

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

[REDACTED]
Student,

v.

[REDACTED]
Local School District.

)
)
) CASE NO. 2008-0396 AUG 25 2008
)
) MARY SCHWARTZ
) Impartial Hearing Officer
)

DECISION AND ORDER

Jurisdiction

This matter is before the undersigned hearing officer on the parents' 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.*, and 23 Il. Adm. Code § 226.600 *et. seq.* The parties have been fully advised of their rights pursuant to these statutes and regulations.

Procedural Background

On March 13, 2008, the parents submitted a due process request, which the district received on March 17, 2008. The Illinois State Board of Education ("ISBE") appointed the undersigned as hearing officer on March 24th. The undersigned issued a Preliminary Scheduling Order on March 25th and scheduled an initial telephone status conference call for April 2nd. The district filed its response to the due process request on March 26th.

The district scheduled a resolution session for March 31st; however, the parents asked to waive resolution, and the district agreed to do so. Although the parents were originally represented in this matter, the undersigned was informed on April 2nd, that the parents had decided to represent themselves. A conference call was then held with the district and parent, and the prehearing conference was scheduled for April 21st. The parties were fully advised of their rights prior to the prehearing conference. The prehearing was held as scheduled. As the prehearing conference is summarized in a the undersigned's prehearing conference report, the details are not reported here.

Several telephone status conference calls were held between the prehearing conference and the due process hearing to discuss hearing related matters with the parties. During one status call, the undersigned ordered that the district must call as witnesses the outside experts whose reports the district had used in making its decisions about the student's eligibility and placement. The undersigned also asked the district to submit a memorandum on its position that homebound tutoring is the student's stay-put placement.

The due process hearing was held on May 9 and 23, June 19 and 30, July 29, and August 12, 2008. The district called ten witnesses, which included IEP members and the three outside evaluators on whose reports the district based its eligibility and placement determinations. The parents called nine witnesses, including the substitute teacher, the student's treating psychiatrist and counselor, the mother, and several of the district's witnesses. County Court Reporters, Inc., provided court reporters throughout the proceedings. Both parties entered their entire evidence binders into evidence at the end of the hearing¹. A transcript of the proceedings, with the exception of the final day on which closing arguments were held, was provided to the undersigned prior to writing this decision. The hearing officer has reviewed the transcript and all documents entered into evidence by the parties. This decision is issued within ten days, as required by Illinois statute.

Issues Presented and Remedies Sought

The parents contend that the district's proposed placement, a therapeutic day school, does not provide the student with a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). They also disagree with the district's eligibility determination of emotional disorder ("ED") for the student. The parents request that the undersigned determine that the student's eligibility category is Attention Deficit Hyperactivity Disorder ("ADHD") and that the appropriate placement to provide the student with a FAPE in the LRE is a regular education classroom in the neighborhood school. The parents further request that the district provide in-school social work services for the student and develop an appropriate transition plan with the parents to help the student transition back to school from her lengthy homebound placement.

The district argues that the student's eligibility category is ED and that placement at [REDACTED] will provide her with a FAPE in the LRE. The district does not dispute the ADHD diagnosis but rather asserts that any needed services for ADHD can be addressed through the ED category.

Burden of Proof

In an administrative hearing, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 126 S. Ct. 528, 539 (2005). Therefore, in this matter the parents have the burden of proof as they filed the due process complaint. Under Illinois law, 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,

¹ Prior to entering the parents' documents into evidence, the undersigned noted and discussed with the parties the following document problems: 1) the final document list does not indicate documents at #16 and 23, so those tabs are left blank in the binder; 2) a comparison of the document at tab 7 to the purported same document in the District's evidence binder shows that they are not exactly the same document - the district was unable to explain the differences in documents, and so each party's version of the document was entered into evidence; 3) the document listed as #27 was not provided to the district or hearing officer; the document now found at tab 27 but numbered by the parents as 29 is the same document given to the district as document 27; the district was not given document #28 by the parents, so the hearing officer's document #28 was copied and provided to the district at the close of the hearing. All these corrections were made on the record and agreed to by the parties.

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 Fact²

The student in this matter, whose birth date is [REDACTED], was an eight-year-old second grader at the time the parents filed their due process request. (SD 13). In first grade, she had attended a regular education class at [REDACTED] and had not been identified as IDEA eligible. Testimony and school records indicate that in first grade, she was above average academically and was "performing at expectation" in listening, working cooperatively, assuming responsibility for her own behavior, and respecting and following school rules. (SD 27, TR 1 at 200). Her first grade report card indicates that her areas of strength were following directions and organizing materials and tasks. (SD 27).

The testimony of district personnel who knew the student in first grade supports the conclusion that she did not stand out from her peers in any concerning way at that time. The student's first grade teacher, [REDACTED] testified that although the student had sometimes made sad drawings and seemed in a sad mood, she was fine the next day. [REDACTED] stated that this behavior was no different from other first graders, who got upset with peers over incidents at lunch and recess and then were friends again the next day. (TR 1 at 208, 209). [REDACTED] the school social worker, had contact with the student in first grade through an anger/bullying/teasing prevention program that she presented to the first graders. She recalled that the student was "smiling and joyful throughout the day" in first grade. (TR 1 at 162).

