

Case Number: 2010-0219

Hearing Officer: Michael Risen

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

MAR 16 2010  
Special Education Services

## Impartial Due Process Hearing Decision Cover Page

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District Name [REDACTED]

Phone: [REDACTED]

Superintendent [REDACTED]

Address [REDACTED]

Represented by [REDACTED]

Parent Name [REDACTED]

Address [REDACTED]

Represented by [REDACTED]

### Date and Timelines

Date of Written Request: 12/21/2009

Date of Pre-hearing Conf: 02/04/2010

Date of Hearing: 02/18/2010 to 3/8/2010

12:00:00 AM

Date of Decision: 3/13/2010

### Summary of Decision

The Parent met her Burden of Proof in all areas of this DPCN. The District failed to meet its Child Find obligations and the evidence submitted by the District in support of same was not convincing. The Student's progressive failure over the course of four plus years, coupled with the Student's serious pleas for help through several unusual behavioral episodes should have triggered an evaluation by the District much sooner than what occurred. In addition, the IEP designed by the District was found to be de minimis and failed to provide adequate modifications and accommodations required by the student's severe emotional, behavioral and health impairments. The Parent had secured an Individual Care Grant from the State. Consistent with Public Act 095-0844 and 105 ILCS 5/14-7.05, the District was ordered to revise the Student's IEP to reflect that the least restrictive environment is in a residential facility that is consistent in all respects with the recommendations of the Student's current psychiatrist. The District is required to provide the educational costs of the residential placement at public expense. Additional awards to the Parent included compensation for any out of pocket expenses the Parent could document related to completed Independent Educational Evaluations. Compensatory education award included requiring the District to provide at public expense appropriate independent study or advanced placement classes for the student to make up credits lost during the first year and a one half of high school and support for monthly visits for the Parent at the residential facility.



On December 29, 2009, the hearing officer received an email from [REDACTED] Due Process Coordinator that forwarded an email sent to him from [REDACTED] District Superintendent, regarding [REDACTED]'s prior association with the hearing officer. Subsequently, the hearing officer notified both parties via electronic mail (HO AC28) the extent of his association with [REDACTED] and offered to recuse himself at the request of either party. Also on December 29, 2009, the hearing officer received a response email from the Parent indicating their approval of the hearing officer (HO AC29). Additionally, the hearing officer received a response email from [REDACTED] indicating his approval of the hearing officer (HO AC30). The hearing officer notified the District and the Parents, that the Pre-Hearing Conference would be held on January 21, 2010, 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 December 29, 2009, the Hearing officer received the District's response to the Due Process Complaint Notice (DPCN). The Parties waived the resolution session (HO AC38). A request for a continuance in the prehearing conference was made via telephone call from [REDACTED] on January 21, 2010 due to the Superintendent's recent surgery. The continuance was granted and the Prehearing Conference was rescheduled to February 4, 2010 at 9:30 AM via teleconference. The District filed via electronic mail their prehearing disclosure statements on February 1, 2010. The Parent filed prehearing disclosure statements on February 3, 2010 via electronic mail. The Pre-Hearing Conference was held on February 4, 2010 via teleconference with [REDACTED] participating for the District along with the Parent's representative. Hearing dates were confirmed for February 18 and 23 and March 4 & 5, 2010. The March 5, 2010 date was not needed as testimony and document presentation/review were completed in three days.

**PREHEARING CONFERENCE AGREEMENTS**

On February 4, 2010 a Pre-Hearing Teleconference was held. Participating in the teleconference were [REDACTED] for the District and [REDACTED] for the Parent. 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) By agreement of the parties, the five business day rule deadline was set at 5:00 PM on February 12, 2010.
- 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 attending school at [REDACTED] [REDACTED] at the time of the Pre-Hearing.
- 12) The Parties agreed the Student's primary eligibility is Emotional Disability.
- 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 twelve issues are the issues to be resolved in this DPCN:

**A. Evaluation**

1. Did the District fail to conduct adequate and timely assessments of all areas of potential disabilities?
2. Did this failure to conduct adequate and timely assessments result in the failure of the student's educational program addressing, or addressing inadequately, his emotional/behavioral difficulties and health impairments?
3. In light of the student's academic deterioration that began in sixth grade, did the District fail to conduct a full individual evaluation and make an eligibility determination on a timely basis thereby violating "child find" provisions?

**B. Services**

4. Did the District fail to provide essential related services in the areas of assistive technology, psychological, occupational therapy and social work?
5. Did the District fail to develop a timely and adequate FBA and BIP?

**C. Placement**

1. Does the current IEP fail to provide FAPE by reflecting current academic, functional developmental skills of the student that are neither accurate nor objectively stated?
2. Does the current IEP fail to provide goal statements that are responsive to the emotional, behavioral, and health impediments of the student, and fail to provide objectively measurable milestones to assess progress?
3. Does the current IEP fail to provide quarterly objectives that provide accurate and meaningful strategies for improving the student's academic, developmental and functional skills?
4. Does the current IEP fail to provide sufficient related services in counseling, behavior management, and organizational support?
5. Does the current IEP fail to provide adequate modifications and accommodations required by the student's severe emotional, behavioral and health impairments?

