

Case Number: 2010-0077

Hearing Officer: Michael Kisen

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

JAN 21 2010

Special Education Services

Impartial Due Process Hearing Decision Cover Page

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District Name
Superintendent
Address
Represented by

Phone:

Parent Name
Address
Represented by

Phone:

Parent Name

Address

Date and Timelines

Date of Written Request: 09/14/2009
Date of Pre-hearing Conf: 10/01/2009

Date of Hearing: 12/10/2009 to 1/15/2010
12:00:00 AM
Date of Decision:

Summary of Decision

The Parents failed to meet their burden of proof on all five issues identified in this DPCN. The District established they were ready to implement the most recent IEP dated 5/22/09. In order for the Parent to avail themselves and the Student of the services identified in the 5/22/09 IEP, the Parents must first re-enroll the Student in the District of residence. No further obligation exists for the District until such re-enrollment occurs.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) ISBE CASE NO. 2010-0077
)
) Michael Risen
) Impartial Due Process
) Hearing Officer

PROCEDURAL INFORMATION

On Thursday, December 10, 2009 at 9:00 AM, an Impartial Due Process Hearing was convened by D. Michael Risen, the hearing officer, on behalf of [REDACTED] hereinafter referred to as the Student, at [REDACTED] School located at [REDACTED]. A transcript was completed and will be ordered upon request of any of the parties involved and then delivered to all. The Parties agreed to file their supporting case law by January 15, 2010 at which time the Hearing portion of the above captioned DPCN would close and the decision would be due on January 25, 2010, per agreement by both parties. The Hearing officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14 – 8.02a et seq., 23 Illinois Administrative Code 226.600 et seq., the Individuals with Disabilities Education Act 20 USC 1400 (IDEIA), and 34 CFR 300.507 et seq. The parties were informed of their rights under 105 ILCS 5/14 – 8.02 et seq., 23 Illinois Administrative Code 226.636 and CFR 300.509. Participating in the hearing were parents of the student [REDACTED] (hereinafter referred to as the Parents) during the first five days of the Hearing (the Student's Grandfather, [REDACTED] joined the Parents late on Day 5 and attended all of Day 6 of the Hearing playing the role of an observer for the Parents). Participating for the District were [REDACTED], Counsel for the District, [REDACTED] Director of Student Services and representative for the District, and [REDACTED] Director of the Special Education Cooperative (hereinafter referred to as the District).

The Parents filed a request for a due process hearing on August 27, 2009 and amended that complaint on September 1, 2009. The District letter to ISBE and the accompanying ISBE form labeled "District Request for an Impartial Due Process Hearing officer" was date stamped at ISBE on September 2, 2009 by the Division of Program Compliance. The Hearing officer assignment letter from ISBE signed by Due Process Coordinator Andrew Eulass was dated September 3, 2009. The appointment and aforementioned letter and form were received on September 4, 2009 when the Hearing officer accessed same on the ISBE web site for Hearing officers known as SEDS.

On September 4, 2009, the Hearing officer notified the District and the Parents, that the Pre-Hearing Conference would be held on September 28, which would be more than 30 days from the date the due process request was filed. This notice also included an initial letter to the Parties from the Hearing officer detailing the appointment of the Hearing officer, Hearing officer jurisdiction, and other pertinent information needed by the Parties, as well as, information related to the rights of parties related to hearings, the required disclosure list, sample parent and district witness/document lists, a form detailing suggestions for stipulations of fact, and the format for both the Pre-Hearing Conference and the Hearing Format. On September 10, 2009, the Hearing officer received the District's response to the Due Process Complaint Notice (DPCN). Also on September 10, 2009, the District filed with the Hearing officer a Notice of Insufficiency. Subsequently, an email was sent by the Parents on September 12, 2009, indicating the Parents and District had met and agreed the

Parents could file an amended DPCN. In an email dated 12/13/09 and in response to both parties, the Hearing officer provided detailed directions to the Parents describing the minimum requirements and content required for a sufficient amended DPCN and granted the Parent's request per the District's agreement to allow the Parents until 5:00 PM on September 25, 2009 to file the amended DPCN. The amended DPCN was received on September 14, 2009 via an email attachment. The District's response to the amended DPCN was received on September 25, 2009. The Pre-Hearing Conference was held on October 1, 2009 via teleconference with the District representatives and the Parents participating. The District filed their Pre-Hearing Disclosure statement including the District's proposed witness and document lists. The Parents did not file the required documents prior to the Prehearing. During the Pre-Hearing Conference, the Parents agreed to provide the required documents and the Hearing officer sent, via email, another copy of the sample witness and document lists for the Parents to use. The Pre-Hearing Teleconference was held and completed on October 1, 2009. Hearing dates eventually identified and confirmed were November 10 and 12 of 2009. During the conduct of the Hearing, it was determined that additional dates would be needed and those dates were identified as November 13, 2009 and December 10, 16, 2009 and January 7, 2010.

