

Case Number: 2010-0171  
[REDACTED] vs. City of Chicago SD 299  
Hearing Officer: Stacey Stutzman

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

IAN 19 2010  
Special Education Services

## Impartial Due Process Hearing Decision Cover Page

Instructions: Complete this form and return it along with the decision. The information collected on this form will be used for the purpose of indexing the decision by subject matter as required by 23 Illinois Administrative Code 226-695

District Name [REDACTED] Phone: [REDACTED]  
Superintendent [REDACTED]  
Address [REDACTED]  
Represented by [REDACTED]  
Parent Name [REDACTED]  
Address [REDACTED]  
Represented by Michael O'Connor

### Date and Timelines

Date of Written Request: 11/10/2009  
Date of Pre-hearing Conf: 12/21/2009

Date of Hearing: 01/04/2010 to 1/5/2010  
Date of Decision: 01/14/2010

### Summary of Decision

Student is a 15 year old male of at least low average intelligence enrolled at District charter school since Fall 2008, who has had IEPs intermittently since age 3 due to PDD and processing deficits. Most recently, he was given a 504 plan 11/30/07 in 8<sup>th</sup> grade at public school. Parent enrolled him in charter school for high school due to size of high school and Student's socialization difficulties. Student had difficulties from the outset of high school and Parent requested reevaluation for special ed services, which was not completed until December, 2009, and which resulted in eligibility due to ED and a placement recommendation of therapeutic day school. Student did not attend school except for a few days from January, 2009 to the present. He had 4 psychiatric hospitalizations during that time. No homebound services have been provided by the District. At the IEP meeting, no IEP was written. District did not offer any therapeutic placements at the IEP meeting nor at the due process hearing.

Parent requested Orders that Student be placed at [REDACTED] at District expense, that an IEP and transition plan appropriate to Student's needs be developed by the Acacia staff, that he be provided with social work and psychological counseling services, and that District provide or pay for compensatory services in the form of counseling and tutoring due to failure to identify and provide FAPE for Student resulting in the loss of one full year of education to Student.

HELD: For Parent on all issues relating to deprivation of FAPE.

ORDERED: Placement at Acacia Academy at public expense, including transportation and all related services to meet Student's needs per IEP and transition plan to be developed by Acacia staff and Parent. Additional instruction and services are to be included in the IEP to address Student's regressed grade level academic performance to and allow him to acquire the high school credits he did not acquire due to lack of education received since January 1, 2009 in compensation for denial of FAPE

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

[REDACTED]

Student )

and )

[REDACTED]

District )

Case no. 2010-0171  
Stacey L. Stutzman  
Impartial Hearing Officer

**DECISION AND ORDER**

This matter is before the undersigned impartial hearing officer for a due process hearing concerning Parent's request for Orders that Student be placed at [REDACTED] at District expense, that an IEP appropriate to Student's needs be developed by the [REDACTED] staff, that he be provided with social work and psychological counseling services, and that District provide or pay for compensatory services in the form of counseling and tutoring due to failure to identify and provide FAPE for Student resulting in the loss of one full year of education to Student. The hearing officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-.02a(g)(2008). The parties have been informed of their hearing rights under 23 ILAC 226.625 and 34 CFR 300.512. The undersigned Hearing Officer has also advised the parties that there are and have been no conflicts which have prevented her from conducting a fair and impartial hearing and rendering a fair and impartial decision in this cause.

**Procedural History**

Parent's attorney submitted Parent's request for due process hearing to District's Superintendent via facsimile and U.S. mail on November 10, 2009 alleging District's failure to provide Student with FAPE from November 10, 2007 through the present time for multiple reasons. District submitted a written response to the hearing request to Parent's counsel on November 19, 2009 and provided a copy to the Hearing Officer at her request on December 21, 2009 at the time of the Pre-Hearing Conference. In its brief Response to the rather extensive and detailed hearing request, District stated that evaluation was scheduled for December 8, 2009, that it had appropriately responded to and addressed Student's needs and provided FAPE, and that IEEs were not available for the reason that Student had not been evaluated by the District.

The hearing officer initially assigned was unavailable to hear the case, and it was assigned to the undersigned Hearing Officer on December 8, 2009 via the Special Education Database System of the Illinois State Board of Education. Upon receipt of the assignment, Hearing Officer contacted the attorneys for both parties regarding the Pre-Hearing Conference that was scheduled, according to the Illinois State Board of Education Special Education Database System, for Saturday December 12, 2009. Hearing Officer offered to conduct the Pre-Hearing Conference as scheduled. However, Parent's attorney requested that it be rescheduled to December 21, 2009, and District counsel agreed, because of an IEP meeting/resolution session scheduled for December 15, 2009, and the request was granted. The Pre-Hearing Conference proceeded as scheduled on December 21, 2009 by telephone. The Pre-Hearing Conference Report dated December 21, 2009 is attached to the transcript and incorporated into the record in this matter as Hearing Officer Exhibit A.

The hearing in this matter proceeded as scheduled on January 4 and January 5, 2010, the dates to which both parties agreed in a telephone conference held on December 16, 2009 and

which dates were confirmed at the Pre-Hearing Conference. This Decision is being issued within 10 days of completion of the hearing but not within 45 days of the initiation of the 45 day timeline due to the delay in assignment of the case to this hearing officer and the continuance of the Pre-Hearing Conference as noted above.

