

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

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MAR 10 2009

[REDACTED]
Student,

v.

)
)
) CASE NO. 2009-0190
)
)

SPECIAL EDUCATION
SERVICES

) MARY SCHWARTZ
) Impartial Hearing Officer
)
)
)

DECISION AND ORDER

Jurisdiction

This matter is before the undersigned hearing officer on the guardian'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.*, 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

The student's guardian filed a due process complaint on November 14, 2008. The district received the complaint that same day. The Illinois State Board of Education ("ISBE") appointed the undersigned as hearing officer on November 21, 2008. The undersigned sent a Preliminary Scheduling Order to the parties on November 22, 2008, and attempted to set up a telephone conference call with the parties. The district filed its response on December 2, 2008. The student's guardian, [REDACTED], represented herself and the student throughout these proceedings. The district is represented by [REDACTED]

The district convened a meeting on December 18, 2008, which it asserts was a resolution meeting. The guardian attended the meeting and disagrees with the characterization of the meeting as a resolution meeting. The guardian contends that the meeting focused on her current concerns about the student rather than on the issues raised in the due process complaint. Regardless of how the meeting is characterized, it was not held within the 15 calendar day resolution period, and it did not resolve the issues identified by the guardian. The prehearing conference was held as scheduled on January 22, 2009, at the district's administrative office. Because the guardian did not have her preliminary witness and document lists, the prehearing was completed on February 12th by telephone conference call.

The due process hearing was held on February 27, 2009, at the district's administrative office. The guardian called two witnesses: the student and [REDACTED] a cousin of the guardian who has frequent contact with the student. The district called the

following witnesses: [REDACTED], the district's Assistant Superintendent for School Improvement; [REDACTED], the student's seventh grade special education teacher; and, [REDACTED] the district's school psychologist. [REDACTED] of [REDACTED] was the court reporter. The hearing officer did not receive a transcript of the proceedings and thus has relied on her notes taken during the hearing and her memory for the testimony referenced below. At the close of the hearing, the guardian asked to enter two documents into evidence that had not been tendered by the five day disclosure date. The documents are letters from two people who know the student. The district did not object to the guardian's request, with the stipulation that the authors of the letters have no knowledge of the student in her school setting - the letters are based solely on their observations in the community. The documents are in the guardian's exhibit binder, labeled PD 197 and 198. All documentary evidence and case law submitted by the parties was reviewed in the process of rendering this decision. This decision is issued within ten days after the hearing's conclusion, as required by Illinois law. 105 ILCS 5/14-8.02a(g55)(5).

Issues Presented and Remedies Sought

The guardian contends that the district has not provided the student with a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") in the following ways:

1. The district incorrectly determined that the student has a secondary eligibility category of emotional disorder ("ED"), in addition to her primary disability of cognitive disability;
2. The evaluation data on which the district based its ED eligibility determination is inaccurate in the following ways;
 - a. The student does not have difficulty interacting with peers and adults;
 - b. The student does not demonstrate inappropriate behaviors throughout the school building;
 - c. The student does take ownership of her behavior;
 - d. The student has not shown the required behaviors to a marked degree and over an extended period of time; and,
 - e. The district relied on information and conclusions in prior IEPs in making this determination.
3. The district's proposed placement does not provide the student with a FAPE in the LRE and is based on the district's incorrect determination that the student has behavioral problems.

As a remedy for the above alleged violations, the guardian requests that the undersigned order the district:

1. To develop an IEP that maintains the student in her current educational placement, which includes the following:
 - a. Language arts instruction in a general education classroom that is co-taught with a resource teacher;
 - b. Math in an instructional classroom that is taught by a special education teacher with an instructional aide;

- c. General education classes for all other classes;
 - d. 40 minutes/day of resource room; and
 - e. related services of speech/language (60 minutes/week) and counseling (40 minutes/week).
2. To destroy all records of evaluations/data that the guardian believes are incorrect or invalid; and,
 3. To delete information on the student's IEP goal sheets that reference behavioral problems.