PREHEARING CONFERENCE AGREEMENTS

On October 1, 2009 a Pre-Hearing Teleconference was held. Participating in the teleconference were the Parents and the District. The following items were agreed to at the Pre-Hearing:

- 1) Neither party had objections to the Hearing officer serving in this manner.
- 2) The Parties were informed that the Hearing officer would rule on any new evidentiary objections at the Hearing and that the Parties could raise such on the record at the beginning of the Hearing on any matters where they disagreed with the Hearing officer's rulings.
- 3) No interpreter was needed.
- 4) All witnesses were to be sequestered prior to their testimony.
- 5) The Parents chose for the Hearing to be closed and to have a written transcript.
- 6) The District would arrange for the court reporter. As Petitioner, the Parent would present their case first and shoulder the burden of proof.
- 7) Opening statements would be limited to five (5) minutes.
- 8) The five business day rule deadline was at 5:00 PM on November 3, 2009.
- 9) The Parties agreed that written briefs would not be filed at the close of the Hearing.
- 10) The Parties agreed the Student is a resident of the District.
- 11) The Parties agreed that the Student was not attending school at the time of the Pre-Hearing.
- 12) The Parties agreed the Student's primary eligibility is was Autism as listed on the Student's most recent IEP dated May 22, 2009.
- 13) The Parties agreed the Student is a student with a disability eligible for programs and services as stipulated by the Individuals With Disability Education Act (IDEA).
- 14) The Parties agreed that the issues identified herein were the only issues in this DPCN and that they contained no insufficiencies.

ISSUES PRESENTED

The Parties agreed the following five issues are the issues to be resolved in this DPCN:

A. Placement:

1. Did the District make an improper determination to place the Student in the District's STEP program as alleged by the Parents that the District failed to properly consider the information in the Student's most recent IEP and failed to involve the Parent's in the decision;
2. Did the District attempt to deny the Student registration and thereby deny the Student FAPE during the Extended School Year (ESY) of the Summer of 2009?

B. Services:

1. Did the District fail to provide a Free Appropriate Public Education during the ESY of 2009 by prohibiting staff members from implementing the Student's IEP services for speech and language and occupational therapy, by observing the Student during the delivery of the aforementioned services;
2. Did a Coop staff member improperly restrict the Student from access to the Student's mother after the student returned from the washroom thereby creating a confusing learning environment for the Student and potentially interfering with the Student's right to receive FAPE?

- C. Evaluation:** Was the District obligated to provide the Student with an Independent Educational Evaluation (IEE) and does the District now have an obligation to reimburse the Parents for the cost of an IEE that is either now completed or about to be completed?

PARENT'S POSITION

The Parent's position, as stated by the Mother in her opening and closing statements, is that the Student is a student eligible for special education services and supports and that the Student can only receive a Free and Appropriate Public Education (hereinafter FAPE) in the Least Restrictive Environment (hereinafter LRE) if the Student receives the appropriate programs and services as stipulated in the Independent Educational Evaluation (IEE) conducted by [REDACTED]. Further, the Parents assert that the Student's FAPE in the LRE can only be achieved if the aforementioned services are provided in the Specialized Instruction (SI) Classroom located at [REDACTED]. As a result of the aforementioned IEE, the Parents assert that [REDACTED] is no longer the appropriate primary disabling condition and that the Student should be identified as Other Health Impaired (OHI) due to a tentative diagnosis by [REDACTED] of anxiety disorder manifested by selective mutism and the existence of a pineal cyst. While the Parents acknowledge the student has speech and language delays, the Parent asserts that these are caused by the selective mutism as diagnosed in the IEE and the existence of the pineal mass. The Parents assert that the delays in speech and language are best addressed in the SI Classroom because the Parents assert the disabled peers in the SI Classroom display language patterns typically found in the Student's nondisabled peer group and would therefore provide more consistent and appropriate modeling.

The Parents contend that the District assigned administrators to observe the Student during the delivery of ESY of 2009 and that these observations interfered with the Student's therapy time thereby denying the student FAPE during ESY. The Parents contend that various administrators would either observe the child by looking through the door or window of the therapy room, or in one instance, sit in the therapy room to observe during therapy. The Parent contends that the

Student's feelings of being anxious in new surroundings was impacted by causing the Student to be distracted and that the Student experienced a heightened sense of anxiety that interfered with the delivery of the services.

The Parents contend that the Student was improperly detained or otherwise interfered with during ESY of 2009 while the Student was waiting in the reception area of the [REDACTED] with the Mother while they waited for the Student's sibling to complete therapy. The alleged interference occurred when the Student was returning from the bathroom and the Parent asserts the ESY Nurse attempted to either block or redirect the Student from returning to the Student's Mother. This interference, as alleged by the Parents, further added to the anxiety of the Student, thereby reducing the effectiveness of the ESY therapy services and therefore denied the Student the right of a FAPE.

The Parents contend that they initiated, on their own, an IEE to be completed by [REDACTED] and that after initiating this IEE, the Parents asked the District to pay for its completion. It was never clear during the hearing, either through documents submitted or testimony given, the reason(s) the Parents initiated the IEE process. It could be inferred that the Parents may have believed that the IEE was necessary because the IEP completed by the Student's former District on May 22, 2009 was not accurate or otherwise appropriate to meet the Student's handicapping conditions. However, this was not clear from the evidence submitted and therefore remains an inference. The Parents contend they asked the District to pay for the IEE and the Parents contend that the District denied their request.