In attendance at the hearing on January 4 and 5, 2010 were Parent, Parent's attorney, [REDACTED], and District's attorney, [REDACTED]. The hearing was reported by [REDACTED] certified court reporter, of [REDACTED]. All of the following witnesses<sup>1</sup> were common to both parties' final witness lists and testified on behalf of both parties: [REDACTED], Director of the Charter School of Student's current enrollment (hereinafter "Charter"); [REDACTED], Case Manager, team leader, special education teacher of Charter; [REDACTED], Social Worker of Charter; [REDACTED], Director of Specialized Services for Charter's educational management organization; [REDACTED], Chemistry Teacher of Charter; [REDACTED], School Nurse of Charter; [REDACTED], Special Education Teacher of Charter; [REDACTED], Writing Teacher of Charter; [REDACTED], private Therapist; B.K., District Citywide Lead Teacher; [REDACTED], District School Psychologist; [REDACTED], District Senior Specialist Home and Hospital Instruction Unit; [REDACTED], Principal of private Therapeutic Day School; and **Parent**.

Parent's attorney submitted 304 pages of documents in his disclosure packet of December 28, 2009, and additional pages numbered 305 through 341 were admitted during the hearing. District counsel submitted 74 pages of documents in his disclosure packet of December 28, 2009 and additional pages numbered 75 through 87 were admitted during the hearing. Hereinafter Parent documents are referred to with a "P" preceding the page number and District documents with a "D" preceding the page number. Pursuant to Hearing Officer's request at Pre-Hearing Conference in this matter that parties include copies of legal precedent they wished considered in their disclosure packets. Parent's attorney provided copies of the following case law in his disclosure packet: *Nein v. Clark County School Corp.*, 95 F.Supp.2d 961 (S.D. Ind. 2000); *K.T. v. Elmhurst Comm. School Dist.*, 205, 36 IDELR 153 (N.D. Ill. 2002); *Knable v. Bexley City School Dist.*, 238 F.3d 755(6<sup>th</sup> Cir. 2001); and *Independent School Dist. 701 v. J.T.*, 45 IDELR 92 (Dist. Minn. 2006). He also included a copy of *Letter to Fisher*, 23 IDELR 565 (1995) and a copy of the hearing officer decision in ISBE Case # 2009-0113. District's attorney provided copies of *Marc V. v. North East Indep. School Dist.*, 455 F.Supp. 577(W.D. Tex. 2006) and *R.H. v. Plano Indep. School Dist.*, 2008 WL 906289(E.D. Tex. 2008) to Hearing Officer and Parent's counsel at the time of his closing argument.

The following documents were used by the parties' attorneys at hearing: P1-9, 133-135, 149-150, 155-232, 257-58, 269-271, 286-87, 301-341; and D1-2, 4-6, 9-19, 75-87.

### **Issues Presented**

Whether District violated Student's right to a free appropriate public education from November 10, 2007 to present as follows:

1. Failure to conduct timely and adequate assessments of all areas of potential disabilities, with the result that the student's educational program did not address, or addressed inadequately emotional/behavioral difficulties;
2. Failure to conduct a full individual evaluation and make an eligibility determination on a timely basis in violation of specific "child find" provisions, given knowledge of the student's attendance problems and his severe emotional disturbances and hospitalizations;
3. Failure to provide essential related services in the areas of psychological and social work services with sufficient intensity and duration;
4. Failure to develop a timely and adequate functional behavior analysis and behavior intervention plan for student;

<sup>1</sup> Witness [REDACTED] was not on the parties' lists but testified in lieu of witness [REDACTED], who was unavailable, by agreement of the parties.

5. Failure to provide homebound services as requested by the student's physician;
6. Failure to prepare and implement an adequate transition plan which identifies student needs for success after graduation and offers adequate supports to address those needs; and
7. Failure to offer a placement with sufficient structure and support to manage the student's emotional disturbances.

### **Findings of Fact**

The material facts introduced at hearing that are relevant to the aforesaid issues are as follows: Student is a 15 year old male of at least average intelligence who will turn age 16 on January 31, 2010. He was most recently found eligible for special education at an IEP meeting held on December 15, 2009 due to an emotional disability. He was initially determined eligible for special education and related services due to pervasive developmental disorder in 1997 at age 3. District terminated his eligibility in 2000 because he was found to have low to average IQ and commensurate achievement scores. In September 2002, he was again determined eligible due to processing deficits. In November of 2005, based on an evaluation by a District psychologist, he was found to have average intelligence and achievement scores again, and he was again terminated from special education eligibility on February 6, 2006, in spite of his social deficits, for which the school social worker recommended that parent secure private therapy at her own expense. Student was given a Section 504 plan in 2006 to help remediate impairments in social skills development and other issues associated with a diagnosis of autism. He attended District public schools through grade 8. (Parent; [REDACTED]: P8; D79-82; P159)

