undersigned dismissed the district's request for a hearing on the IEE issue on July 11, 2008. The district was not required to withdraw its complaint as the complaint was dismissed as moot.

After this hearing officer was appointed, the student requested that the undersigned order an IEE. The district responded to the student's request on September 18, 2008. On September 24, 2008, the undersigned denied the student's request, stating in relevant part that the hearing officer "must hear all the evaluation testimony and evidence before deciding if the district's evaluations were adequate."

Dr. [redacted] the student's expert witness, has never met the student. Her knowledge of the student is from reviewing the student's and district's evidence binders in this case. (TR 1290, 1347). Dr. [redacted] testified that on the WASI, the student received a verbal scaled score of 70, a similarities scaled score between 80 and 85, and a performance scaled score of 85. (TR 1294, 1295). Dr. [redacted] testified that the WASI is a brief intelligence test and does not give sufficient information to adequately determine the student's needs. (TR 1292, 1293, 1296). She did testify that the WASI could be given when a student had several prior evaluations and stable IQ scores. (TR 1349). She also testified that the test was administered in a non-standard way but stated that such administration did not necessarily affect the validity of the test. (TR 1305, 1306). Although she has never administered the WASI, Dr. [redacted] testified that it is difficult to score. (TR 1292, 1293, 1299).

Dr. [redacted] also testified regarding the K-TEA that the student was given in 2006. She stated that the test was out of date when it was administered. (TR 1307-1309, 1361). She testified that the newer version of the test was standardized and normed on the present population and thus would provide a good comparison to average in the general population. (TR 1309). She stated that the test scores on the K-TEA that the student was given could be inflated when compared to scores on the updated K-TEA II. (TR 1311, 1364). She testified that based on these assessments, it would be hard to determine the student's actual educational needs. (TR 1313).

The district's school psychologist, Ms. [redacted] testified regarding her evaluation of the student. Ms. [redacted] testified that on the WASI, the vocabulary and matrix reasoning subtests are used to determine an overall estimate of a student's cognitive ability. (TR 56, 123, 124). She testified that the student has a unique profile in that she scores better on academic achievement tests than on tests of cognitive ability. She testified that the student needs experience and practice to understand how to do things. (TR 119). She testified that the student does not meet the criteria for mental impairment because she does not demonstrate below average adaptive skills, communication skills and core academic skills. (TR 120). She further testified that the patterns in the student's assessments over the years have been

consistent – she scores stronger in verbal areas than in nonverbal, and she scores better on academic achievement tests than on tests of intellectual functioning. (TR122).

According to the testimony presented, the WASI may be used when a student has been tested before and has stable IQ scores. The opinions of the two school psychologists differ as to whether the student's scores were stable. The evidence shows that the student has always scored at the low end of average on IQ tests, with variations in the actual IQ score. Ms. [redacted] testified that she did not give the fourth WASI subtest because she had sufficient information on performance from another evaluation the student had taken. (TR 114). While the testimony of both witnesses was credible, the fact that Ms. [redacted] has personal knowledge of the student and several years of experience with her makes her testimony persuasive. As to Dr. [redacted]s testimony that the K-TEA was out of date and thus scores could be inflated in any comparison to updated tests, there was no testimony that the district made such a comparison. Ms. [redacted] testified that she had selected that test so that she could compare the student's scores to the scores she had received when she took the same test in 2003. (TR 108, 109). Based on the testimony and evidence presented, the student has not shown by a preponderance of the evidence that the district's evaluation was not adequate.

A student school record is any writing concerning a student and by which a student may be individually identified that is maintained by a school, regardless of how or where the information in stored. 105 ILCS 10/2(d). A student's temporary record includes intelligence test scores, aptitude test scores, and psychological and personality test results. 105 ILCS 10/2(f). A school must maintain a student's temporary record and the information contained in that record for not less than five years after the student has transferred, graduated, or otherwise withdrawn from the school. 105 ILCS 10/4(f). A parent alleging a violation of the Illinois Student School Records Act may file an action for injunctive relief or for damages in the Circuit Court of the county in which the violation occurred or in which the school is located. 105 ILCS 10/9. This hearing officer has no jurisdiction over violations of FERPA or the Illinois Student Records Act.

Dr. [redacted] testified regarding her knowledge and experience with test protocols. She testified that it is not common practice for school psychologists to destroy test protocols. (TR 1314). She testified that she retains test protocols for seven years. (TR 1315). She further testified that in the school districts she is familiar with, the common practice is to retain test protocols. She also testified that school psychologists have an ethical responsibility to retain such documents. (TR 1362, 1363). She testified that protocols are necessary to determine whether an evaluator has properly administered and scored the tests used to assess a student. (TR 1300, 1313).

The district's school psychologist testified that the district retains the test cover sheets, which include a summary of the scores, the raw scores, the standard scores, and the percentile ranks. (TR 54, 125). She further testified that it was standard practice in the district to not retain answers to test questions once the scores were written into a report and the eligibility conference was held. (TR 58, 124). She also stated that other districts in the county destroyed test protocols and retained only the personally identifiable information. (TR 128). She also testified that the district's policy has changed. (TR 128).

To begin, this hearing officer has no jurisdiction over alleged records violations pursuant to FERPA and the Illinois Student Records Act. Might it have been better to retain the protocols from the district's evaluations of the student? Perhaps, but that is not the question before this hearing officer. The student's claim is that the destruction of the test protocols denied her a FAPE. To find in the student's favor on this issue, the undersigned would have to assume that the district's evaluation was incorrectly scored and thus invalid. A decision cannot be based on assumptions. The student has not shown that the destruction of test protocols denied her a FAPE.

IT IS ORDERED THAT: All student's claims against the district in this matter are hereby dismissed. The district need take no further action in this matter.

Right to Request Clarification

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party(ies) and the Illinois State Board of Education. After a decision is issued, the hearing officer may not make substantive changes to the decision. The right to request such clarification does not permit a party to request reconsideration of the decision itself, and the hearing officer is not authorized to entertain a request for reconsideration.

Right to File Civil Action

This decision is binding on the parties unless a civil action is timely commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

ISSUED: November 29, 2008

Mary Schwartz
Impartial Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Decision and Order was sent by certified mail prepaid and directed to:

Mr. [redacted], Esq.
[redacted]

Mr. [redacted], Esq.
[redacted]

Mr. Andrew Eulass
Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

before 3:00 p.m. on November 29, 2008.

Mary Schwartz
Impartial Hearing Officer
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