Finally, the Parents contend that the Mother attempted to register the Student, along with the Student's younger sibling, on May 20, 2009. When arriving at the desk of the registrar for the District, the Parents contend that the Student's Mother was informed that registration materials for the younger sibling were available but the District did not have the proper materials for the Student at that time. Further, the Parents contend that the District would not accept the Parent's documents that met the District's Policies requiring proof of residency. The Parents also assert that the conduct of the registrar was such during this registration period that the Parents believed the District had either instructed the registrar to prohibit registration in the District, or at least make it difficult such that Parents might not register, thereby denying the Student access to a FAPE. The Parents acknowledge that the Student was officially registered in the District on June 8, 2009.

The Parents ask that the Hearing officer order the following:

- 1) placement in the Specialized Instruction Classroom located at [REDACTED]
- 2) order the District to convene an IEP meeting and implement the recommendations of the IEE completed by [REDACTED]
- 3) to allow the Parent's meaningful participation in the development of that IEP by allowing the Parents to review the services the Student received during various times of home school instruction;
- 4) and to order the District to reimburse the Parents the costs associated with the IEE not already paid for by the school district.

DISTRICT'S POSITION

The District asserts that it has, by and through its administrators and staff, made every effort to comply with the IDEA and work with the Parents to appropriately implement the Student's IEP from May 22, 2009 as developed by the Student's previous school district. The District asserts that the Student was enrolled in a timely manner and began ESY on time, several written attempts were made by the District's administrators to schedule an IEP meeting with the Parents, numerous phone calls were made between staff and the Parents to either discuss the Student or to arrange for meetings regarding the Student's previously developed IEP, the District took the initiative at arranging and participating in mediation where some agreements were reached, the District arranged observations for the Parents to observe proposed and potential placements for the Student, and the District provided for payment of the fees for the Parent's independent evaluator to attend an IEP meeting so that her findings could be shared and considered on behalf of the Student at the IEP meeting conducted on October 22, 2009. The District asserts that all of these efforts support the District's position that the Parent's assertions in the DPCN are without merit and asks the Hearing officer to find:

- 1) that the Parents failed to meet their burden of proof and therefore find that the District did not interfere with the Student's enrollment or registration;
- 2) that the District properly planned for and provided ESY services in a timely manner consistent with the Student's IEP;
- 3) that school Administrators did not interfere with the Student's ESY services as a result of any observations that were completed;
- 4) that no staff member inappropriately interfered with the Student or otherwise prevented the Student from going to her mother;
- 5) that no request for an IEE was ever presented in writing to the Superintendent of the District and therefore, there was no obligation for the District to provide such, (the District also notes that the Student's three year evaluation is due in January of 2010 and that the District should be allowed to complete same in collaboration with the Parents);
- 6) and lastly that the District's recommendation for the STEP program is properly based upon the Student's most recent and complete IEP dated 5/22/09 and is therefore appropriate and to therefore order placement of the Student in the LWASE STEP program.

FINDINGS OF FACT

- 1) There were twenty two witnesses who testified during the Hearing which was originally scheduled for a two day hearing but actually occurred during six days.
- 2) Sixteen of these witnesses (most of whom were District staff) were presented by the Parents during their case-in-chief because the Parents requested the due process hearing and thus bore the burden of going forward as well as the burden of proof.
- 3) Neither party submitted post-hearing briefs but both parties agreed to file case law that the Parties wanted the Hearing officer to consider. The parties agreed that the Hearing would not close until 5:00 PM on January 15, 2010 in order to allow the parties time to submit their case law documents to the Hearing officer. It was further agreed by both parties that the decision in this DPCN would be due by 5:00 PM on January 25, 2010.

- 4) While a transcript of the hearing was taken, the completed transcript was not available for the writing of this decision.
- 5) There was one volume of exhibits submitted by the Parents with additional supplemental documents gleaned from the Student's school records allowed for admission during the Hearing. The District was afforded the opportunity to review the supplemental documents and submit a written objection to the admission of any of those documents. Some of the objections submitted by the District were sustained, with the majority of the documents being admitted (see HO Exhibit #205 pp # NK HO 0610-0616). The District objected to the admission of the supplemental documents on the basis they were being submitted after the close of the five business day rule. The Hearing officer admitted the documents on the basis that the Parents indeed listed the Student's records as part of their document list in their disclosure statement filed prior to the five business day rule and the District was allowed to review the supplemental documents in a timely fashion prior to their use during day six of the Hearing.
- 6) The Parents' documents as submitted were not numbered but the District arranged those documents in a binder for all parties and numbered them: "N001-N109."
- 7) The District submitted two volumes of exhibits. The District exhibits were bound and marked by tabs and page numbers with pages numbered "A001-A384," "B001-B012," "C001-C052," "D001-D479," "E001-E006," and "F001-F032."
- 8) Additionally, the Hearing officer submitted exhibits consisting of 625 pages and marked as "NK HO 0001 – HO 0625." The exhibits from the Hearing officer were documents representing the various email and USPS communications between the parties as well as motions or objections and subsequent rulings on both.
- 9) The Student is a female student who was born on [REDACTED]. The student recently celebrated her tenth birthday.
- 10) The document that begins on page A001 reflects the earliest completed IEP for the Student that was submitted by either party and reflects an IEP filed in the District's documents that was completed by the Student's previous school district and is dated 9/19/2006. This IEP reflected the student has been receiving special education services since at least that date when the Student was then five years old. The Student continued receiving those services intermittently (with some periods of home schooling during the intervening time periods) from her previous school district until moving into the [REDACTED] and registering on June 8, 2009.
- 11) SD document located on page A277 reflects the Student's most recent IEP that is complete and signed by the Parents. This IEP was completed by the Student's previous school district on 5/22/2009 and reflects on page A277 that the Student's primary eligibility is Autism.
- 12) A school district psychological evaluation was completed by the Student's previous school district on November 7, 2006 by Psychologist [REDACTED]. The findings of this evaluation