6. Does the IEP include a transition plan that provides adequate support for the student's stated goal of post-secondary education?
7. Does the IEP include a transition plan that adequately addresses the student's strengths and weaknesses, the development of behavior management, self-monitoring and self-advocacy skills, additional resources and supports to be accessed through the school district and through community resources respectively, strategies for strengthening the student's functional, developmental and academic skills through ameliorating recognized deficits in areas of attention, social/emotional fragility and executive functioning problems?

### **PARENT'S POSITION**

The Parent's position, as stated during the opening statements, is that the Student is a student eligible for special education services. He is described by his teachers as a creative, bright, perceptive boy. He has a history of strong academic achievements. He was on the honor roll through much of elementary school. His ISAT scores tended to meet/exceed standards. His grades were quite good until they began to drop off in the sixth (6<sup>th</sup>) grade. He went from A's and B's to C's in the eighth (8<sup>th</sup>) grade. During his freshman year his grades dropped even more. The student had a "D" average and failed several courses. In fact, the student earned four of seven credits during his freshman year. During this current year (sophomore) the student is failing biology, English and math. He also began to display a number of discipline incidents, going from one in grade 6, to three in grade 7, six in grade 8 and then from one per month during his freshman year to seven behavior incidents in the month of May. Also during his freshman year, the student developed oppositional behaviors, suicidal thoughts and self-injurious behaviors. He began seeing a psychiatrist during the spring semester of his freshman year (2009). The student was hospitalized for two weeks in June 2009 for psychiatric care. As a result of that stay, the Student was diagnosed with mood disorder, anxiety disorder, oppositional defiant disorder, and ADHD. The Parent acknowledges the District conducted an evaluation of the Student in November of 2009 and found him eligible for services in December of 2009 as a student with an emotional disability and completed an IEP that reflects services of 20 minutes per week of social work services and two study halls per week with a special education teacher and a Behavior Intervention Plan that calls for an assignment notebook to monitor homework completion. The Parent also contends that any progress made by the Student since the implementation of this IEP has "generally been very poor,

particularly for a young man who has a history of being very bright and academically talented” (TR, p. 20). The Parent contends that the District’s response is “too little and too late” (TR, p. 21).

Based upon the issues identified at the Pre-Hearing Conference, the Parent asks that the Hearing officer order the following:

- 1) Placement in a therapeutic school placement with sufficient structure and support to allow the student an opportunity to make reasonable academic, developmental and functional progress consistent with his cognitive skills;
- 2) Direct that the District pay for independent educational evaluations in areas of identified need where the District has conducted an inadequate assessment or failed to conduct any assessment;
- 3) Direct District to offer related services in sufficient intensity to allow student access to educational opportunity, including: Social work/counseling and/or psychological counseling at least 120 minutes per week.
- 4) Direct District to provide compensatory education services for loss of FAPE during the past two years, including:
  - a. Additional social work and/or psychological counseling services outside regular school hours for 60 minutes per week for two years. (Parent’s counsel in his post hearing brief acknowledges that “A practical challenge is that [REDACTED] will be in residential facility receiving care and support 24/7, leaving little or no time for additional services and supports” (p. 14)).
  - b. Order such additional services as may be recommended by any ordered IEE’s.

Should the Parents prevail, order such additional relief as may be appropriate based on evidence introduced at hearing. In Parent’s counsel’s post hearing brief (p. 14) “Parent recommends that as a compensatory service, the District be directed to pay for monthly visits by the parent, including transportation and hotel costs that may be incurred in visiting [REDACTED] during the time that he is in a residential facility.” Additionally, it is also requested on p. 15 of this document the following: “Parent also requests that the District be directed to pay for costs of additional courses, including independent study and advanced placement courses as may be recommended by the educational staff at the residential facility, in order to help make up for lost credits during [REDACTED] first three semesters of high school. Should [REDACTED] return to his regular High School without making up missing or failed credits, the

obligation of the District to pay for independent study and or advanced placement courses should continue until he graduates.”

- 5) Direct the District to convene an IEP meeting for the purpose of incorporating into the student’s IEP all orders rendered by the hearing officer.

### **DISTRICT’S POSITION**

The District asserted they would not have much disagreement with the underlying facts in this case. The District did want to point out that the burden of proof is on the party seeking relief and that the Parent’s burden was to cite credible evidence that the choice the School District made cannot be justified. The District pointed out that the IDEA requires that students with disabilities be offered a Free Appropriate Education (FAPE) that meets their individual needs. The District interprets this requirement to mean that a child receives personalized instruction to meet the unique needs of that child with sufficient support services to enable the child to receive educational benefits. The District indicated they believe the evidence would show two things: the District complied with all of the procedural requirements to produce an IEP and that the IEP developed is providing the student with educational benefit.