Approximately three weeks into the student's second grade year, on September 17, 2007, the incident that led to the parents' due process request occurred. On that day, the student's regular second grade teacher was not in the classroom, and [REDACTED] was the assigned substitute teacher. (SD 1; TR 1 at 184, TR 2 at 189). [REDACTED] testified that after lunch on September 17th, a "little girl" told her that the student had said that she wanted to kill people. (TR 190, 196). [REDACTED] did not question the little girl about what had happened. (TR 2 at 195). Instead, the substitute teacher took the student aside and told her that "when you kill somebody it means they're dead and they're gone." (TR 2 at 194). She did not ask the student if she had made the alleged statement or ask her if she knew what it meant. (TR 2 at 168, 190, 194). Later that afternoon, [REDACTED] asked the class to draw pictures of groups to which they belonged. [REDACTED] testified that the student drew a picture with people in black, all of whom had sad faces. (TR 2 at 190). [REDACTED] took an eraser and changed the sad faces to smiling faces. According to [REDACTED] the student changed the faces back to sad and then threw the picture away. (TR 2 at 190).

At the end of the school day, [REDACTED] reported the incident to another teacher at work, [REDACTED], who had been the student's first grade teacher. (SD 1; TR 2 at 197).

2 The parents' documents are cited as PD followed by a page number; the district's documents are cited as SD, followed by a page number. The notation TR refers to the hearing transcript. As the transcript pages are not numbered consecutively from hearing date to hearing date, the undersigned has numbered each transcript consecutively, as indicated by the number after TR.

Testimony revealed important inconsistencies between [REDACTED] description of what occurred on September 17th and what [REDACTED] recalled being told by [REDACTED]. [REDACTED] first testified that [REDACTED] had told her that the student had said to [REDACTED] that she that she wanted to kill someone, but not specifically who. (TR 1 at 216 228). [REDACTED] later testified that several students had told the substitute teacher that the student had said to them that "she wanted to kill somebody." (TR 1 at 202, 216, 218, 228). [REDACTED] testimony was internally consistent and given without hesitation, and the undersigned finds it the most credible report of what took place on September 17th. Neither teacher informed the student's parents of the statement the student was reported to have said. (TR 1 at 169, 227).

The next day, September 18th, [REDACTED] reported the incident to [REDACTED], the school social worker, before school started. (SD 1; TR 1 at 28, 29, 205). [REDACTED] testified that [REDACTED] had informed her that a peer had told [REDACTED] that the student had "mentioned on the playground" that she "wanted to know what it would be like kill someone." (SD 1; TR 1 at 28, 29). When the students arrived at school, [REDACTED] took the student into her office to question her about the incident. (TR1 at 29). [REDACTED] testified that the student told her that there was a gun at her home, that her father had used the gun before, and that she was afraid that she would use the gun. [REDACTED] testified that she asked the student who she was afraid she would hurt, and the student named four specific girls. (SD 2; TR 1 at 29-31). The social worker stated that she asked the student why, and the student told her that two of the girls had not sat by her on the bus, and the other two did not want to play with her on the playground. When she asked the student how long she had had these thoughts, [REDACTED] reported that the student answered for two days. (SD 1; TR 1 at 31). [REDACTED] testified that the student appeared calm and matter of fact during the interview and did not show any remorse. (TR 1 at 32, 161, 163). She stated that the student's affect was flat and that she showed no facial signs of anger. (TR 1 at 32). [REDACTED] searched the student and her locker, backpack and desk and reported the incident to the principal, [REDACTED] (SD 1, 2; TR 1 at 33, 34)

After speaking with [REDACTED], [REDACTED] contacted the superintendent's office and was instructed to "remove the student from the classroom, do a pre-suspension conference with her, as well as to contact the police because a gun was involved." (TR 53). [REDACTED] interviewed the student in [REDACTED] presence and determined that what the student told her corroborated [REDACTED] report. (SD 2; TR 2 at 54-56). The principal testified that the student appeared calm during the interview and did not show any remorse or hesitation about what she was saying. (TR 2 at 56).

[REDACTED] contacted the school's police liaison officer, who came to the school with another officer and interviewed the student. Both the principal and social were present during that interview. (SD 2; TR 2 at 54, 57). [REDACTED] testified that the police did not initially let her to contact the parents because they wanted to investigate the alleged weapon. (TR 1 at 36). The [REDACTED] police contacted two county detectives as the student's residence is not within the city's jurisdiction. (SD 2). [REDACTED] was allowed to contact the parents after the police interviewed the student. [REDACTED] also called the county's crisis referral line, which sent a SASS worker to the school to evaluate the student. (SD 2; TR 1 at 37, 38).

The SASS worker spoke with the principal and social worker, met with the police officers, and then interviewed the student alone. (SD 2; TR 1 at 38; TR 2 at 58). The SASS worker recommended that the student be psychiatrically hospitalized. (TR 1 at 39; TR 2 at 59). After the SASS interview, the student and her mother were taken to the [REDACTED] police department. (SD 2; TR 2 at 61). They returned to the school around 4:00 p.m. (TR 1 at 43; TR 2 at 61).

The student was hospitalized at [REDACTED] from September 18, 2007, to October 5, 2007. (SD 13). On October 4th, she was given a comprehensive psychological assessment by [REDACTED], Psy.D. [REDACTED] is a licensed clinical psychologist and specializes in neuropsychology and forensic psychology. (TR 2 at 7). His evaluation included a formal assessment and interview with the student, a review of her hospital records, and an interview with her counselor at the hospital. The evaluation took between 2.5 and three hours. (TR 2 at 8). He did not interview the student's parents. (SD 3 at 1; TR 2 at 9, 21).