The district argues that it has removed the secondary ED eligibility from the student's IEP and, therefore, the first issue is resolved. Although the district will not agree to delete the behavioral information in the student's IEP, it has agreed to include an addendum to the IEP, detailing the guardian's disagreement with the information if she provides such a statement. At the prehearing, the district also offered to place the contested student records in a sealed envelope that would be stored in the administrative office; however, the contested records would remain part of the student's educational file and would be sent with her file upon request should she transfer to another school.

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 guardian has the burden of proof. The guardian requested that the district present its case first, and the district agreed to do so. This arrangement did not change the burden of proof.

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, 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, who is 13 years old, attends seventh grade in junior high school within District 54. She is eligible for special education and related services as a student with a cognitive disability. (SD 89). The student lives with her legal guardian, [REDACTED] (SD 90).

According to school records, the student was exposed to cocaine in utero. She was removed from her biological mother when she was ten days old and placed in foster care. (SD 217). The foster mother later adopted [REDACTED], and the student lived with her adoptive mother until February 2008. At that time, the adoptive mother became ill and unable to care for [REDACTED]. The student was then placed at [REDACTED] in [REDACTED] (SD 198). The student has had no contact with her adoptive mother since February 2008. (SD 199). At some point, the student was moved from [REDACTED] to a foster home placement with [REDACTED] [REDACTED] is the daughter of the student's current guardian. In

June 2008, the student began to reside with [REDACTED] and enrolled in [REDACTED] for school year 2008-09. (SD 198). The student's adoptive mother appointed [REDACTED] as the student's short-term guardian on October 3, 2008, and renewed the appointment on December 3, 2008. (PD 27-37).

The student's first connection with the public school system was with [REDACTED]. Records indicate that although that district found [REDACTED] eligible for early childhood services, her adoptive mother elected not to enroll [REDACTED] in an early childhood program. The student began kindergarten in [REDACTED] and received her first case study evaluation in 2003, when she was repeating kindergarten. (SD 208). The evaluation assessed the student's intellectual functioning, academic achievement, adaptive functioning, and speech/language development. (SD 210). On the Wechsler Intelligence Scale for Children-III ("WISC-III"), the student achieved a verbal I.Q. of 73, a performance I.Q. of 71, and a Full Scale I.Q. of 70. On the Wechsler Individual Achievement Test ("WIAT-II"), her standard scores were 78 in word reading and numerical operations and 76 in spelling. (SD 209). These scores are within the borderline range. (SD 210). The Vineland Adaptive Behavior Scales were given both to the adoptive mother and classroom teacher. Both raters scored her as having low adaptive behavior scores. (SD 218).

[REDACTED] re-evaluated the student in March 2006. (SD 201). She was given several different assessments of cognitive functioning, including the WISC-IV, the Stanford Binet Intellectual Scale, 5th Edition (Abbreviated Battery), and the Kaufman Brief Intelligence Test ("KBIT"). On the WISC-IV, she received a full scale IQ of 75. Her I.Q. on the abbreviated Stanford-Binet was 61 and on the KBIT was 71. Her academic achievement was again measured using the WIAT-II. On the WIAT-II, she achieved standard scores of 60 in word reading, 69 in numerical operations, and 63 in spelling. (SD 202).

On March 1, 2007, [REDACTED] convened an IEP meeting for the student. The IEP team determined that her placement would be 93% in special education and 7% in regular education. (SD 128). She was placed in a cross-categorical classroom and also received speech/language therapy and social work services. (SD 139, 140). Her IEP for that year notes numerous behavioral concerns, including verbal and physical aggression, distractibility, need for constant re-direction, and not taking responsibility for her own actions. (SD 131, 139, 144-146).

The student transferred to [REDACTED] in February 2008. (SD 314, 315). The [REDACTED] IEP in the student's records is incomplete and contains only a few speech/language goals and a re-evaluation of the student's speech/language functioning in April 2008. On the Receptive One-Word Picture Vocabulary Test, she scored at the third percentile. She was at the first percentile on the Expressive One-Word Picture Vocabulary Test. The examiner determined that the student has weak skills in expressive and receptive language, language processing, listening comprehension and verbal reasoning. (SD 118). The student's speech/language goals were reviewed and updated on May 13, 2008. (SD 119-121).