The District acknowledges in their post hearing brief on page 2 that “█ suffers from emotional and behavioral issues which have resulted in three recent, closely connected periods of in-patient hospitalization.” The District asserts that the first time the District knew of any potential obligation to evaluate █ under the IDEA was “near the end of his final hospitalization, the Parent telephoned Director of Special Education Thurman and requested a case study evaluation” (District post hearing brief p.2). The District then convened a domain meeting on October 30, 2009 and completed an IEP meeting on December 15, 2009. The District also notes in its brief on pp. 7-8 that during the Student’s seventh grade year, the Core Team of the RtI group “never identified (the Student) as being a student “at risk” academically or emotionally/behaviorally. The District continues in the post hearing brief to describe its actions with the Student by noting that Tier II interventions consisting of counseling and an intervention to address organizational concern was instituted during the student’s freshman year. Finally, and prior to the evaluation for special education and subsequent placement, the District notes that an academic intervention was

employed: “(the Student) was placed in English 9, language arts intervention class to provide academic support and to address lost credit from the year before” (p.8).

### **FINDINGS OF FACT**

- 1) There were twenty-five (25) witnesses who testified during the three (3) days of hearing.
- 2) A written transcript of the hearing was taken, and was available for the writing of this decision. That transcript is incorporated into the record of this hearing and cited in the decision as “TR.”
- 3) There were two volumes of bound exhibits submitted by the Parent with additional supplemental documents submitted at the hearing and allowed to be entered into evidence with no objections from the District. Additionally, the Parent submitted a post hearing brief (referenced going forward as PB) that included nine supporting documents and these are admitted into the record and marked as the Appendix portion of the Parent’s documents.
- 4) The Parents’ documents as submitted were numbered as PD 001-PD757.
- 5) The District submitted one volume of exhibits. The District exhibits were not bound or marked by tabs and this was completed by the hearing officer for ease of reference. The District’s documents included documents numbered 1-26 and each document’s pages were numbered in their own succession, starting over again at page one for each document submitted. The District also submitted a post hearing brief (referenced going forward as DB) and this is now entered as part of the record of this case and is marked as the Appendix portion of the District’s documents as well.
- 6) Additionally, the Hearing officer submitted exhibits consisting of 108 pages and marked as “HO 1 – HO 108.” 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 that occurred prior to the hearing.

7) The Student is a male student who was born on September 1, 1994. The Student celebrated his 15<sup>th</sup> birthday in the fall of 2009 and is currently a sophomore in high school.

8) The document identified as District document #3 reflects the first and only IEP for the Student. This IEP reflected the student was first identified by the District as a student eligible under the IDEA as of December 15, 2010, the date of the IEP. The Student's primary eligibility as identified in SD #3, page 11 is "Emotional Disability."

9) SD document #3, page 28 reflects the Student's IEP identifies services of 20 minutes per week from the social worker and 225 minutes per week special education study skills class which represents 12% of the student's educational program.

10) SD document #3, pages 20 and 21 reflect two transition goals for the Student describing that the Student "will demonstrate organizational and study skills in order to succeed in his academic classes" and, the Student "will acquire the credits and skills to successfully transition to a post-secondary college." Pages 22-25 of the same document reflect four functional goals that were written for the Student related to the Student demonstrating the ability to express his feelings and identify personal strengths, improve his use of interpersonal social skills, set and monitor progress toward personal goals for school performance, and improve his ability to take personal responsibility for his actions and how he perceives his role in life situations.

11) The Director of Special Education testified that the IEP team considered the results of the Wechsler Intelligence Scale for Children IV, Wechsler Individual Achievement Test, BASC, Conners Rating Scale, FBA, student observations, student interview, parent interview, and input from all teachers with the exception of PE and a review of the records from outside agencies provided by the Parent to develop the Student's IEP.

12) Parent Document 258 reflects the students grade point average through 5<sup>th</sup> grade ranged between 3.6 and 4.0 on a 4 point scale. Sixth grade reflects a drop to 2.5, seventh grade a drop to 2.4, eight grade a drop to 2.0 including earning two "D's" (PD 257) and ninth grade a drop to .75,

below a "D" average, including 3 "F's" and a "D" fall semester and 3 "F's" and two "D's" second semester of his freshman year (PD 251).

13) PD 214 reflects a complete psychological utilizing the WISC III was completed with the student on August 7, 2001 when the student was almost seven years old. This report reflects a full scale IQ of 133 which is labeled in the report as "Very Superior" and the 99<sup>th</sup> percentile.

14) PD 257 reflects the Student earned grades in all subjects commensurate with the IQ scores reflected in PD 214 through the end of the fifth grade.