were reflected by the "Gilliam Autism Rating Scale" and the document on page A007 reflects "She scored in the mildly-moderately autistic range on this measure."

13) Subsequent to this completed evaluation, IEP's dated 1/17/06 (SD A024), 5/29/08 (SD A056), 9/3/08 (SD091), 10/15/08 (SD A128), 1/17/09 (SD A199), 4/15/09 (SD A231), and 5/22/09 (SD A277) were completed by the Student's previous school district. In all cases, at least one Parent's signature was present indicating participation in the IEP development and completion. In all cases, the Primary Disability noted on the IEP was "Autism." In all cases, no notations or minority reports were found indicating any disagreement with this disability finding. The most recent and complete IEP dated 5/22/09 recommends that the Student receive Occupational Therapy 30 minutes per week, Speech and Language Therapy 120 minutes per week, Social Work Services 30 minutes per week, and a personal aide with special education services not in the general education classroom for 1,760 minutes per week for a total of 1,560 minutes of special education services each week (SD A303).

14) The Parents moved to the [REDACTED] late in the spring of 2009 and registration of the Student was completed on June 8, 2009 (it is acknowledged herein that the Parent felt that registration was made more difficult for her than what she believes most parents experience). The Parent provided fax copies of the Student's special education information and the Student was enrolled by the District for ESY for speech and language and occupational therapy. The Student attended 4 sessions and missed 2 sessions of OT and attended 6 sessions and missed 3 sessions of S&L during the ESY of 2009 (SD A316).

15) The District communicated with the Parents in a letter dated July 3, 2009 that offered four dates to the Parents for the purpose of scheduling an IEP meeting for the Student as well as an attachment that detailed the amendment for the Student's speech goals and objectives (SD C001).

16) The District communicated with the Parents in a letter dated July 17, 2009 scheduling the Student's IEP meeting for August 4, 2009 (SD C009). Additionally, in this same communication, the District acknowledged to the Parent her email communication that "there is significant information in regards to [REDACTED] private speech and occupational therapy services" and the District requested that the Parent provide a "summary of her present levels of performance from the providers."

17) The Parents responded to the aforementioned letter (paragraph 16) with a detailed email dated same day admonishing the District and its administrators for "not listening." The email acknowledged the August 4, 2009 IEP date and indicated the Parents wanted to share all of the student's records "These records are extensive and I will have to be present with all IEP members for review." There is no evidence that the Parent made any effort to provide the summary requested in the letter identified in paragraph 16 above.

18) The District communicated with the Parents in a letter dated July 23, 2009 (SD C012) describing in detail preparations needed for the Student's IEP meeting scheduled for August 4, 2009.

19) There was no record of an August 4, 2009 IEP meeting submitted.

- 20) The parties participated in an August 29, 2009 mediation session conducted by a mediator from the ISBE.
- 21) The Parents and the District met in mediation with a mediator from the Illinois State Board of Education on 8/19/09 (SD A335).
- 22) In a letter dated August 20, 2009 (SD C027), from the District's legal representative, the Parents were informed in detail of the Parent's rights under the IDEA and the District's acknowledgement to wait to proceed pending the Parent's completion of an IEE. The letter also reconfirmed the District's intentions and willingness to provide the Student with services pending the completion of the Parent's reports.
- 23) The Parents filed a DPCN on August 27, 2009 and amended the DPCN on September 14, 2009.
- 24) In a letter dated September 14, 2009 (SD D222), the District, through their legal representative, wrote the Parents reviewing the District's previous recommendations for the Student, expressing the District's concerns that the Student was not attending school, offering to convene an IEP meeting, and discussing required resolution to attempt to resolve the DPCN.
- 25) In a letter dated September 15, 2009 (SD C032), the District, through their legal representative, wrote the Parents confirming their interest in participating in the resolution session and the fact that the District was "very concerned that (Student) is not attending school."
- 26) Parents confirmed via electronic mail on September 21, 2009 their intent to participate in the resolution session dated September 23, 2009 (SD C037).
- 27) In a letter dated September 28, 2009 (SD D271), authored by [REDACTED] (Director of Special Services for the child's previous school District) there was a review of the IEP dated 5/22/09 and the Director noted: "... please remember that on several occasions I offered to have a transition IEP meeting with [REDACTED] staff and the staff from the new school. Each time this offer was made, the offer was respectfully declined."
- 28) In a ruling dated October 6, 2009, Stay Put was determined by the Hearing officer.
- 29) In a letter from the District's representative dated October 9, 2009 (SD D404), the District provided details to the Parents of the plan to comply with the Stay Put Order.
- 30) In an electronic mail from the hearing officer to both parties (SD D425), the Hearing officer confirms to the parties that the District's proposed program to meet the Stay Put order is reasonable and satisfactory.
- 31) In an electronic mail to the hearing officer from the Parents (SD D433-D434), the Parents detailed their reasons for not sending the student to the Stay Put placement and their reasons for refusing to send the student to the ordered Stay Put placement in the future.