A Section 504 Plan was prepared for Student, then in Grade 8, on November 30, 2007, which Parent was told to take to the neighborhood high school after Student's 8<sup>th</sup> Grade graduation. She advised the 504 team that she was concerned about a drop in Student's grades and also about Student transitioning to high school. Student has always had social problems, for which Parent has sought and received assistance for Student from a community mental health facility since 2005. Student relied on his maternal Grandmother to help him handle his anxiety. 8<sup>th</sup> Grade was hard for Student, who complained that school was horrible for him, and he hated to go, preferring to be by himself. His 504 Plan made reference to a "D" in reading and failure to complete his assignments though having "the ability and skills to earn average grades". His final grades for the 2007-08 school year ranged from A to F. His 504 Plan included notation of his "obsessive compulsive disorder, Asperger's Disease (sic), and ADHD." It noted his then current medications as "Focalin, Zoloft, and Risperdal." The plan was for Student to take his medications and discuss why he wasn't doing his work and to set goals for himself. (Parent; P7-9, 258)

Rather than enroll Student in his neighborhood public high school, because of its large size and her fear that it would be too confusing and stressful for Student due to his disabilities, Parent enrolled him instead at Charter, a charter school in the District, with a population of 600 students, which is attended by Student's older brother. She gave the 11/30/07 504 Plan to Charter when she registered Student. It called for direct psychological services in the amount of 15 minutes per month and consultation with teachers monthly. It called for the school nurse to provide consultation to facilitate communication between home, school, and health provider regarding medication management on a monthly basis. Parent was told that if issues arose with the 504 Plan, Student would be reevaluated for special education. (Parent; P7-9)

In the Fall semester of the 2008-09 school year, which began in August, 2008, Student had anxiety about attending school. He stayed up and walked the floors at night worrying about attending school. Student rode the bus to and from school with his older brother. Student's brother became embarrassed by Student's behavior and Student felt that he was a burden on his brother. (Parent)

From the beginning of his freshman year, Student had behavior problems. He was often defiant of teachers and had difficulty socializing with other students. He had mild to moderate altercations with staff and students. His teachers logged issues beginning August 26, 2008, which included inattention, talking and playing in class, hitting another student with a pencil, disrupting the class, lack of preparedness, sleeping in class, which Parent attributed to his inability to sleep at night, failure to participate, and a grade of D+. His first quarter grades included a D+ in writing and a D+ in social science. His second quarter grades included a D- in writing and a C- in social studies. (D2, 79) As early as August 2008, Parent discussed the need for a re-evaluation and Student's past IEPs with the school personnel, including the school psychologist, social worker, and case manager.<sup>2</sup> The school psychologist advised Parent that she would work on it and get back to her. The psychologist was going to set up a meeting to discuss reevaluation due to the issues Student was having. (Parent)

On January 1, 2009, Student's Grandmother passed away. Student's behavior began to deteriorate, and Parent was concerned that the death might have been a trigger of Student's deteriorating behavior, although Student did not appear to mourn or grieve her death. Student refused to attend school altogether beginning in January 2009. He did not feel that he fit in and complained that no one understood how he felt. He is over 5 feet 6 inches tall and weighs 250 pounds. Parent is female, 5 feet 6 inches tall, and of slight build. School personnel were advised of Student's refusal to attend, and a meeting was to be scheduled. Parent spoke by phone frequently with the school social worker, in January and February, 2009, and she asked the school social worker for a reevaluation, which the social worker was trying to set up. The social worker told the Director of Student Services for Charter, her boss, that Student was not coming to school and that he needed to be evaluated. The social worker was told that there was nothing the school could do if the Student was not coming to school. (Parent; D.Z.; D1, 79; P155-56)

Student had psychiatric hospital admissions for 2 weeks in March/April, 2009, 4 weeks in May, 2009, 2 weeks in June, 2009, and 2 weeks in October, 2009. (Parent; P339) He attempted to complete a summer school program in order to obtain enough credits to become a sophomore but was not able to finish it. (Parent) Charter has not provided any homebound educational services to Student, even though Student was not coming to school beginning in January 2009 and was aware of Student's psychiatric day and inpatient hospitalizations. (D1; P222-232) The young staff at Charter did not know what homebound services were. Charter personnel first attempted to initiate homebound services in the Fall of 2009 when the newly hired school nurse advised of the need for a physician's statement. Charter secured the physician's statement but could not find a teacher to provide the services. (D1) When Charter sought District's assistance in providing homebound services to Student, District advised Charter that it has a policy of not providing homebound services to charter

<sup>2</sup> The school psychologist and case manager referred to here from 2008-09 school year did not return to the school in the 2009-10 school year and did not testify at hearing. The social worker, is still on staff for Charter and did testify at hearing.

and for social worker to check in on him in his classrooms periodically. If he is discovered missing, security, the police, and Parent are to be notified. If he walks out of class and is gone for 10 minutes, the case manager is to be notified, or, should the case manager be unavailable, the principal or assistant principal. On November 19, 2009, Student left the gym class at 10:00 a.m. and ran away again and was gone the whole day, and the police had to be contacted. (Parent; [REDACTED]; D1, 15)

Student has only 4 1/2 credits from the 2008-09 school year. The case manager from the non-profit mental health center did take his homework to him while he was hospitalized in the Spring and he did attend class at the hospital's day program at some point when he was being treated privately in Spring 2009. (Parent) He should have 6 credits in order to be a sophomore. Had he been given homebound instruction, he would have received credit. An absence of more than 10 days results in a grade of "F". Student now has a "D" average. [REDACTED]

