

Case Number: 2008-0538

Hearing Officer: Sheana Hermann

Illinois State Board of Education
Special Education Services
100 North First Street
Springfield, Illinois 62777

REC-1111

MAY 07 2009

Impartial Due Process Hearing Decision Cover Page

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District Name
Superintendent
Address
Represented by

Phone:

Parent Name
Address
Represented by

Date and Timelines

Date of Written Request: 06/09/2008
Date of Pre-hearing Conf: 01/21/2009

Date of Hearing: 03/13/2009 to 4/22/2009
12:00:00 AM
Date of Decision: 05/04/2009

Summary of Decision

Finding in favor of Parent where the District failed to conduct a child find of the Student and refused to conduct a case study evaluation of the Student although the Student was exhibiting severe academic difficulty and was failing school and in fact had to repeat third grade.

Student's biological grandmother and foster parent; [REDACTED] school psychologist at the District; [REDACTED], case worker at [REDACTED]; [REDACTED] educational liaison at [REDACTED]; [REDACTED] case manager and assistant principal at District; and [REDACTED] social worker at District. The parties' documents were entered into evidence. The Parties submitted a copy of the Student's attendance for the 2006 school year at [REDACTED] via email transmission on April 16, 2009. This document is marked as Student Exhibit "K" and has been added to the Student's evidence packet. The parties sent closing briefs on April 22, 2009 by email transmission. The parties acknowledged receiving their rights.

Issues in Dispute

On December 4, 2007, the student's case worker from [REDACTED] of Illinois requested a case study in writing. The District on January 1, 2008 denied the case worker's request stating that it would attempt school based problem solving. On May 1, 2008 and May 13, 2008, the case worker sent letters requesting a copy of the school based problem solving plan and stated that a case study evaluation was warranted. The case worker stated that the District did not respond to the letters.

The Parent believes the following are at issue:

- 1). Whether the District failed in its obligation to conduct a case study evaluation of the student and to find the student eligible for special education services?
- 2). Whether the District failed to provide the student with his rights to due process?

District's Position

The District provided the Student with a free and appropriate public education at all times. The student did not attend school during second grade (2006-2007) school year. The District's decision to not conduct a case study evaluation was proper in light of the student's missed school year and resultant lack of documentation regarding the student's academic performance. The District also states that the parent did receive a copy of the Procedural Safeguards. The District has commenced a case study evaluation within sixty days after commencement of the 2008-2009 school year.

Finding Of Fact

The Student is a ten year old third grade student born January 15, 1999. He is repeating third grade. He was found eligible for special education services on January 5, 2009 with a primary disability of learning disabled (D. Ex. 2).

The Parent is the Student's maternal grandmother. She became the Student's foster parent in September of 2007. (T. 15).

The Parent stated that she had concerns with the Student's academics when she enrolled the Student in school (T. 15). She noticed that the Student could not read (T. 16).

She went into talk to [REDACTED], the school case manager and asked to have the Student tested (T. 18).

The Parent stated that [REDACTED] had her sign a paper for consent to evaluate however, the paper was not a consent to evaluate. (S. Ex. E). She also

During her meeting with [REDACTED], she was advised that she would need to discuss her concerns with the Student's teacher [REDACTED] (T. 19-20).

She was told by the Student's teacher that she believed that he needed to be tested (T. 22).

At report card pick up in November 2007, he was failing all his grades (T. 23). She stated that she again met with [REDACTED] and at this time [REDACTED] stated she would start the paper work to have the Student tested for special education (T. 24).

The Student failed the third grade in during the 2007-2008 school year (T. 26).

The Parent did not make any written request for special education (T 30). However, [REDACTED] sent a letter on December 4, 2007 (S. Ex. A).

[REDACTED] the school psychologist testified she evaluated the Student in January of 2009.

She performed testing on the Student using the Woodcock Johnson Test of Achievement Third Addition (D. Ex. 3)

The letter word recognition identification he scored a grade equivalent of 2.5. On the calculation subtest, he scored a grade equivalent of 2.4. On the passage comprehension subtest, the grade equivalent of 1.9. On the applied problems subtest the equivalent of 1.9, applied problem subtest, grade equivalent of 2.6 and word task a skills grade equivalent of 1.9. (T43-44).