[REDACTED] administered the Wechsler Intelligence Scale for Children ("WISC-IV") and the Peabody Picture Vocabulary Test ("PPVT") to assess the student's intellectual functioning. (SD 3 at 2,3). On the WISC-IV, the student's full scale IQ was 117, which is in the high average range. (SD 3 at 3). She scored at the 95th percentile on the PPVT. (SD 3 at 4). [REDACTED] concluded that while the student's intellectual functioning was in the high average to superior range, she might not use sound judgment in unstructured situations due to her "current emotional state." (SD 3 at 7).

[REDACTED] evaluation of the student's emotional functioning included a formal assessment using several projective tests, including the House-Tree-Person, Incomplete Sentences – High School Form, Thematic Apperception Test, Rorschach Inkblot Test as well as his behavioral observations. (SD 3 at 1, 5). Based on his assessment, [REDACTED] concluded that the student had significant mood lability and expressed her feelings "more intensely than justified by the situation." He opined that she had limited coping skills, significant difficulties with interpersonal relationships, anxiety, and low self-esteem. (SD 3 at 6). Although he saw no evidence of psychosis at the time of his evaluation, [REDACTED] testified that there was a possibility that the student might present as psychotic when in an agitated mood disorder state. (TR 2 at 30, 31).

Based on his evaluation, [REDACTED] diagnosed the student with Mood Disorder Not Otherwise Specified ("NOS"), Intermittent Explosive Disorder (provisional) ("IED"), and developing borderline personality traits and obsessive-compulsive personality traits. He recommended that she remain in a structured setting that could provide counseling and/or psychotherapy and attend a partial hospitalization program upon discharge from the hospital to help her transition back to home and school. He also recommended development of a safety plan (SD 3 at 8).

The student enrolled in [REDACTED] partial hospitalization program after being discharged from the in-patient unit. (SD 5). She attended the partial program for one week and then was dropped from the program for lack of attendance. (TR 1 at 61- 64; TR 2 at 75-77, 97). The parents reported that she had missed for two days because of illness. (TR 2 at 76, 77).

The district decided to obtain a safety evaluation and provide homebound tutoring for the student after reviewing [REDACTED] report. [REDACTED] testified that the decision to obtain a safety evaluation and provide homebound tutoring was based on [REDACTED] report coupled with learning that the student was no longer attending the partial program. (TR 2 at 64, 65). [REDACTED] the district's special education coordinator, testified that she was "stunned" after reviewing [REDACTED] report and immediately decided to set up homebound tutoring. (TR 2 at 98). There is conflicting testimony as to when the district decided to conduct a case study evaluation. [REDACTED] testified that the decision to conduct the CSE was made after she reviewed the safety evaluation on October 17th, while [REDACTED] testified that the decision had been made after reviewing [REDACTED] report. (TR 2 at 65, 100). Whichever was the exact sequence, the evidence clearly shows that the district set up homebound tutoring for the student and contacted the parents regarding a safety evaluation and a CSE. (TR 2 at 101).

[REDACTED] contacted [REDACTED], Ph.D., to arrange for the safety evaluation. (TR 1 at 275). [REDACTED] conducted the safety evaluation on October 16, 2007. (SD 8; TR 1 at 274, 275). [REDACTED] is a licensed clinical psychologist and is employed by [REDACTED] (TR 1 at 274). According to [REDACTED], he had been asked to conduct the evaluation because the student had "threatened to kill four girls at school because they were mean to her. (SD 8 at 1; TR 1 at 275, 276). The safety evaluation included a review of [REDACTED] October 4th evaluation and individual interviews with the student and her mother. Each interview lasted approximately 15 to 20 minutes. (SD 8 at 1; TR 1 at 274).

[REDACTED] report states that the mother told him that the student's brother showed her an old gun in the house "a while ago." The father removed the gun sometime after the student had seen it, but the parents did not tell the student this because they did not know that she knew about the gun. The mother reported that the gun was not functional. The mother also told [REDACTED] that the student has a hard time talking about issues and feels she is treated unfairly because she has to share a bed with her sister. The mother reported that the student has no history of aggressive or threatening behavior. (SD 8 at 1).

[REDACTED] found the student cooperative and fully oriented during his assessment and reported that her affect was within normal limits. He found no evidence of psychosis. He noted that she was mildly depressed and "struggling" with ADHD. Although he found that she was able to report appropriate coping strategies within a structured interview, he was unsure whether she would be able to do so in a less structured situation. (SD 8 at 2, TR 1 at 282). [REDACTED] testified that during the interview, the student did not show insight as to the severity of the situation or the strong affect of someone who can talk about how to handle such a situation in the future. (TR 1 at 277). In his report, [REDACTED] recommended that the student be gradually exposed to less structured situations and receive therapy to address affect regulation and social skills. (SD 8 at 2). [REDACTED] testified that therapy should teach the student coping skills, such as helping her recognize changes in her mood and developing coping strategies or self-talk, to help her control mood lability. (TR 1 at 295).

[REDACTED] explained that a safety evaluation is a narrowly focused assessment directed to answering one question: is the student imminently dangerous to others at the time of the evaluation? School placement recommendations are not part of a safety

evaluation. (TR 1 at 276). Based on his assessment, ██████████ determined that the student was not "imminently dangerous to herself or others at this time." (SD 8 at 2).

On October 22, 2008, the district began providing five hours/week of homebound tutoring to the student at her home. (TR 1 at 71, 72, 75; TR 2 at 107). This has been the student's educational placement throughout this proceeding. In December 2007, the mother requested that the tutoring be increased to ten hours/week; however, due to parental concerns that the district had not put the increase in a written offer, the parents decided not to increase the tutoring. (SD 22; TR 2 at 149- 154).