The school psychologist asked Parent to bring Student to another school for a psychological assessment, which she conducted on December 10, 2009. According to her testing, Student has a low average I.Q. His rate of academic growth has regressed since evaluation in 2005, as testing shows him achieving only at a grade equivalent of 7.9 and 7.6 and an age equivalent of 13 in math and writing. His reading comprehension is above grade and age level. He has adaptive skills falling in the 1% or lower range. He has identified deficits in abstract math concepts, writing, auditory processing, short-term working memory skills, verbal fluid reasoning skills, socialization skills, social relationships, emotional discord, depressive mood, and coping skills She concluded that *Student's emotional issues and inability to cope within a regular school setting and with social relationship are affecting Student's academic performance. Those issues, she determined, are compounded by the effects of having Asperger-like tendencies which appears to be crippling his ability to connect with peers in a healthy, non-threatening manner.* ([REDACTED]; D79-87)

A Social Assessment Report dated 12/15/09 indicates a date of referral of 10/31/09 and purports to be based upon an interview of Parent on 10/13/09 and observation of Student on 10/29/09. ([REDACTED]; P155-57) Upon the advice of the people at the community mental health facility that she needed to get help after the October 30 meeting, Parent retained an attorney and requested a due process hearing on November 10, 2009. (Parent; DPHR) Thereafter, the school nurse interviewed Parent on 11/12/09 and reviewed Student's psychiatric hospitalization records, noting in her report diagnoses of Intermittent Explosive Disorder, ADHD, and Asperger's Syndrome. ([REDACTED]; P339-41)

An IEP meeting was noticed on November 23, 2009 for the stated purposes of eligibility determination, development of IEP and determination of educational placement, and consideration of the need for transition services. (P2) That meeting was convened on the morning of December 15, 2009 as noticed.(P2) The IEP team reached consensus that Student is eligible for special education and related services due to a primary disability of emotional disturbance. The team discussed the intensity and location of services, and the Charter teachers did not feel that it had the resources to meet Student's needs, which led to consensus that a therapeutic day school is the appropriate placement for Student. District policy requires that a representative from its Special Services Department be present to determine a therapeutic placement. (Stipulation of Attorneys for Parties) The IEP cover page states that the IEP is to be effective from 12/15/09 through 12/15/10 and indicates consensus of the IEP team to the IEP

recommendations.(P1)<sup>3</sup> The Charter has a self-contained special education program, but it is designed to serve students who function below Student's cognitive level, and it still requires movement from class to class. Charter cannot meet Student's needs because it cannot prevent him from leaving the building or provide the intensity of services needed to meet his social emotional needs. [REDACTED]

[REDACTED] is the District representative assigned to work with Charter. She received notice of the meeting by phone call and email but she did not attend the meeting. [REDACTED]

[REDACTED] In spite of the IEP team's consensus as to the need for placement in a therapeutic day school, District did not offer any therapeutic placements, public or private, for consideration at the December 15, 2009 meeting, and Charter was waiting for District to offer an alternative placement for Student. As of the date of the hearing, no placement alternatives have been presented to Parent by the District. No additional meetings have been scheduled. [REDACTED]; Parent) District operates one public therapeutic day school for high school students. [REDACTED]

Student is bright and requires an academic program for average to above average achieving students. He displays the least anxiety when working directly with the instructor or in a very small group of students. He displays anxiety and expresses the desire to or attempts to escape the classroom when in large groups of students. His Asperger's hinders his tolerance for any type of social setting for any length of time. His classes at Charter have included 25 to 30 students. [REDACTED]

At the December 15, 2009 IEP meeting, Parent and her counsel requested placement at [REDACTED] a private therapeutic day school outside of the District. (Parent: [REDACTED]) It's mission is to individualize and personalize the educational program to help students feel comfortable, to enjoy learning, and to receive the highest level of education according to academic ability. [REDACTED] has 55 high school students, 3 to 4 students per class, with a maximum of 10 students with a teacher and assistant. On staff are a social worker, a psychologist, 3 occupational therapists, speech/language therapist and a behavior specialist. It offers an academic curriculum to meet the cognitive needs of average to above average students. It is approved for placement of special education students by the Illinois State Board of Education, general and intensive, and can accept students with learning disabilities, emotional disabilities, and autism. Parent and Student have visited the campus. [REDACTED] is prepared to begin educating Student with one day's notice of his impending attendance. It has experience with students with school phobia. A plan can be made to transport Student to the school and get him into the building. It has served children who refused to attend school and has gone to a student's home in the past when the student refused to attend school. [REDACTED]

### Conclusions of Law

At a due process hearing convened pursuant to the provisions of the Illinois School Code, it is incumbent upon the District to present evidence that it has provided or has offered to provide the student in question with a free appropriate public education in the least restrictive environment, in accordance with the stated issues in the case. *ILCS 5/14-8.02a(g-55)(2008)* The burden of persuasion, however, falls upon the party seeking relief, in this case, Parent. *Schaffer v. Weast*, 546 U.S. 49(2005)

An appropriate education, or FAPE, as it is commonly designated, is an education that is reasonably calculated to provide the student with meaningful educational benefit.