15) PD 74-PD 90 reflects the current psychological completed by the school psychologist, [REDACTED] (hereinafter referred to as the Psychologist). This report reflected a full scale IQ of 115. When asked by the Parent's attorney if this score of 115 was significantly different from the IQ score of 133 in PD 214, the psychologist responded "yes, I would say so." Further, when asked by the Parent's attorney if the Psychologist could account for the difference, her testimony was not convincing. She reflected they were different versions of the same test and the Student was now older and some subtests were different. She acknowledged under further questioning that both tests were appropriate for the time in which they were administered. She also acknowledged under testimony that she was not aware of which psychotropic drugs the Student was taking when the current testing was completed and acknowledged that she did not reflect any reference to medications in her final report. When asked about PD 81, part of the psychologist's own report, she acknowledged that her findings were the same as the findings of one of the Parent's independent evaluators, [REDACTED]. The psychologist affirmed that her conclusions of inattention, defiance/aggression, and ADHD symptoms were the same as the findings of [REDACTED] as submitted in a report provided by the Parent. PD 85 reflected scores from the BASC. When asked, the Psychologist indicated that the Student's scores reflected on the BASC were in the clinically significant range for inattention/hyperactivity. When asked during testimony by Parent's counsel if she had been notified by the Parent in October of 2008 via email (PD 479) that the Parent had concerns about the Student's grades and that he seemed depressed, the Psychologist testified she could not remember much about this other than she passed it on to the school counselor. When asked if such a concern when coupled with the student's grades during freshman year might

normally trigger a request for RtI, the psychologist responded "It could possibly" (TR 116). When asked when the Psychologist had any more dealings with the Student, she testified (TR 116) "That would have been this fall when she called." The record reflects (TR 116) that this would have been October 2009, approximately one year later after the email referenced in PD 479 above.

16) Several of the Student's current high school teachers were called to testify. Several facts emerged from the testimony of some of the teachers that have a direct bearing on the issues in this DPCN including, [REDACTED] science teacher, testified the student failed both semesters of Biology his freshman year and first semester of science his sophomore year. She also testified she observed the Student to be sleepy or tired and that he seemed to be performing better the early part of the spring semester. The first special education teacher assigned to the Student was [REDACTED]. He testified that during the time that he had the Student he only brought his assignment notebook (one of the accommodations listed in the Student's IEP) five out of nine times that he attended [REDACTED]'s class (TR 356). The next teacher to testify whose testimony was illuminating was [REDACTED] the Student's recently assigned special education teacher who followed [REDACTED] with the Student. [REDACTED] assumed the duties of working with the Student sometime in February of 2010. She also testified that she had only had the Student "four or five times" (TR 189) so far. [REDACTED] testified the student's goals that she was working on were "to improve [REDACTED] organizational skills and to refine his goals towards his career" (TR 179). The High School English teacher [REDACTED] also testified. [REDACTED] testimony was of significance as she was the most experienced teacher the Student had in the High School. [REDACTED] testified she had been teaching for 23 years. Of particular note in her testimony was that the Student failed her English class first semester and she could not recall having a conversation with the Student's Parent. She then testified the Student also failed her second semester English class. When asked by Parent's counsel what happens when a freshman student fails both semesters of English, she responded "They take it again" (TR 369). She followed that testimony with confirmation that the Student was continuing to fail that class when taking it over for the second time. Further, she volunteered she was on the RtI team during this time the Student was retaking and failing the second attempt at freshman English. When asked by Parent's counsel whether or not she discussed ways to help the student with her RtI team, I found her answer as basically non-responsive in that she discussed generalities of what is done by the team when a student is referred, but no specific strategies were

identified as having been discussed in the RtI team for this Student (TR 371). Another teacher whose testimony was of particular importance was that of the Math teacher, [REDACTED]. In particular, [REDACTED] testified to a math worksheet completed in her class by the Student and this document is reflected as PD 336. The teacher testified that the Student had written several inappropriate comments on the assignment indicating clear signs of depression and self-loathing, as well as, a series of symbols that appeared to be a form of unique writing like "hieroglyphics." [REDACTED] did testify the Student was sent to see the school counselor as a result of this incident and that she believed the student was hospitalized shortly thereafter. She also testified that no one followed up with her about this incident other than to inform her the Student had been hospitalized (TR 397).