- 32) The Parents submitted an IEE labeled "Neuropsychological Evaluation" completed by [REDACTED] of [REDACTED] (SD A328-A334) and dated July 17, 20 and 28 of 2009 as the dates the evaluation was conducted.
- 33) On or about September 22, 2006, the District and the Parents had been dealing with a disagreement regarding the Student's placement during that period of time. The Parents filed a formal complaint against the District that resulted in an investigation by the ISBE of the District. This investigation resulted in the ISBE admonishing the District for a fax sent by the then Superintendent of Schools offering the Parent their preferred placement for the Student in return for the Parent agreeing to various conditions set by the District. The ISBE noted that this communication did violate "IAC 23 226.180" (Parent Supplemental Documents (PSD) 55f). There were three (3) other allegations made by the Parents in the complaint and the ISBE found "No violation" (PSD 55e-55g).
- 34) The incidents detailed in paragraph 33 above seem to be the root of "tensions" between the Parents and the District. These "tensions" have dictated the manner in which the Parents have interacted with various personnel of the school district since re-enrolling the student on June 8, 2009 and contribute extensively to the origins of the issues that exist in this DPCN.
- 35) An IEP meeting was held on October 22, 2009 with the Parents attending along with the Parents Independent Evaluator, [REDACTED] (SD A352). The purpose of the IEP meeting was to consider the findings of [REDACTED] as documented in her report found in the document labeled as SD A328. The IEP was not completed. The participants completed discussions of the IEE and made arrangements for the Parents to visit several programs that the District staff believed could meet the Student's needs and conform to the recommendations of the IEE. In the notes from the discussion of the IEP meeting (SD A379) the following is reflected: "[REDACTED] reviewed that SCII and SI are similar – but that SI students are expected to do 3rd grade science and social science. [REDACTED] and [REDACTED] agreed that she can't do 3rd grade curriculum. [REDACTED] expressed concerns regarding the pace of instruction in the 3rd grade class. ... [REDACTED] asked if there were any other classrooms. [REDACTED] explained the AI classroom. It is a self-contained, instruction is individualized and general ed classes are individualized. [REDACTED] asked which class (AI or SCII) was more able to meet needs. Team stated both. [REDACTED] did say that children are more in the impaired range. [REDACTED] does not feel that AI is a good match. [REDACTED] was asked about pacing as the Student will need a slow pace of instruction and a calm setting – SCII is match now and then for a year or so and then as she progressed move up to SI. ... [REDACTED] offered for [REDACTED] to see the SI classroom but she had to leave at 11:05 due to an appointment at the hospital in [REDACTED]" The notes from the discussion closed with the notations that Parents were to complete observations that afternoon or the next day. Testimony reflected that the Parents spent less than 10 minutes in observing the proposed classrooms in each instant observation.
- 36) After the classroom observations, the Parents declined the services offered during the 10/22/09 IEP meeting and proceeded to Hearing.

Burden of Proof

Under the IDEA, the burden of proof rests with the party seeking relief (*Schaffer v. Weast*, 546 U.S. 49 (2005)). While both parties have submitted substantial documentary evidence and considerable testimony was offered over six full days that was at times, conflicting, the Parents failed to meet their Burden of Proof.

DISCUSSION AND CONCLUSIONS OF LAW

A. Placement:

1. Did the District make an improper determination to place the Student in the District's STEP program as alleged by the Parents that the District failed to properly consider the information in the Student's most recent IEP and failed to involve the Parents in the decision;
2. Did the District attempt to deny the Student registration and thereby deny the Student FAPE during the Extended School Year (ESY) of the Summer of 2009?

When considering a dispute regarding a student with a disability and the student's school district, the hearing officer must first begin by considering the Supreme Court decision in *Rowley* (*Board of Education of the Hendrick Hudson School District, Westchester County et al. V. Rowley* by her Parents, *Rowley et ux.* 458 U.S. 167 (1982)). In *Rowley*, the decision is directed by the Supreme Court which set forth a two pronged test for determination of a Free Appropriate Public Education (FAPE) in the least restrictive environment (LRE). The first prong directs the decision to determine whether or not the District has complied with the statutory procedures required by the Individuals With Disabilities Education Act (IDEA) 20U.S.C. 1401 et seq. *Rowley* indicates that any substantial denial of procedural safeguards that results in adverse impact on the parents' participation or the Student's education in so much as the result is a loss of educational opportunity then there has been a denial of the law's requirement for FAPE. This first test of *Rowley* provides for relief only when the procedural violations result in substantial harm to the student (*W.G. v. Board of Trustees*, 960F.2d 1479, 1484 (9th Circuit 1992)). In the instant case, the record is clear that the District enrolled the student in a timely fashion, provided appropriate ESY services based upon the student's already established IEP, offered to implement the current IEP and made several attempts to schedule an IEP with the Parent. The District offered the Parent several program choices for placement that were described as programs that could meet the Student's needs as identified in the 5/22/09 IEP and the Parents declined all placements. The District fully complied with the hearing officer's order regarding Stay Put and the Parent did not send the Student for services. Additionally, the District, through testimony and documentary evidence, established a willingness to meet with the staff from the previous school district to review the IEP and programs and services provided by that District. Indeed, the Director of the Special Education services from the previous District indicated in a letter (SD D271) to the Parents that she had offered same on several occasions and yet the Parents declined. Hence, the Parents have failed to meet the Burden of Proof that a procedural violation occurred.