<sup>3</sup> No part of an IEP was presented by either party at hearing other than the Notice of the meeting and the first page of an IEP, P1 and P2.

as based on an individual education plan, or IEP, developed by an IEP team, including the student's parents. *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176 (1982) The school district is required to follow procedures that are designed to allow the parents to participate in the development of the IEP. The applicable procedures are set forth in 34 CFR 300.300-.328(2006) and 23 ILAC 226.110-.350(2007). Procedural violations alone cannot be deemed a denial of FAPE unless the evidence proves that the violations impeded the student's right to FAPE, the parents' right to participate in the decision making process, or caused student to be deprived of an educational benefit. Otherwise, a hearing officer's determination of whether FAPE was received must be based on substantive grounds. 20 U.S.C. 1415(f)(3)(E)(2007); 34 CFR 300.513(a)(2006)

An IEP must be evaluated as written in order to determine whether it offered FAPE at the time written. *Knable v. Bexley City School Dist.*, 238 F.3d 755 (6<sup>th</sup> Cir. 2001) An analysis of whether an IEP is reasonably calculated to provide educational benefits under Rowley's substantive standard must necessarily include an examination of the particular student's intellectual potential and disability and the academic progress the child has made. Where the student displays considerable intellectual potential, the IDEA requires a great deal more than a negligible benefit. *K.T. v. Elmhurst Comm. School Dist.* 205, 36 IDELR 153(N.D.Ill. 2002). The educational benefit provided to the child 'must be gauged in relation to the child's potential'. *Nein v. Clark Co. School Corp.*, 95 F.Supp.2d 961(S.D.Ind. 2000)

For purposes of the IDEA and the Illinois School Code, when a school's charter is issued by a local board of education, as is Charter in this case, it shall be considered a school within the District. 23 ILAC 226.60(a)(2007)

Special education due process hearing officers are empowered to grant the relief they deem appropriate in issuing Orders upon due process hearings. 20 U.S.C. 1415(i)(2)(C)(iii) Appropriate relief includes compensatory education as an equitable remedy to be granted upon finding that a child has been denied FAPE under the IDEA. *Diatta v. District of Columbia*, 41 IDELR 124 (D.D.C. 2004) An award of compensatory education may include prospective educational services to compensate for a past deficient program. *Reid v. District of Columbia*, 40 IDELR 255 (D.C. Cir. 2004)

Based on the material facts that are relevant to the issues in this cause and the statutory/regulatory and case law, as cited above and in the following sections, which is applicable to those facts, the undersigned Hearing Officer concludes that District has violated Student's right to a free appropriate public education under both the procedural and the substantive prongs of the *Rowley* analysis. Because of Illinois 2 year statute of limitations on claims made under the IDEA, Parent's attorney has limited his request for relief to violations that have occurred subsequent to November 10, 2007, when Student was in Grade 8 in public school.

Parent's counsel has correctly asserted District's failure to comply with Illinois' child find regulations. Student's diagnoses, his prior IEPs, his 504 plan confirmation of academic and social/emotional deficits and Parent's stated concerns over his grades and his upcoming need to transition to high school in November, 2007 were more than sufficient to trigger evaluation for special education services at that time. It is also significant that District did not begin the process to evaluate Student until October 2, 2009 in spite of Charter staff's attempts at referral as early as January of 2009 and Parent's request for evaluation and Charter's indication that it would begin the referral process in the Fall of 2008 when Student was experiencing social/emotional and academic distress. And even then, District continued to delay the psychological evaluation of Student until December 10, 2009, which evaluation confirmed that Student

is and has been in need of special education programming and placement as urged by his Parent, his private therapists, and Charter staff for over a year. It is because of the delay in evaluation until November and December of 2009 that Student has lost significant educational opportunity over the past year. The IEP as presented at hearing does not provide Student with FAPE, and there is no evidence that District has or will provide FAPE to this Student even though he has been and continues to be in urgent need of same at this time.

As to the issues specified by Parent's counsel and as delineated in the Pre Hearing Conference Report, it is concluded as follows:

**Issue 1:** Whether District violated Student's right to a free appropriate public education by failing to conduct timely and adequate assessments of all areas of potential disabilities, with the result that the student's educational program did not address, or addressed inadequately emotional/behavioral difficulties?

Illinois law provides that a Parent or school employee may request an evaluation to determine whether a student is eligible for special education and related services. The procedures require the District to process the request and determine whether it is to be honored within 14 school days of receipt and to notify the Parent in writing if it is not going to conduct the evaluation. If it is going to evaluate, it must convene a domain meeting with a team that is to include parent and obtain parent's informed written consent to conduct the evaluations called for. It then has 60 school days from the date parent consents in writing to complete the identified assessments and hold an IEP eligibility meeting. *105 ILCS 5/14-8.02(b)(2008); 23 ILAC 226.110(2007)*

First, as set forth in the discussion above and under *Issue 2* below, it is the opinion of this hearing officer that Illinois' Child Find law is applicable to this matter and that Student should have been appropriately evaluated thereunder as early as November, 2007.

This case presents the unusual set of circumstances where a student is determined eligible for special ed programming at age 3 and then subsequently has his eligibility terminated twice on the grounds that his grades are commensurate with his cognitive ability regardless of his identified difficulties in dealing with the school environment and interacting with others. And the preponderance of the evidence here supports Parent's contention that District failed to conduct timely and adequate assessments of all areas of potential disabilities, with the result that Student's educational program did not address, or address inadequately, his emotional and behavioral difficulties.

Parent's testimony is unrefuted that she took Student's 504 plan to Charter and that she began seeking an evaluation of Student to receive special education from the outset of the 2008 school year. The former case worker and psychologist told her that they were trying to get a meeting set up for purposes of getting the evaluation done. The current social worker also testified that she was trying to get an evaluation set up when Student was not coming to school and had to be hospitalized in 2009. Staff led Parent to believe that an evaluation would be done. It did not issue a denial of her request or of the requests of the social worker.