17) The School Counselor, [REDACTED] (hereinafter referred to as the counselor), also testified. In her testimony she acknowledged that she was a member of the High School's RtI team and that she first came into contact with the Student during his freshman year in 2008 when mother contacted the psychologist with her concerns about depression and his grades. She also testified that the Student reported to her that he had problems with organization and motivation and she acknowledged that she was aware that his grades were not good at the time. She also testified she did not look at his grades from elementary school. When asked by Parent's counsel to explain these issues with the student she responded "There's a huge population of students who think that at 2:50 the day is done and they shouldn't have to do homework, and he kind of was like that as well" (TR 201). When asked if this was part of the Student's history she testified she did not know what he did in Jr. High School. She further testified that she had about eight sessions with the Student over the course of his freshman year but did not make a referral to the RtI team on behalf of the Student. When asked by Parent's counsel to review the Student's report card in high school (PD 251) the counselor acknowledged that he had failed biology, English and geometry and she acknowledged that these were key academic subjects. When asked by Parent's counsel if this would ordinarily raise a red flag, she responded: "I would like to tell you yes, but with a lot of students nowadays, there are a lot of students who perform like that" (TR 204). She further testified that during the spring of his freshman year she also knew that the Student was seeing a psychiatrist during this time, on psychiatric medication, and that his grades during second semester were worsening. She further testified that she did not have any discussion with anyone regarding a referral to RtI or elsewhere during this time (TR 207). She did indicate that she provided the Student with a three

ring binder for his classes to help with his organization and looked into summer school for the Student to try and help him make up for lost credits (TR 204-205). Finally, she testified that the first intervention with RtI for the Student was in the Fall of 2009 and that only occurred after the Student had experienced two psychiatric hospitalizations (TR 209). The Counselor was a member of the RtI team during this period.

18) The school social worker, [REDACTED] (hereinafter referred to as the social worker), also testified. She testified she first became aware of the Student during the time the domain review was to begin. She also testified that she was a member of the RtI team and she did not remember the Student's name being brought up in that context prior to the scheduling of the domain review. During testimony, the social worker acknowledged that part of the Student's IEP was to for her to provide 20 minutes a week of her time with the Student. When asked to justify that amount of time, she could only say that it was "a collaborative agreement...and it was just we said at a minimum ... and if something else came up during the day, we could always add more"(TR 223-224). I found this answer to be almost unresponsive and certainly not very illuminating to the rationale for what appears to be a relatively minimal amount of social work counseling time for a student identified as having an emotional disability.

19) Also testifying was [REDACTED] a therapist who saw [REDACTED] on a weekly basis until December, 2009. His testimony reflected that he was in complete agreement with the recommendations of [REDACTED] and [REDACTED]. He also stated in his testimony and as reflected in the Parent's documents that he recommended a residential placement for [REDACTED] (PD 96 and TR 424-5 and 432-34).

20) The Student's Mother also testified (hereinafter referred to as the Parent). The Parent testified that she had sought out a psychiatrist for [REDACTED] in April, 2009 (TR 577). The psychiatrist, [REDACTED] who began treating the Student at this time also testified. Her testimony reflected that she prescribed mood stabilizing drugs that seemed at first to ameliorate symptoms (TR 607-8). However, in June, 2009 the Student experienced the first of three hospitalizations for psychiatric reasons. He was admitted because of agitated behavior and self injurious behavior (PD 112). When the Student was discharged, he was diagnosed as having a depressive disorder, anxiety disorder, oppositional defiant

disorder and ADHD, NOS (PD 112). Further, [REDACTED] testified that his prognosis at that time was “guarded” based on his rigid thought processes and failure to respond to medications while an inpatient. [REDACTED] further testified that she evaluated the Student again on February 11, 2010 and that based upon that more recent assessment her recommendations remained the same, namely residential placement (TR 623-624). The Student’s Parent testified that she had expressed concerns to the school counselor, [REDACTED] at the start of the 2009-10 school year. This was confirmed in the testimony of [REDACTED]. [REDACTED] further testified that she referred the Parent to [REDACTED] for a psychological assessment of the Student to “evaluate psychosis, mainly to look at psychosis secondary to a mood disorder or a primary thought disorder that is interfering with his ability to make rational decisions” (PD 146). [REDACTED] conducted the evaluation and prepared a written report that indicated “serous psychopathology” with impaired reality testing (PD 91-94). [REDACTED] report further indicated that she recommended “a structured setting where a therapeutic behavioral program could interrupt his isolation, withdrawal and retreats into fantasy’ (PD 94). It is important to note that the District’s own psychological report was in direct agreement with those found by both [REDACTED] and [REDACTED]. In fact, the school report concludes “the current evaluation results were consistent with the results [REDACTED] obtained. Both results indicated elevated scores for inattention, defiance/aggression, and the ADHD symptoms scale” (PD 81). The Parent also testified that she sought and received an ICG (Individual Care Grant) for the Student to pay for the recommended residential services. She testified that she received approval for the ICG (PD 574) on February 10, 2010 and that she was seeking placement for the student in a residential facility consistent with the recommendations of [REDACTED] and [REDACTED].