The second prong of the *Rowley* test is to determine whether or not the individualized program developed through such procedures is reasonably calculated to enable the Student to receive

educational benefit. Further illuminating this test is 23 IL Admin Code Section 226.50 which provides in part:

“...a) Transfer Students

Provision of FAPE to students who transfer into a local school district shall be made in accordance with the requirements of 20 USC 1414(d)(2)(C). The additional requirements of this subsection (a) shall also apply.

1) In the case of an eligible student transferring into a district from another district within Illinois, when the new district obtains a copy of the student’s IEP before or at the time the child is presented for enrollment:

a. The district may adopt the IEP of the former local school district without an IEP meeting if: i) the parents indicate, either orally or in writing, satisfaction with the current IEP; and ii) the new district determines that the current IEP is appropriate and can be implemented as written.”

The District, through documents and credible testimony of its staff, including [REDACTED] School Psychologist, [REDACTED] Coop Director, and [REDACTED] Director of Student Services, proved during the hearing that the District was ready, willing and able to implement the 5/22/09 IEP developed by the previous school district and agreed to by the Parents at the time of its completion. The Student was enrolled in, and programmed for, ESY consistent with the Student’s transfer IEP dated 5/22/09 (SD A316). In written communications provided on July 3, 2009 (SD C001), July 17, 2009 (SD C009), July 23, 2009 (SD C012), the District offered to conduct an IEP meeting to program for the Student in a timely manner to be ready to provide services for the Student at the start of and during the 2009-10 school year. An IEP was scheduled for August 4, 2009 (SD C009) but the Parents did not participate and no IEP was ever completed. The documentary evidence and testimony from administrators and staff is clear that the District made more than a reasonable effort to meet the needs of the Student documented in the transfer IEP dated 5/22/09. The District and the Parents participated in mediation and the resolution session but the issues remained unresolved. In a letter from the District’s legal counsel dated August 20, 2009 the District further confirmed their commitment and desire to program for the Student in time for school to begin. Further, in another letter from Counsel dated September 14, 2009, the District expressed concern that the Student was not in school, discussed the District’s proposals for accommodating the Student, and reiterated the District’s desire and willingness to educate the Student. Even after the hearing officer’s ruling on Stay Put and the District’s letter of proposed compliance (SD D404), the Parents did not send the Student for Stay Put services after being informed by the hearing officer that the District was indeed complying with the Stay Put Order (hearing officer Exhibit p.429). Even though there was a Stay Put ruling in the Parent’s favor, the Parents did not bring the Student to school for Stay Put services nor ask the District for transportation so that the Student might participate.

The District’s recommendation to involve the Student in the Cooperative’s STEP program was based upon the IEP provided by the Parents dated 5/22/09. District administrators testified that they met with the Mother of the Student to discuss this program and others during the summer of 2009. This testimony related to the fact that these meetings took place was confirmed by the Mother during her testimony. Such discussion is appropriate per 23 IL Admin Code Section 226.50 referenced above. Further, testimony by the District’s administrators and other staff called by the

Parents confirmed that the District carefully considered the input of the Parent's Independent Evaluator and that the District attempted to find a program that the independent evaluator believed would be a good match for the Student. This was further corroborated in the IEP notes as reflected in SD document page A379. Indeed, during testimony by the evaluator, [REDACTED] testified that she was allowed to share her examination of the student with staff during the IEP dated 10/22/09, that she believed the staff listened to her, that the discussion that took place was an "open discussion," and she did not believe the staff had made any predetermined decisions prior to the start of the IEP meeting. [REDACTED] further testified that she did not believe the Adapted Instruction program would meet the Student's needs but that the SCII program could with an appropriately modified curriculum. She commented that it would be best if there were no students with an eligibility of emotional disturbance in the class and the administrators confirmed during testimony that there are none in the SCII program. [REDACTED] also confirmed that it was her opinion that the student would require a one to one aide regardless of the program placement. [REDACTED] further testified that her opinions were based upon 7.5 hours of interaction with the student in her office over 3 visits and input from the Mother. She acknowledged that she did not observe the Student with any of her peers at school, nor consult with school staff as to their experiences with the Student. [REDACTED] described her assessment of the Student as likely having an anxiety disorder that manifests itself through selective mutism, a cyst on the Student's pineal gland that is sometimes associated with cognitive delays and issues with visual spatial skills. She also testified the pineal gland is normally associated with regulating day and night sequences. [REDACTED] recommends that the Student be transitioned to school slowly, maybe half days to begin with and then increasing as she transitions. The emphasis should be placed on reducing anxiety and this would be a short term goal with long term goals focusing on the language impairment while avoiding academic stressors until the student is better acclimated. [REDACTED] acknowledged in her testimony that normally a complete diagnosis would include an assessment of the Student's IQ functioning, achievement and executive functioning, verbal and spatial skills, but she was unable to complete these tests due to the limited time she saw the student. She also testified that she did believe the Student presented as a child with [REDACTED]. I found the testimony of [REDACTED] to be sincere and credible.