██████████ met with mother to discuss conducting the CSE (TR 2 at 100). The parents signed the CSE consent form on October 24, 2007.³ (SD 7 at 1). The CSE components included a health history, a social developmental history, and a psychiatric evaluation. (SD 7, 10, 13). The mother signed a consent for the psychiatric evaluation on November 8, 2007.⁴ (SD 7, p. 2). The district selected ██████████ to conduct the psychiatric evaluation.

██████████ did a three-year residency at ██████████, followed by a two-year fellowship at the ██████████ (TR4 at 6). She has worked for two residential facilities, ██████████ and ██████████, and currently is in private practice. (TR 4 at 7). ██████████ is not board certified in either adult or child and adolescent psychiatry. (TR 2 at 7, 52).

Prior to interviewing the student, ██████████ spoke with ██████████ and reviewed the reports by ██████████ and ██████████, as well as the student's academic progress reports. (TR 4 at 9, 10). ██████████ evaluated the student on November 28, 2007. (SD 17 at 1). Her report indicates that the student had been referred for a risk assessment because she had stated that she "would kill four girls at her school." (SD 17 at 1). ██████████ interviewed the student for approximately one hour and 45 minutes and then separately interviewed the father for 30 minutes. (TR 4 at 9, 10). ██████████ reported that she did not see a change in the student between what the district had reported in September and what she saw in her November evaluation of the student. (TR 4 at 13).

██████████ behavioral observations of the student include: overactive and visibly restless, charming and somewhat dramatic, labile mood and inappropriate affect, no evidence of remorse and limited perceptiveness, judgment, insight and impulse control. (SD 17 at 5; TR 4 at 19, 20). She considered the lack of remorse a significant factor in risk assessment. (TR 4 at 20, 21). ██████████ testified that the student looked angry at times during the interview and excited by her descriptions. (TR 4 at 20). ██████████ opined that ADHD did not cause lack of remorse or labile mood. (TR 4 at 21, 23). ██████████ diagnosed the student with ADHD Disorder, Predominantly Hyperactive-Impulsive Type and a Mood Disorder NOS. She gave the student a Global Assessment of Functioning ("GAF") score of 40. (SD 17 at 6; TR 4 at 23, 24).

³ The parents assert that on October 22nd they signed the CSE consent form on the top line because they had not been given page 2, as specified, and then on October 24th the mother signed the bottom line, per ██████████ instructions that she must do so to get the student back in school. (TR 5 at 191, 192).

⁴ The parents assert that the word "psychiatric" was not on the consent form when they signed it. (TR 5 at 198). The district argues that their consent may be implied from the fact that the father drove the student to the psychiatric evaluation. (TR 5 at 204). As noted above, the due process complaint does not allege procedural violations.

Based on these findings, [REDACTED] determined that it was not safe for the student to return to a mainstream classroom at the time of the assessment. [REDACTED] assessed the student as showing several risk factors that indicated she was "at high risk for episodic, severe violence." (SD 17 at 8). These risk factors included: ongoing, chronic and frequent thoughts and plans to harm her peers; diverse types of harms; target-focused plans of harm; proximity to targets of plan; violence motivated by anger; and constant or increasing seriousness of harm. (SD 17 at 8). [REDACTED] recommended that the student be placed in a therapeutic day school, with a 1:1 aide if the IEP team determined an aide necessary. She also recommended that the parents receive education about the student's diagnosis and prognosis as well as interventions they could implement; family therapy; pharmacotherapy; and individual therapy for the student, with an emphasis on play therapy and an insight oriented approach. (SD 17 at 8, 9).

The district scheduled numerous eligibility/IEP meetings, some of which were cancelled by the parents due to family illness and the need for the parents to visit the placement options. (SD 14; TR 2 at 104, 105; TR 5 at 38, 39). The district cancelled one meeting because it had not received [REDACTED] evaluation. (TR 2 at 122). The mother and/or father attended each meeting and, depending on the meeting, their attorney or case manager also attended. (SD 16 at 1, 3; PD 10; TR 2 at 121; SD 18 at 1; SD 23 at 1; SD 24 at 1). The district's attorney attended each IEP meeting. (SD 16, 18, 23, 24).

The initial meeting to discuss eligibility was held on December 18, 2007. (SD 14 at 1; SD 18; SD 23 at 6; PD 8,10). The district invited representatives from a continuum of placement options to the eligibility meeting to discuss potential programs for the student. These representatives included staff from a therapeutic day school, a behavior disorders self-contained classroom, and resource services. (SD 16; PD 8; TR 2 at 121). The IEP team did not determine eligibility on December 18th because the district had not received [REDACTED] report. (SD 23 at 6; TR 2 at 120, 122).

The IEP team reconvened on January 17, 2008, to continue the eligibility discussion. (SD 18 at 1). They discussed two possible eligibilities: emotional disturbance ("ED") and other health impairment ("OHI"), the latter based on the student's diagnosis of ADHD. District staff used the evaluations done by [REDACTED], [REDACTED], and [REDACTED] as the basis for determining that the student met the following ED criteria: inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior under normal circumstances; and, a general pervasive mood of unhappiness or depression. (TR 1 at 83-89, 207, 239-244, 336-340, TR 2 at 66, 124, 125). The team also determined that the student's ED adversely effected her educational performance. (SD 23 at 11,13; TR 1 at 244, TR 2 at 68, 128). [REDACTED], who was at the meeting, agreed with the ED eligibility. (TR 5 at 102).

The IEP team then discussed whether the student's ADHD met the criteria for OHI. They initially determined that it did, but after further discussion decided that it did not because her ADHD did not adversely impact her educational performance. (SD 23 at 12; TR 1 at 90, 245, 347; TR 2 at 125). Some time after the meeting, the district provided the parents with a list of possible placements, both private and within the district, so that they could visit the placements. (SD 19). The mother visited several placements, as did the district. (SD 20; 24 at 4).