### DISCUSSION AND CONCLUSIONS OF LAW

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 as 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 (9<sup>th</sup> Circuit 1992)). In the instant case, the District argues that "There is no evidence in the record that the District has failed to comply with the procedures of the Act" (DB, p. 5). In the District's brief, it is also argued that the District commenced a timely evaluation and IEP completion of the Student by responding with a domain meeting on October 30, 2009 (DB, p. 3) one day after the Parent's request to the District's Director of Special Education and completed the Student's IEP on December 15, 2010 which the District notes was "29 days, and well within the 60 day time limit" (DB, p.7). More specifically, the District argues that this effort and others documented via testimony or submitted documents, supports the District's compliance with the procedure known as "Child Find."

I find there are problems with the District's arguments regarding their compliance with the Child Find procedural obligation as noted in 20 USC Section 1412 (a)(3)(A) which states: "In general All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services." The District acknowledges the District was fully aware of these Child Find responsibilities in the District's post hearing brief under the heading "Child Find." In their argument, there are a number of positions that are submitted that I find less than convincing. First, the District indicates: "The quarterly Core Team notes for the relevant period of time never identified (the Student) as being a student "at risk" academically or emotionally behaviorally. His teachers describe him as a typical child in the seventh and eighth grades." PD 257 is the District's Health and Scholarship Record reflecting the Student's grades from kindergarten through the eighth grade. The Student's approximate grade point in the fifth grade for his five core academic subjects computes to a 3.6/4. Then in sixth grade, his GPA in his core academic subjects dropped to a 2.5/4, then 2.0/4 in grade seven and finally 2.0/4 in grade eight with his first grade of "D" being recorded for both Math and English, in which the Student also earned his first grade of "F" during the second semester of eighth grade (PD 252). To accept the District's position that the Student was "a typical

child” during this time frame would be to accept the belief that most students experience a drop in their grade point average of almost 50% when attending Jr. High School. This was the first serious red flag that should have triggered at least a referral to the RtI team at the Jr. High. This expectation is supported by the Courts in both *Wiesenberg v. BOE of Salt Lake City*, 181 F. Supp. 2d 1307 (D. Utah, 2002) and in *W.B. v. Matula*, 67 F. 3d 484, 501 (3<sup>rd</sup> Cir.1995).

The District continues to argue in support of its efforts to comply with the Child Find procedures by asserting that the District instituted Tier II interventions through RtI at the end of the Student’s Freshman year in high school (DB p.8). These Tier II interventions included counseling from the school counselor (the District also asserts here that such a measure is “typical of what is experienced with many adolescent boys”) (DB, p.8). To accept this position that the student was typical of “many adolescent boys” would be to accept the position of the counselor whose testimony indicated that she did not see the severity of need when a student earns failing grades in English, geometry and biology during the student’s freshman year. As reported above in the Findings of Fact, the counselor’s response to why this did not trigger a stronger response from the District she testified: “I would like to tell you yes, but with a lot of students nowadays, there are a lot of students who perform like that” (TR 204). As reflected by the Court in Matula, Child find expects a District to be identified and evaluated “within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.” This hearing officer concludes that a student whose grades in the elementary school were at or above 3.6 on a four point scale and then steadily declines over the course of the next four years from that high level of performance to a near .0 on a four point scale is certainly not typical of “many adolescent boys.” Indeed, and based upon the previous discussion, this decision could conclude that the evidence supports that the District failed to meet this procedural requirement of Child Find and thereby failed to meet the first prong of Rowley as a result. Additionally, as pointed out in the Parent’s Post Hearing Brief, the evidence and testimony at hearing support five other clear incidents in the Student’s time in school that could have, and should have, triggered a more serious consideration of the Student’s need to be evaluated for a disability, or other direct intervention. PD 328 and 329 reflect a significant concern that should have been triggered when the Student wrote in a two page essay during a Saturday detention thoughts, reflections, and intentions that are indicative of an adolescent who is likely very disturbed. PD 638 is an email from the Student’s English teacher to the High School Principal expressing

concern for the Student due to changes she was witnessing in the Student. PD 251 reflects the end of the Student's second semester grades his freshman year that now reflected grades of four "F's" and two "D's." Then finally, the school counselor acknowledged during testimony that she was informed that the Student experienced a psychiatric hospitalization over the summer and yet the District, by and through its various professional staff charged to make such decisions, did not see a need to complete an evaluation of the Student until the Mother finally asked for same on October 30, 2010. I conclude the Parent has met the burden of proof in this area and has clearly established that the District failed to meet its Child Find obligations under the IDEA.

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. Since the District clearly failed to meet the first prong of Rowley by violating the Child Find procedures, it is reasonable that this discussion could end here and an order entered in favor of the Parent. However, I believe it is important to also address the District's failure to meet the second Prong of Rowley as it also has a bearing on the Parent's request for remedy in this DPCN.