During testimony of the District's Neuropsychologist, [REDACTED] who I also found to be sincere and credible, concerns regarding the completeness of the testing performed by [REDACTED] were raised under cross-examination by the District. [REDACTED] testified that there were substantial differences in the psychological report completed by the previous District as reflected in SD A005-A008. [REDACTED] indicated that the previous psychological report measured more areas than the IEE and reflected the Student's social interaction with peers. [REDACTED] also testified that [REDACTED] indicated during the IEP meeting on 10/22/09 that she would have liked to complete more testing but insurance limitations prevented that. [REDACTED] also questioned whether or not [REDACTED] should have used a test for Asbergers because this test is normally given to children who display with average to above average abilities and there is no indication in any of the Student's records that this would be appropriate. Additionally, [REDACTED] testified that children who display with Asbergers Syndrome do not typically have the language impairment identified in the Student's records and in the IEE. Further, and most significant in terms of the disagreement between the two psychologists, was the testimony of [REDACTED] that indicated that she was familiar with the requirements for diagnosis of selective mutism and anxiety disorder. She testified that part of those requirements included that the

evaluator needs to know the child's performance in school in order to diagnose, or at least two or three different environments (e.g., home and school). [REDACTED] also testified that disabilities like selective mutism are typically diagnosed around the age of 5. Further, she testified that the pineal region of the brain is not typically related to academic functioning. Additionally, an MRI scan (PD N095) dated 8/5/09 the impression noted reads: "Mild left maxillary sinus mucosal disease. Otherwise, unremarkable MRI of the brain." During the Mother's testimony, the District asked if the child was currently under the care of a neurosurgeon or neurologist and the Mother indicated she was not.

Since there is no evidence to substantiate that the IEP developed by the previous District on 5/22/09 and agreed to by the Parents at the time it was designed was in fact, either now or then, incomplete or inappropriate, and since the District through all of the aforementioned documents and credible testimony of administrators and the District's psychologist, as cited herein, it is the conclusion of the hearing officer that the District has clearly demonstrated that they have complied with the procedural requirements of the IDEA and met the two prongs of Rowley. As a result, it is the decision of the hearing officer that relative to issues A. 1 and 2, the Parents failed to meet their Burden of Proof and the finding is in favor of the District with regards to these two issues.

B. Services:

1. Did the District fail to provide a Free Appropriate Public Education during the ESY of 2009 by prohibiting staff members from implementing the Student's IEP services for speech and language and occupational therapy, by observing the Student during the delivery of the aforementioned services;
2. Did a Coop staff member improperly restrict the Student from access to the Student's Mother after the Student returned from the washroom thereby creating a confusing learning environment for the Student and potentially interfering with the Student's right to receive FAPE?

Credible testimony was provided by ESY Principal [REDACTED] and Substitute ESY Principal [REDACTED] as well as credible testimony from [REDACTED] and [REDACTED] and therapists [REDACTED] and [REDACTED] regarding the programs and services provided by the District to the Student during ESY of 2009 that all address the issue of B(1) listed above. Principals [REDACTED] and [REDACTED] both testified that it is common practice for supervisors to peer into observation rooms and classrooms, as well as, physically visit same as part of their effort to insure that students are receiving the professional services required. Indeed, this hearing officer served 30 years as a public school administrator in the State of Illinois and confirms these observation practices as a legitimate professional practice and part of effective leadership and supervision. Beyond that, therapist [REDACTED] testified it was not uncommon for an administrator to visit her room during therapy or otherwise observe her and the Student. Additionally, when questioned by the Parents whether or not the Student seemed frustrated by visitors to the session, therapist [REDACTED] responded "No." Also, when questioned by both the Parents and the District regarding the student's IEP goals for speech and language, therapist [REDACTED] testified she was focusing on the goals as written in the 5/22/09 IEP until she was instructed to do otherwise. When questioned further, [REDACTED] testified that she was instructed by [REDACTED] to stop working on verbs because the Student's Mother had indicated to the administrators that she did not want that included in the Student's

speech and language therapy even though it was reflected as part of the goals in the 5/22/09 IEP. She testified that she complied with the directive from [REDACTED] as she understood that the Parents wanted her to do so. There was no evidence or testimony presented to the contrary and this testimony was further corroborated by Director of Student Services [REDACTED]

With regard to a staff member of the [REDACTED] preventing the Student from accessing her Mother when returning from the restroom during ESY of 2009 two specific witnesses were examined, the secretary of the [REDACTED] and the Nurse, [REDACTED]. According to the Parent's documents, Nurse [REDACTED] was the [REDACTED] employee alleged to have in some way interfered with the Student's access to her Mother. Neither witness testified to having seen anyone bothering, inappropriately "redirecting" or otherwise interfering with the Student while she returned from the restroom. Both witnesses presented testimony that appeared credible and both described the area where the alleged interference took place as quite small. Other than the Mother's allegations, there was simply no evidence provided to substantiate the allegation contained in Issue B(2). Therefore, in regards to Issue B(2), the finding by the hearing officer is that the Parents failed to meet their Burden of Proof with regards to Issue B(2) and therefore the finding is in favor of the District in that there is no evidence that any employee "inappropriately" interfered or otherwise "redirected" the Student.