On February 27, the IEP team met again and determined that [REDACTED] was the most appropriate placement for the student. However, it agreed to postpone placement so that the parents could visit [REDACTED] and some other placements. (SD 22). The IEP team reconvened on March 7, 2008, to finalize the student's goals and placement. The team identified the student's social/emotional needs as: assistance to accept responsibility and identify consequences of behavior; identify and express feelings appropriately; develop/improve appropriate social/peer interaction skills; develop/improve coping skills to implement when faced with a frustrating situation; develop/improve problem solving strategies; and supervision during unstructured times and gradual exposure to unstructured situations such as playground, bus. (SD 24 at 10). Goals developed to address these needs include that the student will: generalize the personal traits and feelings of characters in an instructional level selection and why they feel the way they do in five out of five trials; use a self-calming technique (i.e., deep breathing, talking about feelings, taking a walk) when she feels angry or frustrated in five out of five times; identify and describe alternative solutions to interpersonal problems at school in five out of five trials; and, generalize and manage her emotions and behavior at school by identifying how various situations make her feel describing her physical responses to strong emotions, identifying her changing emotions throughout the day, and practicing self talk to calm herself 80% of the time. (SD 24 at 13-16). The mother did not consent to placement at [REDACTED] and shortly thereafter filed for due process. (SD 25, 26).

The student has been receiving weekly mental health counseling from [REDACTED]. [REDACTED] the [REDACTED] since December 2007. (TR 5 at 13). The [REDACTED] is funded by the Illinois Department of Human Services to provide mental health services to residents who meet its eligibility criteria. (TR 5 at 170). The student was transferred to the [REDACTED] outpatient department on December 13, 2007, after SASS ended its post-hospitalization follow-up services. (TR 5 at 15). Ms. [REDACTED] treatment is based on a treatment plan that includes the following goals: developing and using new coping skills; maintaining healthy friendships and peer relationships; and, securing placement in a safe and appropriate school. [REDACTED] testified that the plan also has a fourth goal, which she could not recall it at the time of her testimony. (TR 5 at 85). [REDACTED] testified that the student has improved over the course of her treatment and now is emotionally stable and able to talk about her feelings appropriately. (TR 5 at 25). She also testified that the student has talked about the September 17th incident. She stated that the student is sad because she is not in school and feels that it is her fault that she is not there. (TR 5 at 117, 177, 178).

[REDACTED] has observed the student in a number of different settings, both structured and unstructured. These settings include at home with her younger and older siblings, at a baseball game, and at the park. (TR 5 at 62). She has also talked with the student's tutors. (TR 5 at 61). [REDACTED] testified that she has never seen the student act inappropriately or appear psychotic. (TR 5 at 23). [REDACTED] testified that in addition to baseball, the student has been involved with Girl Scouts and recently went on a successful camping trip. (TR 5 at 90).

The student began receiving psychiatric services from [REDACTED] on January 24, 2008. (TR 3 at 51). [REDACTED] is a psychiatrist with the [REDACTED] and has been employed there for one and a half years. She attended medical school in [REDACTED] and did a five-year neurology residency there. She then completed a three-year general psychiatry fellowship at [REDACTED] in Chicago followed by a

two-year child and adolescent psychiatry fellowship, also at [REDACTED]. In addition to her work at the [REDACTED], she is medical director of the Child Psychiatry Inpatient Unit at [REDACTED]. [REDACTED] is board certified in both adult psychiatry and child and adolescent psychiatry. (TR 3 at 9-11).

[REDACTED] met with the student individually and then separately with her mother at the initial interview, for a total of 70 minutes. (PD 14; TR 3 at 9). As of June 19, 2008, [REDACTED] has met with the student a total of six times and was scheduled to meet with her again in July 2008. (TR 3 at 51). She provides medication management and discusses issues with the student. (TR 3 at 53). The appointments are approximately 30 minutes per session, sometimes individually and other times with the mother present. (TR 3 at 105). [REDACTED] testified that the American Academy of Child and Adolescent Psychiatry Guidelines require several sessions for a child psychiatric evaluation. (TR 3 at 39). She testified that she continually evaluates the student's safety and does not find her a threat to others. (TR 3 at 105).

[REDACTED] has diagnosed the student with Adjustment Disorder with anxious mood and ADHD and has prescribed Concerta for the ADHD. (PD 14; TR 3 at 64, 106). She has not observed any symptoms of mood disorder, depression or mania. (TR 3 at 64). She has, however, seen sadness and remorse. (TR 3 at 64, 65, 158, 159). Dr. [REDACTED] assessed the student's GAF score as 55 on April 15 and June 17, 2008. She testified that she gave the student this score because she is receiving ongoing therapy and counseling, and does not require inpatient hospitalization, a partial program, or interventions other than what she is currently receiving. (TR 3 at 93).

District's Stipulations Made During the Due Process Hearing

The district made the following stipulations during the hearing:

1. The student has never harmed anyone. (TR 3 at 118).
2. The parents have been against placement at a therapeutic day school throughout this matter. (TR 1 at 134, 226)
3. [REDACTED] prepared the Identification of Needed Assessments form, found at SD 7 at 3, which identifies the individuals who would be completing the respective components of the IEP Case Study and but for [REDACTED] signature, the handwriting on the page is [REDACTED]. (TR 5 at 201).
4. [REDACTED] testified that the first date on in the second paragraph of [REDACTED] letter, found at SD 21, should be January 30, 2008. (TR 5 at 39).