She felt that the Student had not received good special education services to begin with and the District needed to get those services to him. (T. 44).

He was found eligible for special education services under the category of learning disability. (D. Ex. 3).

██████████ testified. She is a case worker at ██████████ which is a community social work agency (T. 49) ██████████ is an assignee of the Department of Children and Family Services. She is the Student's case manager (T. 49-50). She was first assigned to the Student in September of 2007 (T. 50). The Student became a temporary ward of the state in August of 2007.

During her initial assessment with the family, the grandmother had told Ms. Douglas that the Student had been in and out of school, and had inconsistent school attendance over the past course of the years and that the Student could not read at the third grade level (T.53).

██████████ requested that the Student's teacher ██████████ fill out a form to indicate the Student's current level of academic performance. (T. 56).

She also had a conversation with ██████████ who told her that the Student was not performing at grade level (T. 57).

██████████ agreed that the Student needed to be evaluated for special education services. (T. 58) (S. Ex F). ██████████ checked off the box which indicated that a case study evaluation be conducted (S. Ex. F.).

After not receiving any follow up from the District, ██████████ drafted a letter on December 4, 2007 requesting a case study evaluation (T. 59). (S. Ex A). In that letter, she noted that the Student had been in and out of school for two years (T. 60). The letter was directed to ██████████ however, she did not receive any response. (T. 63)

After not receiving any response, she called ██████████. A letter was sent to the parent denying a case study evaluation. (S. Ex. B). She did not receive a copy of the procedural safeguards with that letter. The letter from the District was dated January 7, 2009. The letter stated that the refusal to initiate a case study evaluation was based on insufficient amounts of supporting documentation the spec. ed team has decided to conduct the school-based problem solving process. We will contact you concerning the Student's progress. (S. Ex. B).

██████████ testified. She is an educational liaison at ██████████. She spoke to ██████████ a case manager for the District. She had requested a copy of the school base problem solving (T. 89). She was told that school based problem solving took 6 weeks (T. 91). On May 1, 2009 she drafted a letter directed to both ██████████ and ██████████ (T. 91). (S. Ex. C). She requested a copy of the school based problem solving. She also requested a case study evaluation. She did not receive a reply which prompted drafting another letter dated May 13, 2008 (T. 94) (S. Ex. D). ██████████ called her and left a voice mail message either May 18 or May 19, 2008 (T. 96-97). She

spoke to [REDACTED] later that day at which time [REDACTED] stated that the teacher is responsible for implementing the school base problem solving (T. 97). She requested a copy of the school based problem solving plan but never received it.

[REDACTED] testified. She is the assistant principal and a case manager for the District. (T. 122) She first became aware of the Student in the fall of the 2007-2008 school year after his teacher, [REDACTED], had come to her and the school principal to express her concern (T. 127-128). The teacher told her that the Student did not recognize letters and phonetic sounds. (T. 128). [REDACTED] never spoke to the Parent. After speaking with [REDACTED] the principal requested that [REDACTED] take a small group including the Student to work with them. She started the group in October of 2007.

There is no indication that District actually reviewed the Student's attendance sheets (T. 168). Nor is there any record of monitoring of the school based problem solving or what in particular the District was implementing. Unfortunately the Student did not pass to 4th grade and is currently repeating third grade.

After the 2007-2008 school year the Student left [REDACTED] and started to attend [REDACTED]

The Student was found eligible for special education services in January 5, 2009 and an IEP was developed in January of 2009 (D. Ex. 2)

Conclusions of Law

The facts support that the Student has had inconsistent school attendance prior 2007-2008 school year. However, this does not relieve the District of its duties to provide a free and appropriate education of a student who is in need of special educational services. The District failed in its child find obligations and failed to conduct a case study evaluation of the Student after a written request was made on December 4, 2007.