The District implemented the Student's IEP on or about December 15, 2009. The testimony and presentation of witnesses concluded on March 4, 2010. There were only about 45 days of school between those two dates. The District asserts in their post hearing brief (DB, p. 11) that the Student's "emotional and behavioral issues manifest themselves in the school setting in a unique way. He is resistant to performing homework assignments. As a result, while he generally receives high marks in all other areas of school performance, his grades suffer greatly from missed homework assignments frequently resulting in failure. The IEP recognizes this and has successfully addressed it." The only evidence submitted to support this assertion of "success" is that the Student's current grades now only reflect one failing grade. This assertion that the IEP has already resulted in success is not substantiated with any credible evidence and because there have been so few days that the IEP services have been provided, and quarterly grades have not even been calculated, such an assertion could be challenged on its face. In testimony, and in writing (PD 746-747), [REDACTED] indicates that as recent as February 11, 2010, she had examined the Student and saw no substantial change in his mental disorders, which are the underlying cause of his attitude towards

school and work completion, and continues to recommend residential placement. [REDACTED] also specifically addressed concerns she had during testimony with the amount of social work minutes provided for in the IEP (20 minutes). She specifically testified: "especially for dealing with his defiant behavior and his fluctuations in mood, there should be ongoing support in the school and 20 minutes a week with a counselor that he may not even be able to see during a particular time, I don't think that is enough." Documents and testimony reflect the Student has a serious mental health disorder, presents an eligibility criteria of emotional disability, and there has been no disagreement presented in this diagnosis between the District's psychologist and that of the Parent's independent evaluators, all of who presented with substantial credentials, training and experience. The District fashioned an IEP that included one additional study skills class, the use of an assignment notebook (it should be noted that testimony reflected the student seldom used the assignment notebook as planned for in the IEP from the outset of IEP implementation), and 20 minutes per week of counseling services on an as needed basis. It is also noted that the District's Post Hearing Brief asserts that the staff followed up with the Student to be certain that he records his assignment. This is not supported by either documentary evidence or testimony. In fact, testimony from [REDACTED] and [REDACTED] and other teachers, as well as the Parent, testified the Student seldom even had his assignment notebook with him. There was simply no evidence submitted that the District's staff followed up with the Student to be certain that his assignments were recorded.

The Courts, in *M.C.; and G.C., on behalf of their son, J.C. vs. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), found this level of services to be "de minimis" and failing to meet the requirements as stipulated in the second prong of Rowley. In JC, the Court overruled the administrative law judge who had found the student had made improvement "at times" and that this demonstrated the District's obligation to meet Rowley's expectation of "educational benefit." In reversing the ALJ, the Court found: "Both Polk and Diamond make clear that an appropriate IEP must result in more than de minimis benefits to satisfy Rowley's "some educational benefit" standard. As we wrote in Diamond, a plan for a severely handicapped student will satisfy the IDEA only if it is "likely to produce progress, not regression or trivial educational advancement." According to the district court, the "limited and varied" progress that the ALJ found was de minimis and therefore not sufficient to satisfy IDEA. The same applies in this case, while the District has

submitted testimony to indicate the Student has made some progress “at times,” the level of progress documented is not enough to assert or prove educational benefit. And while the burden of proof rests with the Parent in this case, the District still carries the burden to prove that “the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate and available” (105 ILCS 5/14.802a (g-55)).

Lastly, the Student’s mother provided evidence that the Student is eligible for an ICG (Individual Care Grant) to pay for residential services (PD 571 and TR 638-642). In the Parent’s Post Hearing Brief, the Parent correctly cites Public Act 095-0844 and 105 ILCS 5/14-7.05 which provides in part:

“Placement in residential facility; payment of educational costs. For any student with a disability in a residential facility placement made or paid for by an Illinois public State agency or made by any court in this State, the school district of residence as determined pursuant to this Article is responsible for the costs of educating the child and shall be reimbursed for those costs in accordance with this Code. Payments shall be made by the resident district to the entity providing the educational services, whether the entity is the residential facility or the school district wherein the facility is located, no less than once per quarter unless otherwise agreed to in writing by the parties.”

Further, the Parent correctly provides further clarification with the following information from pages 13 and 14 of the Parent’s Post Hearing Brief: “Guidance on PA 95-0844 and PA 95-0938 District Funding Responsibility for Court and Public Agency Residential Placements, ISBE (January 26, 2009), which states at Page 8 (copy of document filed herewith):

**If a student with disabilities is placed in an approved facility through an Individual Care Grant, is the district of residence responsible for payment of educational services?**

Yes. A placement made through an Individual Care Grant as authorized by Section 7.1 of the Mental Health and Developmental Disabilities Administrative Act [20 ILCS 1705/1 et seq.] is a placement made and funded by an Illinois public agency; therefore, the student’s district of residence, in general the district in which the parent resides unless there has been a termination of parental rights, will be responsible for payment of the educational services provided to the student. Given existing law and rules which administer Individual Care Grants, ISBE does not consider a placement made with such a grant to be a unilateral parental placement.”