A domain sheet was not completed and Parent was not offered a consent for evaluation form for her signature until it was faxed to her on October 2, 2009. The evaluation was not begun until after Parent hired a lawyer and requested a due process hearing on November 10, 2009. Even then, District did not use any of the psychiatric hospital evaluations to determine eligibility, and rather continued to delay its own

psychological evaluation, which was not performed until December 10, 2009 and which supported Parent's contention that Student has serious deficits, some "crippling" in the words of the school psychologist which require special education placement and services. As a result of the District's failure to respond to the requests of Parent and the Charter and District staff seeking to arrange an evaluation, Student has received no meaningful psychological or social work services, which their own personnel acknowledge are needed to enable Student's education, and no behavioral intervention to address his severe needs from District whatsoever since enrollment in high school, nor has he been placed in a setting that would allow him to feel safe while accommodating his social anxiety issues in order to receive an education.

Student's difficulty in dealing with the social aspects of a typical classroom, functioning in the educational setting while being medicated with various psychotropic pharmaceuticals, engaging in odd behaviors attributable to his OCD and Asperger's syndrome have been ever present. However, rather than reassess Student's needs at any time until December 2009, District put the responsibility upon Parent and private providers outside of the school setting. Parent's attorney correctly described the Student's situation as "Kafkaesque" and "Catch 22" in his closing argument in addressing the District's refusal to evaluate the student's need for special education and a more restrictive setting until the Student's Mother could physically deliver the 250 pound boy to Charter's doorstep and bring him into the building.

**Issue 2:** Whether District violated Student's right to a free appropriate public education by failing to conduct a full individual evaluation and make an eligibility determination on a timely basis in violation of specific "child find" provisions, given knowledge of the student's attendance problems and his severe emotional disturbances and hospitalizations?

District is, and has been during the time period at issue in this cause, legally obligated to actively seek out and identify all children from birth through age 21 within the school district who may be eligible for special education and related services. To this end, it must conduct an ongoing review of each child's performance and progress through its teachers and other professional personnel in order to refer those children who exhibit **problems which interfere with their educational progress and/or their adjustment to the educational setting** (*emphasis added*), suggesting that they may be eligible for special education and related services. When the responsible District staff members conclude that an individual evaluation of a particular child is warranted based on factors such as a child's educational progress, **interaction with others, or other functioning in the school environment** (*emphasis added*), an evaluation shall be conducted pursuant to the procedures established by state and federal regulations. 23 *ILAC 226.100(2007)*, implementing 34 *CFR 300.111(2006)* The aforesaid Child Find responsibility includes children who are suspected of having a disability and in need of special education, even though they are advancing from grade to grade. 34 *CFR 300.111(c)(1)(2006)*

The preponderance of the evidence presented at hearing supports Parent's contention that the District deprived Student of FAPE, not only from the time he began attending high school in the Fall of 2008 but at least as far back as November 30, 2007, when he was struggling in elementary school, having had his special education eligibility taken away from him in 2006 based on average grades and an average I.Q. While Student had his Grandmother, Mother, and the community mental health service providers to attempt to support him during that time, District, knowing of his diagnoses

and difficulties in the educational setting and his below average academic performance due to his failure to complete his work, did nothing other than write a cursory 504 plan and tell Student to set his own goals. Parent, who expressed her legitimate fears regarding Student's ability to transition to the large public high school, was simply told to take the 11/30/07 504 plan to the high school when she registered him. Had the District conducted a full individual evaluation of Student in his 8<sup>th</sup> grade year, an IEP, and behavior and transition plans appropriate to Student's individual needs could have been prepared, and, according to the testimony in this case, might very well have prevented the regression, multiple psychiatric hospitalizations, school phobia, and resulting failure that occurred in high school.

Charter's staff also failed to have Student evaluated for special education services or to provide him with any assistance whatsoever due to high turnover, inexperience, lack of knowledge, and lack of support from District personnel, in spite of the clear signs of distress Student began experiencing from the beginning of his freshman year in 2008 and Parent's plea for help. The testimony of the school social worker, Parent, and the Director of the Charter are most compelling in this regard.

**Issue 3:** Whether District violated Student's right to a free appropriate public education by failing to provide essential related services in the areas of psychological and social work services with sufficient intensity and duration?

District is required, and has been required at all times relevant to the issues in this case, to ensure that related services, including social work and psychological services, as defined in *34 CFR 300.34*, are provided if necessary to assist an eligible child in benefiting from his special education. *23 ILAC 226.310(2007)*

The preponderance of the evidence supports Parent's contention that District failed to provide FAPE to Student by its failure to provide psychological and social work services to Student. There is no evidence that District has provided any meaningful psychological or social work services to Student whatsoever during the time period at issue in this case. As discussed above, Student should have been evaluated as early as November, 2007. The assessments finally conducted by District personnel in this matter, including the social work and psychological assessments, recommend such services for Student. The school social worker concedes that she cannot provide the services in the intensity Student requires.

**Issue 4:** Whether District violated Student's right to a free appropriate public education by failing to develop a timely and adequate functional behavior analysis and behavior intervention plan for student?