[REDACTED] entered [REDACTED] as a seventh grade student in the fall of school year 2008-

09. Because the district did not receive a complete IEP from [REDACTED] and the prior [REDACTED] IEP had expired [REDACTED] placed the student in a regular education class with 40 minutes/week of resource room. (SD 112). On September 24, 2008, [REDACTED] convened a meeting to discuss the student's educational needs. The district proposed continuing the student's resource class and adding a special education language arts class. [REDACTED] did not consent to the language arts class. She did give consent for a re-evaluation. (PD 62-67; SD 110-115).

The district's school psychologist, [REDACTED], administered the WISC-IV to assess the student's intellectual functioning. The student scored at the fifth percentile in verbal comprehension, the fourth percentile in perceptual reasoning, the 34th percentile in working memory, and the 50th percentile in processing speed. (PD 93; SD 190). [REDACTED] did not report a full scale IQ for the student because of a wide scatter in her subtest scores. The examiner reported that the student's behavior varied throughout the three testing sessions, ranging from compliant and working hard to needing reminders to work hard. At times, the student stated "I don't get it" before trying to give an answer. The psychological evaluation also notes that the student received eight discipline referrals during the first two months of school for behaviors including disrespect and inappropriate language and peer contact. (PD 90-94; SD 187-191).

The student's special education teacher, [REDACTED], assessed the student's academic achievement. On the WIAT-II, the student scored at the first percentile in word reading, the second percentile in pseudoword decoding, and the 0.1 percentile in reading comprehension. In math, she scored at the first percentile in math reasoning and at the 0.2 percentile in numerical operations. Her written language scores were higher, as she scored at the third percentile in spelling and the fifth percentile in written expression. At the time of the evaluation, the student was beginning seventh grade. (PD 99-101; SD 192-194).

The district also re-evaluated the student's speech/language abilities. The examiner determined that the student has severe deficits in expressive and receptive vocabulary, adequate pragmatic language skills, and appears to process information slowly. (PD 102-104; SD 195-197). The school social worker assessed the student's adaptive behavior by giving the Vineland to the guardian and the student's teacher. The two raters scored the student very differently. [REDACTED] rated the student's adaptive behavior in communication, daily living skills, socialization and motor skills as adequate. The teacher rated the student as low in communication, daily living skills, and socialization and as moderate high in motor skills. (PD 96, 97; SD 199, 200).

[REDACTED] convened an IEP meeting on November 13, 2008, at which it found the student IDEA eligible under the categories of cognitive disability and emotional disability. (PD 73, 75, 88; SD 89, 93, 107). Both [REDACTED] and [REDACTED] attended the IEP meeting. (PD 72; SD 90). The IEP reports that the student needs constant re-direction, is easily distracted, has outbursts in class, and requires significant adult intervention. (PD 74, 78; SD 91, 92). The student's behavioral problems are described as "minor but chronic" and connected to her frustration with academics. The IEP further notes that the student "is going through many significant life transitions at this time." (PD 74; SD 105). The IEP notes that she has a great sense of humor, is a hard worker, and can be

polite and respectful. Parental concerns include feeling that the IEP team rushed through the re-evaluation, not being notified of behavior problems as they arose, and discrepancies between behavior/socialization reports in the school and at home. (PD 74, 78; SD 94, 105). The IEP states that the student's behavior impedes her learning. (PD 84; SD 101). The district recommended 800 minutes/week of special education, 60 minutes/week of speech/language therapy, and 40 minutes/week of counseling. The student is to participate in regular education classes for science, social studies, health, electives, and physical education. (PD 86; SD 103).

The district administers standardized assessments to its students in the fall, winter and spring. On the reading assessment, the student scored at the fourth percentile in both the fall and winter. She scored at the first percentile in math in both the fall and winter. (PD 119; SD 157). Her winter math score was the second lowest math score for seventh graders in the district. (SD 159-160). Her winter reading score was the fifth lowest among the district's seventh graders. (SD 170-180).