Conclusions of Law

The determination of whether a district has provided a student with a free appropriate public education is a two part analysis: first, has the district complied with the IDEA's statutory procedures; and then, has the district developed an IEP for the student that is reasonably calculated to enable her to benefit from the special education and related services. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) ("Rowley"). The parents' due process complaint does not identify any procedural violations of the IDEA. Although the parents alleged in their opening statement that the district obtained their consent through unethical and deceptive means and violated their procedural safeguards in numerous ways, their due process complaint identifies only substantive issues. Both parties spent considerable time during the

hearing eliciting testimony as to whether such violations had occurred. The undersigned has not considered testimony or documents related to procedural matters in reaching her decision in this matter because the parents did not raise procedural violations in their complaint; thus, such matters are not properly before this hearing officer.

Eligibility Determination

The parents contend that the district incorrectly determined the student's eligibility as emotionally disturbed and ask the undersigned to find the student eligible as ADHD. To be eligible under the ED category, a student must exhibit one or more of the following characteristics over a long period of time and to a marked degree: 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) inappropriate types of behavior under normal circumstances; 4) a general pervasive mood of unhappiness or depression; and, 5) a tendency to develop physical symptoms or fears associated with personal or school problems. The emotional disturbance must also adversely affect the child's educational performance. 34 C.F.R. § 300.8(c)(4); 23 Ill. Adm. Code § 226.75. Educational performance includes the development of social skills and personality, not just the child's ability to meet academic criteria. *Mary P. and Peter P. v. Illinois State Bd. of Educ.*, 23 IDELR 1064 (N.D. Ill. 1996). ("Mary P.").

Each district staff person who was part of the IEP team testified that the student showed three characteristics over a long period of time and to a marked degree: an inability to build or maintain satisfactory relationships with peers, inappropriate types of behavior under normal circumstances, and a general pervasive mood of unhappiness or depression. These same staff testified that this determination was based on events that occurred on September 17th and 18th, the student's 18 day psychiatric hospitalization, her DSM IV diagnoses, and her poor coping skills. (TR 1 at 83-86, 239-244, 336; TR 2 at 66, 124, 125). ██████████ attended the eligibility meeting and also agreed with the ED determination. (SD 18; TR 5 at 102). The testimony further shows that the IEP team determined that the student's ED adversely impacted her educational performance in the development of coping skills and ability to form appropriate relationships. The consideration of the impact of the student's ED on her ability to develop social skills is, under *Mary P.*, an appropriate consideration. The determination that the student is eligible under the category of emotional disturbance is supported by a preponderance of the evidence.

The parents argue that they did not agree with this eligibility determination. The district disputed this contention through questioning each IEP team about whether the mother had agreed. Both parties see only part of the picture on this issue. The parents are members of the IEP team. 20 U.S.C. §1414(d)(1)(B)(i). And, as is true for each member, the parents may disagree with the team's ultimate decision. Such disagreement, however, does not prevent the IEP team from determining eligibility. The IDEA does not require that each IEP team member agree on eligibility, and procedures are in place if there is disagreement. When the parents disagree, as was the case here, they have the right to file a due process complaint to dispute the eligibility determination. 20 U.S.C. §1415(b)(6)(A). The asserted their right to disagree through the filing of a due process complaint.

The parents contend that the student's eligibility is ADHD. As this hearing officer understands their argument, the parents believe that ADHD should be her eligibility category because her treating psychiatrist and other professionals have diagnosed the student with this disorder. This argument fails because the IDEA has no disability category entitled ADHD. Rather, ADHD is specifically included within the OHI category. To be eligible under OHI, a student must have "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as...attention deficit hyperactivity disorder...and adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(9).

Each of the district's IEP team members testified that the IEP team had discussed the student's ADHD and initially determined that she met the OHI criteria. The IEP team developed a goal for ADHD, which was that the student would "independently exhibit classroom behavior expectations (such as staying in her seat during direct instruction, raising her hand to speak and complying with teacher directions)." (SD 23 at 4). After some unspecified discussion, the team decided that the student's ADHD did not adversely impact her educational performance and therefore decided that she was not eligible under OHI. (TR 1 at 90-92, 246, 347; TR 2 at 67, 126, 127).

No evidence was presented that the student's ADHD results in limited strength, vitality, or alertness, or in heightened alertness. The second grade teacher, who was not part of the IEP team, testified that the student was able to listen attentively and follow directions and that her ADHD did not impact her educational performance. (TR 1 at 173-179). A preponderance of the testimony and evidence supports the district's determination that the student was not eligible under OHI, as her ADHD did not result in attention or alertness problems that adversely impacted her educational performance. This determination, however, does not mean that her ADHD is not a significant part of her emotional disturbance and should be addressed as such.

Placement Determination

The parents next argue that a therapeutic day school does not provide the student a free appropriate public education in the least restrictive environment. A student with a disability must be educated with her non-disabled peers to the maximum extent appropriate, and special classes, separate schooling, or other removal of a student with a disability from the regular educational environment may occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.114(a)(2). This is known as the least restrictive environment requirement. In determining a student's LRE, the IEP team must consider any potential harmful effect on the student or the quality of services she needs and ensure that the student is not removed from a regular classroom solely because of needed modifications in the general education curriculum. 34 C.F.R. §300.116(d), (e).