A functional behavior assessment is an assessment process for gathering information regarding a target behavior or behaviors, its antecedents and consequences, controlling variables, the student's strengths and the communicative and functional intent of the behavior, for use in developing behavioral interventions. Behavioral intervention is an intervention based on the methods and empirical findings of behavioral science and designed to influence a child's actions or behaviors positively. *23 ILAC 226.75(2007)* A behavior intervention plan is needed for any student who has a disability on the autism spectrum disorder, including Asperger's syndrome, who has behavioral difficulties resulting from autism spectrum disorder, and the plan is to be included in his IEP. The IEP of any student who requires a behavioral intervention plan shall include a summary

of the findings of the functional behavioral assessment and the prior interventions implemented, a description of interventions to be used, identify the changes expected and the methods of evaluation, identify a schedule for a review of the intervention's effectiveness and identify provisions for communicating with parents in regard to and coordination of school-based and home-based interventions. 105 ILCS 5/14-8.02(2008); 23 ILAC 226.230(b)(2007)

The preponderance of the evidence supports Parent's contention that District denied Student FAPE by failing to conduct a timely and adequate functional behavior assessment and to develop and implement a behavior intervention plan. Clearly, Student was in need of a functional assessment of his behavior, regardless of his Asperger's syndrome diagnosis, from the beginning of his freshman year at Charter. Just as he was not evaluated in a timely manner for special education eligibility, in spite of parental and staff desires for evaluation, he was never assessed in regard to his behavior in the classroom in the Fall of 2008, although many incidents were logged by his teachers. Timely evaluation and behavior assessment of Student and development of a behavior plan may have resulted in the support he needed and might have prevented his inability to attend school beginning in January, 2009.

**Issue 5:** Whether District violated Student's right to a free appropriate public education by failing to provide homebound services as requested by the student's physician?

Each local school district must ensure that a continuum of placements is available to meet the needs of children with disabilities for special education and related services, including home instruction and instruction in hospitals when, pursuant to a licensed physician's written statement, he is unable to attend school elsewhere due to a medical condition. 23 ILAC 226.300(2007)

The preponderance of the evidence presented at hearing in this case supports Parent's contention that District denied Student FAPE in both the Spring and Fall 2009 semesters of high school by failure to provide Student with homebound educational services. That denial of FAPE has continued into the Spring Semester of 2010. As A.P. testified, her staff at Charter was young and inexperienced and did not even know what homebound services were in Spring 2009. Even though aware of Student's inability to attend school and his in and outpatient psychiatric treatment in Spring 2009, they did not ask Parent to provide a doctor's statement until Fall of that year, when the new school nurse advised them, after Student had already missed half of his freshman year and was unable to complete summer school. Then after they received the doctor's written statement, they still did not provide the services. District relied on an illegal policy which denied homebound services to Charter's students, and Charter could not find a teacher to provide the services to Student. And, as the Charter's Director testified, had Student been provided with homebound services, he could have received the necessary school credits. District counsel's reliance on the *Marc V. v. North East Independent* case from Texas for the proposition that District wasn't required to "rubber stamp" a physician's request for homebound services is in no way compelling in this matter.

**Issue 6:** Whether District violated Student's right to a free appropriate public education by failing to prepare and implement an adequate transition plan which identifies student needs for success after graduation and offers adequate supports to address those needs?

Under Illinois law, each special education student is to have in place a transition plan setting forth postsecondary goals based upon age-appropriate assessments related to employment, education or training, and independent living no later than age 14 ½. It is to be included in the student's IEP and reviewed and updated at least annually. The District is to provide the necessary transition services toward attaining the individual's goals, including classes and services by outside entities. *23 ILAC 226.30(2007)*

The preponderance of the evidence presented at hearing in this matter supports Parent's contention that Student was denied FAPE by the District's failure to prepare and implement a transition plan for Student. As discussed above, Student should have been evaluated and provided with an IEP as early as his 8<sup>th</sup> grade school year in 2007 and certainly no later than beginning the second semester of his freshman year in high school. He will soon be 16 years old and clearly requires a transition plan developed in accordance with his unique needs, especially considering his low adaptive behavioral skills and his average or possibly above average academic potential. The need for appropriate planning for this particular student is now a matter of urgency due to the failure to program for him in the past.

**Issue 7:** Whether District violated Student's right to a free appropriate public education by failing to offer a placement with sufficient structure and support to manage the student's emotional disturbances?

Each special education student is to be placed in the least restrictive environment in which he can receive a satisfactory education, meaning that to the maximum extent appropriate, the placement shall provide the student with the opportunity to be educated with his nondisabled peers. However, when the nature and severity of the student's disability so requires, he shall be removed from the regular classroom to a more restrictive setting in which his educational needs can be met. *20 U.S.C. 1412(a)(5)(2005); 105 ILCS 5/14-8.02(d)(2008)* To that end, school districts must ensure that a continuum of placement options are available to meet the needs of students with disabilities who require special education placement, including therapeutic day schools. *23 ILAC 226.300(2007)* A school district may place a child in a nonpublic special education facility when an IEP team determines that no less restrictive setting on the continuum of alternative placements will meet a child's needs. Evidence of a condition that presents a danger to the physical well-being of the student may be taken into consideration in identifying the appropriate placement for a particular child. The school district shall enter into a contract with the private school, approved by the Illinois State Board of Education, and place the child in accordance with the Illinois School Code and its regulations regarding nonpublic placement. *105 ILCS 5/14-7.02(2008), 23 ILAC 226.330(2007)*

The preponderance of the evidence presented at the hearing in this case supports Parent's contention that Student has, to date, been denied FAPE by the District's failure to address Student's severe emotional needs and to provide him with a placement in which he can be satisfactorily educated. The staff who participated in the December 15, 2009 IEP meeting, per their own testimony at hearing, and the stipulation of the parties' attorneys as to what transpired at that meeting, agree that Student requires a therapeutic setting. Although it is not clear from the evidence presented at hearing that such a placement would have been required in the period from November 2007 through the first semester of high

school in 2008, it is clear that a therapeutic setting has been needed in order to allow Student to receive an education since at least January 2009.