Child Find

The IDEA and State special education law impose upon each school district the duty to actively and systematically identify, locate, and assess all children with disabilities who require special education and related services. (20 U.S.C. § 1412; 34 C.F.R. § 300.125; 23 Ill. Admin. Code § 226.100). The obligation is often referred to as the "child-find" or "seek and serve" obligation. This obligation to identify, locate, and assess applies to "children who are suspected of being a

child with a disability ... and in need of special education, even though they are advancing from grade to grade." (34 C.F.R. § 300.125, subd. (a)(2).) The comments to 34 C.F.R. section 300.300, subdivision (a) (2), note the "crucial role that an effective child-find system plays as part of a State's obligation of ensuring that FAPE is available to all children with disabilities." (68 Federal Register no. 48 (March 12, 1999), *A.P. v. Woodstock Board of Education*, 50 IDELR 275 (D. Conn. 2008). In Illinois, 23 Ill. Admin Code § 226.100 (a)(2) requires that screening is ongoing.

Child find does not impose a duty upon the parent to request an evaluation; rather a district has an affirmative duty to seek out those students who need may need special education services. *Robertson County School System v. King*, 24 IDELR 1036 (6th Cir. 1996). Some courts even go further by stating that Districts are not relieved of their duty to evaluate, even when a parent is in agreement to try alternative strategies to address academic difficulties. *Scott v. District of Columbia*, 45 IDELR 160 (D.D.C. 2006).

The Child Find duty is triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability. *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001); *see C.G. v. Five Town Cmty. Sch. Dist.*, No. 05-237-P-S, 2007 WL 494994 (D. Me. Feb. 12, 2007); *Kanongata'a v. Washington Interscholastic Activities Ass'n*, No. CO5-1956C, 2006 WL 1727891 (W.D. Wash. Jun. 20, 2006). When these suspicions arise, the local educational agency "must evaluate the student within a reasonable time after school officials have notice of behavior likely to indicate a disability." *Strock v. Indep. Sch. Dist. No. 281*, No. 06-CV-3314, 2008 WL 782346 (D. Minn. Mar. 21, 2008) (citations omitted).

The U.S. District Court in Texas applied a two prong test to determine whether a local educational agency has complied with its Child Find responsibilities. First, the Court must examine whether the local educational agency had reason to suspect that a student had a disability, and whether that agency had reason to suspect that special education services might be needed to address that disability. Next, the Court must determine if the local educational agency evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability. *Richard R. v. El Paso Independent School District*, 50 IDELR 256 (W.D.Tx. 2008).

In the instant case of the Student, all parties stated that the Student's prior attendance may possibly impact the Student's performance. The Student was exhibiting severe difficulty with his academics. However, it was clear that at the beginning of the 2007-2008 school year, several parties expressed their concerns regarding the Student's academic performance. The Parent sought the help of the case manager, [REDACTED], who then advised her to discuss the matter with the Student's teacher [REDACTED]. The Student's case manager at [REDACTED] intervened also. The testimony of [REDACTED] corroborates that the

Student's teacher, [REDACTED], had expressed her concern to [REDACTED] the school principal. [REDACTED] testified to discussing the teacher's concerns and in fact pulling the Student out for small group sessions in October. [REDACTED] went on to state that the school was employing school based problem solving which lasts 6 weeks. The District knew at least from early October that the Student was exhibiting significant academic problems. Although the District attempted school based problem solving and stated that the Student was progressing. The Student was still performing well below grade level and by December had failed his grades. It may have been reasonable to delay testing perhaps at the beginning of the school term. However, the District in fact never conducted testing during the 2007-2008 school year. The Student was not making significant progress with the school based problem solving and in fact failed third grade. The District failed to conduct an adequate child find upon the Student.

IDEA 2004, 20 USC §1415 (k)(5)(B); 34 CFR § 300.534, sets out three circumstances under which the district will be deemed to have knowledge that a student is with a disability: 1. The parent has expressed concern in writing to district supervisory or administrative personnel, or to one of the child's teachers, that the child is in need of special education and related services. 20 USC § 1415 (k)(5)(B)(i).; 2. The parent has requested an evaluation of the child (under 20 § USC 1414 (a)(1)(B). 20 USC § 1415 (k)(5)(B)(ii); or 3. The child's teacher, or other district personnel, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education or to other district supervisory personnel. 20 USC § 1415 (k)(5)(B)(iii).