The student's IEP identifies her emotional needs as follows: assistance to accept responsibility and identify consequences of behavior; identify and express feelings appropriately; develop/improve appropriate social/peer interaction skills;

develop/improve coping skills to implement when faced with a frustrating situation; develop/improve problem solving strategies; and, supervision during unstructured times and gradual exposure to unstructured situations. (SD 24 at 10). The district's IEP team testified that they made their placement determination after discussing whether these emotional needs could be met in another setting, including in a regular education, resource room, or self-contained classroom. (TR 1 at 94-103, 248, 350, 351, 357-359; TR 2 at 69, 70, 129-132, 144, 145). District staff testified that none of the other options could provide the social work services required. (TR 1 at 97-99, 248, 350, 351, 357-359; TR 2 at 69, 70, 129-132, 144, 145). The principal and social worker also expressed concern that the self-contained classroom did not have enough girls and was not challenging enough to meet the student's academic level. (TR 1 at 97-99; TR 2 at 700).

The district's determination that a therapeutic day school was the student's LRE was based on evaluations by [REDACTED]. Therefore, the analysis of whether the placement offered the student a FAPE in the LRE must begin with an examination of these evaluations. [REDACTED] report did not make a recommendation for educational placement. (SD 3 at 8, 9). He testified that he concurred with [REDACTED] recommendation for such placement, although there is no evidence that district knew that at the time of its placement decision. (TR 2 at 15, 16). [REDACTED] testified that he concurred with a therapeutic placement because he thought that the student's threats should be taken seriously and that he should err "on the side of safety of both her and the school system, because I guarantee you if God forbid she did something, [REDACTED] would have my report on TV and be chasing me down. I'm not in the mood for that." (TR 2 at 34). [REDACTED] testified that while he had thought the student was a danger to others at the time of his evaluation and, after reviewing [REDACTED] report also at the time of that evaluation, he could not say that the student currently was an immediate danger to anyone. (TR 2 at 37, 38).

[REDACTED] determined that the student was not imminently dangerous to herself or others at the time of his evaluation. He did not make a placement recommendation in his report. (SD 8 at 2). [REDACTED] testified that [REDACTED] psychological testing results were not currently reliable or valid in terms of a placement recommendation because the psychological evaluation had occurred before the student was on medication and while she was experiencing mood lability. (TR 1 at 324). He also testified that he could not recommend whether the student should return to a regular classroom with social work services because he had not seen her since October. (TR 1 at 290).

[REDACTED] assessment is the only one of these reports that makes a placement recommendation. (SD 17 at 8). [REDACTED] testified that she had recommended a therapeutic day school because it would provide daily treatment and supervision and the opportunity to observe the student's interactions on a daily basis. (TR 4 at 31). She further testified that she had determined that the student was not safe to return to a mainstream setting in November because of the risk factors she posed at that time. (TR 4 at 33-35). Because her recommendations were based on what she had seen in November, [REDACTED] could not say whether the student currently posed a strong risk. She further testified that it is possible that the student's current needs could be different from those she identified in November if the student has been receiving

psychiatric care and mental health services. (TR 4 at 59). Based on the foregoing, [REDACTED] testified that she could not say that her November recommendations are currently valid. (TR 4 at 22, 59).

Each of these evaluations occurred in 2007: [REDACTED] on October 4th, [REDACTED] on October 16th, and [REDACTED] on November 28th. The IEP team's determination that the student required a therapeutic day school was made on January 17th, four months after the district had any in-school contact with the student and between two and three months after these evaluations were conducted. All of these three experts testified that their recommendations were valid at the time they were made. However, none of them would say that his or her recommendation is currently valid. None of them testified that the student was a risk in January, at the time the placement determination was made, and none were willing to say she is risk now.

[REDACTED] assessment was the one most current to the district's placement determination, and the district relied heavily on it for its determination of the student's emotional needs and placement. [REDACTED] assessment includes a section on her interview with the student. Within this three-page section are several lengthy portions set out in quotation marks. The first portion is 52 lines long, the second and third are each 15 lines, and the others run from 5 to 7 lines. (SD 17 at 1-3). [REDACTED] testified that these portions are direct quotes made by the student. (TR 4 at 11). She stated that these statements were responses to questions such as "(w)hat weapon did you use?" and "(c)an you describe that to me?" and were not blurted out. (TR 4 at 11, 12).

[REDACTED] raised questions about these statements as reported in [REDACTED] evaluation. She expressed concern that the student had been overwhelmed with questions. She stated that she did not know how those questions had been formulated and opined that it is "very easy to put words into the child's mouth." (TR 3 at 43, 46, 147, 148). [REDACTED] expressed similar concerns. She testified that after reviewing [REDACTED] report, she asked herself "did this doctor meet with the same client that I meet with weekly?" She testified that she has never heard the student talk in the manner or length expressed in [REDACTED] report. She reported that the student is usually quiet and shy. [REDACTED] also stated that she was confused by the report because in her experience the student does not understand concepts attributed to her in [REDACTED] report, such as miles and blocks. (TR 5 at 47, 48). The student's mother also testified that she has never heard her daughter talk in the way attributed to her in [REDACTED] report. (TR 5 at 186).

[REDACTED] testified that she did not tape record her interview with the student. (TR 4 at 53, 54). She initially testified that she jotted notes during the interview and then stated that she had written verbatim what the student said. (TR 4 at 54). She stated that the portions set out in quotation marks were responses the student made to questions asked by [REDACTED]. [REDACTED] testified that she did not write her questions in her interview notes or indicate where in the statements she had asked the student a question. (TR 4 at 55-57). When asked how she knew at the time of her testimony exactly what questions she has asked seven months prior, Dr. Din responded "(b)ecause the answers are exactly in response to what my questions were." (TR 4 at 58). When asked if the report she had brought with her and looked at during the testimony included the questions, she said it did not. (TR 4 at 58).