Participants at the December 15, 2009 IEP meeting testified that there was time to develop goals and objectives and write an IEP for Student, but they focused instead on the need for a therapeutic setting for Student. [REDACTED] did not come to the school until after the meeting was over. Her testimony that she didn't come because she had something else to do was contradicted by other testimony as to why she was not there.

District counsel argued at hearing that the meeting was to be reconvened but couldn't be because of the impending winter break. However that argument is not supported by the evidence. No one testified that any dates were presented to reconvene. No one testified that he or she was currently in the process of reconvening the meeting. At any rate, the proper procedure for placement determination would have been to develop goals and identify related services and accommodations for Student, including behavior and transition plans, committing it to writing, and then making a placement determination based on the Student's needs. The team members, however, agreed that Student needed therapeutic day placement and felt that the staff of that ultimate setting would be in a position to write the IEP. Both attorneys were present at the meeting. The only placement identified at the meeting was [REDACTED]. And, to date, District has not offered any other placement.

Pursuant to questioning at hearing, it was determined that District does have one therapeutic day school serving students with emotional disabilities, but no information was offered as to its size, its class sizes, the nature and severity of its students' disabilities, or even whether it is appropriate for or available to serve Student at this time, especially in light of his cognitive abilities and need for a challenging academic curriculum. It is assumed that if District had an appropriate placement for Student pursuant to the IEP team's agreement as to his therapeutic needs, it would have been identified at the IEP meeting or, at the latest, during the due process hearing, knowing that Parent was seeking private placement in order to get Student placed and served immediately. Since no public therapeutic placement which can meet Student's current academic and social/emotional needs has been identified and made available to Student, the nonpublic [REDACTED] placement, which is available and which can meet Student's needs, is appropriate. District counsel's reliance on the *R.H. v. Plano* case, also from Texas, is not compelling.

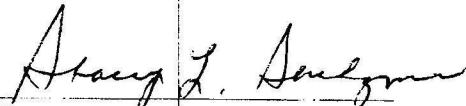
**IT IS THEREFORE ORDERED<sup>4</sup>:**

1. That Student shall be placed at [REDACTED] at public expense, and that said placement shall be effective unless and until his IEP team, including Parent and [REDACTED] staff, determine that Student requires a more or less restrictive environment in which to receive a satisfactory education;
2. That an IEP shall be developed for Student at [REDACTED] and implemented at [REDACTED] in accordance with the requirements of Illinois special education law and to include:

<sup>4</sup> Parent's counsel withdrew requests for IEEs and for O.T. services at and prior to hearing of this matter.

- A. at least 60 minutes per week of direct social work services;
  - B. psychological services in accordance with his current educational needs, to be determined by the IEP team at [REDACTED];
  - C. a behavior intervention plan based on a functional behavior assessment;
  - D. a transition plan based on assessments related to employment, education or training, and independent living; and
  - E. Such additional special education and related services, during and/or beyond regular school hours as deemed necessary by staff, in compensation for District's denial of FAPE to Student and calculated to
    - i. return Student to grade level academic performance in mathematics and writing in reference to the deficits identified in his the psychological evaluation of 12/10/09;
    - ii. allow Student to acquire the high school credits he has been unable to earn since January 1, 2009; and
    - iii. address the social/emotional deficits impacting his adaptive behavior as identified in his psychological evaluation of 12/10/09.
3. That transportation shall be provided to Student at public expense between his home and [REDACTED] in accordance with his daily schedule.
  4. That upon presentation of valid invoices from [REDACTED] pursuant to a contract entered into upon placement approval by the Illinois State Board of Education, which approval shall not be delayed beyond 10 days after application by District. District shall make all payments on behalf of Student directly to [REDACTED] and that District shall be reimbursed by the Illinois State Board of Education in accordance with the Illinois School Code.
  5. That District shall provide proof of compliance with the above orders to the Illinois State Board of Education, Program Compliance Division, 100 N. First Street, Springfield, IL 62777-0001 on or before February 15, 2010.

DATED: January 15, 2010

  
Stacey L. Stutzman  
Impartial Hearing Officer

1242 Deer Trail Lane  
Libertyville, IL 60048  
(847) 362-1950

### **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 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.

### **RIGHT TO FILE A CIVIL ACTION**

This decision shall be binding upon the parties unless a civil action is 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 the decision of the impartial due process hearing officer is mailed to the parties.

### **CERTIFICATE OF SERVICE**

The undersigned due process hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parent and Parent's counsel, District and its counsel, and the Illinois State Board of Education at their respective addresses by depositing same with the United States Postal Service at Libertyville, IL, certified mail postage prepaid, on January 15, 2010 before 5:00 p.m.



Stacey L. Stutzman  
Impartial Hearing Officer