Case Study Evaluation

Under IDEA, a District can refuse a parental request for an evaluation. However, if a District refuses to conduct an evaluation, it must provide the parent with written notice of refusal. 34 CFR § 300.503(a)(2). The written notice must include a description of the refused activity; an explanation of why the district refused to evaluate the child; a statement that the parents have protection under the IDEA's procedural safeguards and the means by which they can obtain a description of those safeguards; sources for parents to contact to obtain assistance in understanding the law; a description of any other options considered and other factors relevant to the district's decision 34 CFR § 300.503(b). 23 Ill. Admin. Code § 226.110.

Courts have supported districts' refusals to conduct a case study evaluation where a district does not have a reasonable basis to suspect a disability. *Letter to Williams*, 20 IDELR 1210 (OSEP 1993) ("However, the parent's request for a Part B evaluation does not automatically trigger the obligation of the LEA to conduct that evaluation. Rather, the LEA must conduct an evaluation without undue delay only if the LEA suspects that the child has a disability and is in need of special education and related services. Therefore, under Part B, an LEA may refuse to conduct an evaluation only if the LEA does not suspect that the child

has a disability."); *Letter to Anonymous*, 19 IDELR 498 (OSEP 1992) ("If the LEA disagrees with the parents and does not suspect the child has a disability, it may refuse to conduct an evaluation. In that instance, the parents may request a due process hearing on the matter of the LEA's refusal to initiate an evaluation.").

If a public agency does not suspect that the child has a disability and denies the request for an initial evaluation, the public agency must provide written notice to the parents, consistent with 34 CFR 300.503 (b) and 20 USC 1415 (c)(1), which explains, among other things, why the public agency refuses to conduct an initial evaluation and the information that was used as the basis to make that decision.

In case where districts have first attempted response to intervention (RTI), parents may request an initial special education evaluation at any time during the RTI process. Because RTI is a general education tool, districts cannot use it to delay disability identification in the face of parents' requests for immediate formal testing for eligibility. If the district agrees with the need for an evaluation, it must evaluate the child, adhering to the appropriate timelines. However, if the district declines the parent's evaluation request, it must issue a prior written notice under 34 CFR 300.503 (a)(2). The parent can challenge the refusal by requesting a due process hearing to resolve the dispute regarding the child's need for an evaluation.

In the instant case, after the request for a case study evaluation was made on December 4, 2007, the District submitted a letter dated January 7, 2008 refusing to conduct an evaluation based on Student's inconsistent attendance and the desire to attempt school based problem solving. The District did not provide the Parent with the procedural safeguards. At this point of the school year, the Student had been in school during the 2007-2008 school year on a regular basis. Although the District wanted to attempt school based problem solving, the facts do not support the reasonableness of this decision. The District had already implemented pull out small groups for the Student since October and the Student's November 2007 report card indicated that he was failing. Attempting school based problem solving does not relieve a district from conducting a case study evaluation nor in light of the facts of this case reasonable, especially when three months of the year had passed with the Student in school on a regular basis, the Parent and the teacher expressing concern with the Student's deficits in his academics.


Conclusion

While a the District attempted to provide non-special education tools to ameliorate the Student's deficits, it failed to find the Student eligible for services pursuant to IDEA and the District's failure deprived the Student the ability to receive a free appropriate education.

IT IS HEREBY ORDERED:

1. The District shall provide the Student with 96 hours of individual tutoring by a certified special education teacher to be implemented within a calendar year starting no later than May 21, 2009.
2. The District shall submit a letter of compliance on or before May 28, 2009.

ENTERED THIS 4th DAY OF May, 2009



Sheana Hermann
Impartial Due Process Hearing Officer

Finality of Decision:

This decision shall be binding upon all parties.

Right to File Civil Action:

Any party to this hearing aggrieved by the final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS 5/14-8.02(i) that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.

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 to the Illinois State Board of Education. **The right to request such a 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.**

CERTIFICATE OF SERVICE

The undersigned hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parent's counsel (7007 2560 0000 7376 2952), District's counsel (7007 2560 0000 7376 2969), and the Illinois State Board of Education (7007 2560 0000 7376 2952) at their respective addresses by depositing same with the United States Postal Service in Lake Bluff, Illinois with proper certified postage paid before 5:00 p.m. on May 4, 2009.



Sheana Hermann
Impartial Due Process Hearing Officer