On December 9, 2008, [REDACTED] requested that the district provide homebound instruction for the student due to "nitpicking, harassment, and retaliation because of my request for a hearing." (PD 171; SD 49). The district denied the guardian's request on December 12th because the student did not have a medical condition that prohibited her from attending school. (PD 177, 178; SD 34, 35). The guardian renewed her request on December 15th and included a physician's statement on a prescription that states that the student "missed school because of anxiety related to incidences of being bullied at school." (PD 174, 175; SD 31, 32). The student returned to school in January and was attending school at the time of the hearing.

Conclusions of Law

A two part analysis is used to determine whether a district has provided a student with a free appropriate public education. First, the district must have complied with the procedures in the IDEA; next, the district must have developed an IEP for the student that is reasonably calculated to enable the student to receive educational benefit. *Board of Educ. of the Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176 (1981). There is no dispute regarding the eligibility determination of cognitive impairment. However, the guardian does argue that the placement proposed in the November 2008 IEP does not offer the student a free appropriate public education.

The assistant superintendent testified that [REDACTED] current general education language arts classroom has 23 to 25 students, two teachers and a classroom aide. The teachers use a seventh grade curriculum with the students. [REDACTED] reads at a second grade level and has poor decoding and comprehension skills. She is unable to discuss the class readings at a seventh grade level. [REDACTED] testified that the student needs direct instruction in reading. The seventh grade math class is pre-algebra. The student, however, has not completely mastered basic computation. The pace of the algebra class is too quick for her, and she requires more time to learn new skills. She needs to practice new math skills, with re-teaching, until the skill is mastered. [REDACTED] testified that the student is experiencing a high level of frustration in her current placement because

she is not successful.

The student's teacher, [REDACTED], testified that the student is the lowest reader in the class. She has the student work on a computer program called Start to Finish, which reads to the student as she follows along and answers questions. The student works on this program in the school library. Start to Finish is designed to develop reading fluency. According to [REDACTED], the student tries to be successful but struggles with the work and has behavior problems when she is frustrated. The student interrupts the class and often needs to be removed from the class. [REDACTED] also testified that on the district's standardized assessments, the student is the second lowest seventh grade student in math and the fifth lowest in reading. She is below state standards in both reading and math on the ISAT, which is the state's standardized tests. [REDACTED], the school psychologist, testified that the student is "in over her head" in her current classroom. She said that the student becomes frustrated in school because the language arts and math content is difficult for her. The uncontroverted evidence shows that although the student is in the seventh grade, her core academic skills are significantly below her grade level.

The student currently receives significant accommodations in both language arts and math. Both [REDACTED] and [REDACTED] testified that the student's work is modified to her instructional level. The student is graded on the modified work, not on a seventh grade standard. Her grades reflect performance at her instructional level rather than on the seventh grade curriculum. The special education teacher also reported that the student completes her math work only when the 1:1 aide is with her. While these accommodations are somewhat tenuously maintaining the student in her current program, there was no evidence showing that the accommodations are helping her increase her reading and math skills. To solely accommodate a student rather than provide the specialized instruction the student needs does not provide a free appropriate public education. See, *J.L. and M. L. v. Mercer Island Sch. Dist.*, 46 IDELR 273 (W.D. Wash. 2006).

It was clear from the testimony that the guardian did not understand the extent of the modifications the student is receiving or realize that the student's grades are modified. The documentation of accommodations in the November IEP is brief, and more information should be provided to fully inform the guardian of the accommodations the student is receiving. (S-101, 102). This information should include the fact that the student's grades are modified and explain how the curriculum is modified. However, the lack of this information in the November IEP has not denied the student a free appropriate public education.