C.Evaluation: Was the District obligated to provide the Student with an Independent Educational Evaluation (IEE) and does the District now have an obligation to reimburse the Parents for the cost of an IEE that is either now completed or about to be completed?

The Statutes related to this issue are clear. 23 IL Admin Code Part 226.180 reads:

"Parents have the right to obtain an independent educational evaluation of their child at public expense in accordance with 34 CFR 300.502 and Section 14-8.02(b) of the ILCS. The following rights and requirements also apply:

- a) If the parents disagree with the district's evaluation and wish to obtain an independent educational evaluation at public expense, their request to that effect shall be submitted in writing to the local school district superintendent."*

The [REDACTED] has not had the opportunity to complete an evaluation of the Student that the Parent could disagree with and thereby request in writing an IEE. The Parents did not submit any documentation that they either disagreed with the evaluation completed by the previous school district or that they had requested in writing to the superintendent of [REDACTED] that they were asking for an IEE completed at public expense. The only documented request that the Parents made of the District #159 was that the District pay for the time of [REDACTED] to attend the 10/22/09 IEP meeting and that was agreed to by the District. As a result, neither documents nor testimony were provided by the Parents to substantiate the allegations made by the Parents relative to this issue. The record reflects the Student is due to have a three year re-evaluation completed by January 17, 2010. As a result, it is the determination of this hearing officer that the Parents did not meet their Burden of Proof in regards to Issue C. Therefore, the finding related to Issue C is against the Parents and in favor of the District.

While it is evident from the Parents preparation for the hearing, the legal research completed and the time required to present the Parent's case, the Parents care deeply about the Student's education and development. It is acknowledged that real "tensions" exist between the Parents and the District that likely have as their roots the incidents surrounding the ISBE complaint filed back in 2006. Both parties will need to make a concerted effort to work past these "tensions" if the best interest of the Student in this hearing is to be effectively achieved. However, the facts in this case, as illustrated by the documents submitted by both parties, and the credible testimony of District administrators and staff clearly indicate the District's sincere and significant efforts to comply with the IDEA's expectations for FAPE in the Least Restrictive Environment. It is clear to this hearing officer that the aforementioned documents and testimony establish that the Parents failed to meet their Burden of Proof for all five issues identified and detailed in the hearing decision for this DPCN. Therefore, as previously indicated individually, the final ruling in this decision is against the Parents on all five issues and in favor of the District. Specifically, the hearing officer finds that the procedures followed by the District related to registration, ESY, supervision of ESY, adoption of the previous school district's IEP, and the District's efforts to develop a new IEP for the Student in collaboration with the Parents meets the laws of the State of Illinois, the procedures of the ISBE, and the procedural requirements of the IDEA and the both prongs of Rowley.

ORDER:

1. While the District's original recommendation of placement of the STEP program appears to be an appropriate placement for the student, the program identified as the SCII program (Self Contained Individualized Instruction) was also deemed appropriate by the District and agreed to as likely being appropriate by the independent evaluator, [REDACTED]. Since that agreement in principle exists between the District and the Parent's chosen evaluator, the hearing officer finds that the SCII placement is likely the most appropriate for the Student's transition back into the public schools. Therefore, if and when the Parents re-enroll the Student in the District, it is recommended that the District place the Student in the SCII program conducted by the [REDACTED] and to provide transportation to the Student as agreed to by the Parents. The District continues to be obligated to structure the initial program for the Student in the SCII program consistent with the IEP dated 5/22/09 (including the provision of one FTE paraprofessional assigned to the Student). It is also recommended that the program be designed such that anxiety reduction and transition to the public school are the focus of the program in order to enable the Student to adjust to the new program and surroundings.
2. If and when the Parents re-enroll the Student in the District with the intent of participating in special education services and programs as described herein, and consistent with the District's own acknowledgement of the need for a three year re-evaluation of the Student, the District will be obligated to complete a full case study re-evaluation of the Student.

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(s) and to the Illinois State Board of Education. After a decision is issued, a hearing officer may not make substantive changes to the decision. 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.

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon 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 5/14-8.02(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.



D. MICHAEL RISEN
HEARING OFFICER

ENTERED: January 20, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Decision and Order** was sent via first class USPS, certified mail, return receipt and electronic mail, return receipt, and directed to:

[REDACTED]

and

[REDACTED]

[REDACTED]

Mr. Andy Eulass
Illinois State Board of Education
100 N. First Street
Springfield, IL 62777-0001

before 5:00 PM. on January 20, 2009

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