The undersigned finds [REDACTED] testimony troubling in several ways. To make a verbatim record by jotting down notes in an interview that lasted for one hour and 45 minutes seems a Herculean feat. Setting out the student's answers in an uninterrupted and lengthy stream, with quotation marks only at the beginning and end, leads a reader to believe that the quoted portion is one continuous response. The omission of the questions to which these statements reportedly were answers is also misleading. Finally, the undersigned is unconvinced that seven months after the interview, [REDACTED] was able to identify precisely where in the student's reported statements she had asked the student a question and what that question had been. The reservations raised by [REDACTED] are supported by the foregoing concerns.

Given the preceding concerns and the fact that [REDACTED] saw the student once whereas [REDACTED] is the student's treating psychiatrist, coupled with the fact that [REDACTED] is board certified in child and adolescent psychiatry and [REDACTED] is not, the undersigned finds the testimony of [REDACTED] more credible. This is not to say that [REDACTED] report is to be discarded. However the statements the student made to [REDACTED] were elicited, their content is concerning and must be taken seriously. No one, including the parents, has denied that.

The student has been receiving monthly psychiatric care and weekly individual counseling since January 2008. Both of her current treating professionals testified that she had made progress and is currently stable. While the district argued that [REDACTED] is not qualified to provide the type of treatment the student needs, it is clear from the testimony presented at the hearing that [REDACTED] is qualified to provide counseling, does so under the weekly supervision of two licensed professionals, and that the student's mental health has improved with this treatment. [REDACTED] treatment plan focuses on helping the student to develop coping skills, improve peer relationships, express her feelings, and improve her self-esteem, which are among the student's needs as identified by the IEP team.

The district has argued that the parents did not tell them about the outside services the student was receiving, implying that they cannot be held accountable for what they did not know. It is clear to the undersigned that both parties share in the communication breakdown. The district knew that the student was receiving services at the [REDACTED] by virtue of the fact that [REDACTED] attended the majority of the student's IEP meeting and could have raised the question of services during an IEP meeting. The parents also could have been forthright with the district about the services they had sought out for their daughter. Unfortunately for the student, neither of these things seems to have happened. This does not mean, however, that the information from the treating professionals is not relevant to the decision in this matter.

So the final question is whether, considering all of the above, a therapeutic day school is the least restrictive placement for this student. At the time the district made its decision, it had had no contact with the student for four months, other than through homebound tutoring. The evaluations on which the staff based their decision were done several months prior, and each evaluator has testified that his or her recommendations were valid at the time they were made. None of the evaluators testified that his or her recommendations were valid now. Given this, the undersigned finds it reasonable to question whether they were valid basis for deciding placement

at the time the district made its decision.

██████ stressed the risk factors the student posed as the central reason for a therapeutic school. There is no evidence that at the end of January 2008 the student was demonstrating "clear, ongoing multiple detailed thoughts and plans to harm her peers." (SD 17 at 80). There is no evidence showing that the student's emotional needs - accept responsibility for behavior, identify and express feelings appropriately, develop and improve appropriate social and peer interaction skills, develop and improve coping skills to implement when faced with a frustrating situation, develop and improve problem solving strategies, supervision in unstructured times – could not be met in a less restrictive environment. The student is receiving outside counseling and psychiatric services, which are some of the services the district found lacking in the less restrictive placements. The parents must prove by a preponderance of the evidence that a therapeutic day school will not provide the student a free appropriate public education in the least restrictive environment. This they have done.

However, this does not lead to a conclusion that a regular classroom is the most appropriate placement for the student. Everyone involved with this student agrees that she has an emotional disturbance and takes her past threats seriously, even though they dispute the exact words she said. Her current treating professionals testified that her needs could be met in self-contained classroom. The undersigned finds that such a classroom will provide the student a free appropriate public education in the least restrictive environment.

Order

IT IS ORDERED THAT:

1. within ten days of its receipt of this order, the district is to convene an IEP meeting for the student;
2. the student's IEP will reflect placement in an appropriate self-contained classroom, with individual and group social work or psychological services;
3. the student's current treating professionals at the DPCHD are to be included as members of the IEP team;
4. the IEP team will develop a transition plan to assist the student in her transition back to school;
5. the IEP team will develop a support plan for the student, to facilitate communication with the student's outside treatment team;
6. the IEP team will develop a safety plan to address a coordinated plan of action should the student verbalize or demonstrate any threat to herself or others;
7. the IEP team will develop a practical and effective communication plan with the parents, so that the parents are regularly informed of the student's progress and immediately informed of any safety issues that may emerge at school;
8. the IEP team is to reconvene five weeks after its initial meeting, or sooner if it determines that is necessary, to evaluate the effectiveness of the student's IEP, make any necessary changes, and to determine the frequency for other IEP meetings; and,
9. the IEP team is to consider whether the student should be mainstreamed for an academic subject, such as reading, to ensure that she is academically

challenged.

Within forty-five (45) days of receipt of this Order, [REDACTED] shall submit proof of compliance to:

Illinois State Board of Education
Program Compliance Division
100 North First Street
Springfield, Illinois 62777-0001

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: AUGUST 22, 2008



Mary Schwartz
Impartial Hearing Officer

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that a true and correct copy of the Decision and Order was sent by certified mail from Chicago, Illinois, and directed to:

[REDACTED]

[REDACTED] Esq.
[REDACTED] Ltd.
[REDACTED] 3

[REDACTED]

before 6:00 p.m. on August 22, 2008



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