[REDACTED] testified regarding the district's proposed placement for the student. In reading, the proposed placement will provide direct instruction in decoding, which is a deficit for the student. The reading instruction will be done in a small group with frequent assessments and will focus on closing the gap between the student's current achievement level and her chronological level. In math, the proposed placement will provide more re-teaching and more time for the student to practice the skills she is learning. The math class will use the same text as that which the student is currently using, but the course will be taught differently than the pre-algebra course. Reading is a

basic skill and a foundation for the student's learning in years to come. The evidence shows that she needs more intensive instruction in basic reading skills. Modifying the curriculum to the student's present level is not going to teach her to read. The student also needs to develop basic math skills and receive direct instruction at her skill level. The evidence shows that the student is obtaining minimal educational benefit in her current placement and that the proposed placement would provide a free appropriate public education.

The guardian raised questions about the student's ability to perform better in her elective classes. District staff agreed that she does better, both academically and behaviorally, in her non-core general education classes such as media. [REDACTED] testified that the student is "doing great" in media and is quite successful there. In media, the students are making videos and doing other technology based projects. Because the students are presented with choices in media, the student is able to pursue what interests her. While the testimony shows that the student benefits from this participation with her non-disabled peers, it also clearly shows that she requires a more structured and intensive educational program for the core academic subjects of language arts and math to benefit educationally.

Because the district has removed the secondary eligibility of emotional disturbance from the IEP, the undersigned finds that the secondary eligibility is no longer at issue. It was clear from this testimony that the guardian's real dispute with the district is over behavioral issues, and a significant amount of testimony was proffered on this subject. The guardian asserts that she has not been consistently notified of the student's behavioral problems in a timely manner. She believes the district has ignored serious behavioral infractions by other students and instead has blamed [REDACTED] for those incidents. She also contends that her input has been ignored and that the district has refused to implement many of the things she has requested - for example, not giving the student candy as a reward for good behavior.

The student has received a significant number of disciplinary referrals, although these referrals are for minor infractions such as being in the hallway without a pass, refusing to follow expectations, and being disruptive. The records indicate that these behaviors were primarily handled by discussing them with the student and re-teaching expectations. (SD 242-256). The district began to collect daily data on the student's behavior in December 2008. (SD 261-305). The teacher and school psychologist testified that the district has used this data to develop positive strategies to work with the student on her behavior, including daily goal sheets. (SD 221-227). The guardian disputes the accuracy of these records, in part because she asserts that the student does not evidence these behavioral problems in the home. The witness called by guardian, as well as the documentary evidence she introduced, attest to the student's good behavior in the home setting and with family friends. (PD 196, 197). The hearing officer does not question the veracity of this documentation; however, the preponderance of evidence adduced at the hearing shows that the student is struggling with frustration within the academic environment, in large part due to her significant reading and math deficits.

The guardian requests that the district destroy these behavioral records and

remove all behavioral information from the student's IEP. The district declines to do either, although it has offered two alternative to the guardian: she may add an addendum to the IEP stating her disagreement; and the district has offered to place the contested information in a sealed envelope, although it will remain as part of the student's record. The procedure for challenging the accuracy of school student records is through a records hearing, not an IDEA due process hearing. The records hearing procedures include an appeal to the circuit court upon receipt of an adverse hearing decision. 105 ILCS 10/7.

Based on the foregoing findings of facts and conclusions of law,

IT IS ORDERED THAT:

All the guardian's claims against the district are hereby dismissed. The district may place the student in the proposed language arts/math program, as that program will provide the student a free appropriate public education.

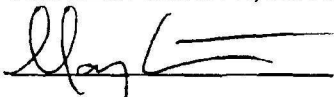
Right to Request Clarification

~~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: March 6, 2009



Mary Schwartz
Impartial Hearing Officer

CERTIFICATE OF DELIVERY BY MAIL

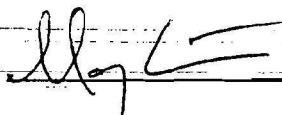
The undersigned hereby certifies that a true and correct copy of the Decision and Order was sent by certified mail with return receipt from [REDACTED], and directed to:

[REDACTED]

[REDACTED]

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

before 6:00 p.m. on March 6, 2009.



Mary Schwartz
Impartial Hearing Officer

[REDACTED]