### **Burden of Proof**

In conclusion, it is the finding of this hearing officer that the preponderance of the evidence supports the position of the Parent and that the Parent has therefore met her required Burden of Proof in this DPCN. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Further, the hearing officer concludes that the evidence submitted by the District is not convincing. Specifically, the preponderance of the evidence supports that the District violated the Child Find provisions of the IDEA and the IEP that was eventually prepared by the District was found to be de minimis and therefore in violation of the second prong of Rowley. Therefore, in respect to the issues presented in this case, the hearing officer rules in totality for the Parent as follows:

#### **A. Evaluation**

1. The District failed to conduct adequate and timely assessments of all areas of potential disabilities.
2. This failure to conduct adequate and timely assessments resulted in the failure of the student's educational program addressing, or addressing adequately, his emotional/behavioral difficulties and health impairments.
3. In light of the student's academic deterioration that began in sixth grade, and has continued to date, the District failed to conduct a full individual evaluation and make an eligibility determination on a timely basis thereby violating "child find" provisions.

#### **B. Services**

4. The District failed to provide essential related services in the areas of assistive technology, psychological, and social work. The Parent withdrew the issue of occupational therapy at the outset of the hearing (TR 15).
5. The District failed to develop a timely and adequate FBA and BIP

#### **C. Placement**

6. The current IEP fails to provide FAPE by reflecting current academic, functional developmental skills of the student in that they are not stated accurately to reflect the nature and severity of the Student's emotional disability.
7. The current IEP fails to provide goal statements that are responsive to the emotional, behavioral, and health impediments of the student, and fails to provide objectively measurable milestones to assess progress as they are presented in a

manner and level of specificity that can only be described as being de minimis and lacking in addressing the nature and severity of the Student's disability.

8. Since the finding is that the current IEP fails to provide FAPE, then it is also the finding that the current IEP fails to provide quarterly objectives that provide accurate and meaningful strategies for improving the student's academic, developmental and functional skills.
9. The current IEP failed to provide sufficient related services in counseling, behavior management, and organizational support that were designed to address the nature and severity of the Student's disability.
10. The current IEP fails to provide adequate modifications and accommodations required by the student's severe emotional, behavioral and health impairments.
11. The IEP includes a transition plan, but the plan that is included does not provide adequate support for the student's stated goal of post-secondary education, and again, only reflects a plan that can be described as being de minimis.
12. The IEP does include a transition plan. However, as noted in number 11, a finding of de minimis reflects that the transition plan does not adequately address the student's strengths and weaknesses, the development of behavior management, self-monitoring and self-advocacy skills, additional resources and supports to be accessed through the school district and through community resources respectively, strategies for strengthening the student's functional, developmental and academic skills through ameliorating recognized deficits in areas of attention, social/emotional fragility and executive functioning problems.

**ORDER:**

The District is hereby ordered:

- I. Consistent with "Public Act 095-0844 and 105 ILCS 5/14-7.05," to revise the Student's IEP to reflect that the least restrictive environment is in a residential facility that is consistent in all respects with the recommendations of the psychiatrist, [REDACTED] and conforms to the ICG secured through the State of Illinois by the Parent.
- II. The District shall be responsible for paying directly to the provider of the residential

placement the costs of the educational program for the student during the time the Student continues to be placed in such a facility.

- III. The District shall reimburse the Parent for the actual out of pocket costs, if any, the Parent incurred for the evaluations completed by [REDACTED] and [REDACTED]. The Parent must submit any explanation of benefits from insurance relative to these out of pocket costs in order to substantiate the actual out of pocket costs incurred, if any.
- IV. In the pre-hearing summary it is reflected that the Parent also requested the following relief: "Direct District to offer related services in sufficient intensity to allow student access to educational opportunity, including: Social work/counseling and/or psychological counseling at least 120 minutes per week. Direct the District to provide compensatory education services for loss of FAPE during the past two years, including:
- a. Additional social work and/or psychological counseling services outside regular school hours for 60 minutes per week for two years.
  - b. Order such additional services as may be recommended by any ordered IEE's."
  - c. As noted previously in this decision, Parent's counsel in his post hearing brief acknowledges that "A practical challenge is that [REDACTED] will be in residential facility receiving care and support 24/7, leaving little or no time for additional services and supports" (p. 14). As a result, the requests from the Parent submitted during the Pre-Hearing Conference and detailed here in item "IV" are not provided.
- V. Also in Parent's post hearing brief, the Parent requests compensatory education due to the extended length of time the District took to recognize, evaluate and offer any services to the Student. Due to the District's failure to meet the statutory expectations of Child Find, (the record reflects the Student lost at least three semesters of his high school education during which his grades for those semesters were substantially "D's" and "F's"), and, in consideration of the discussion in item "IV" above, it is hereby ordered that the District shall provide the following as compensatory relief:
- a. In addition to paying for the educational costs related to the costs of education at the residential facility, the District shall also pay the full cost of any independent study courses or advanced placement courses recommended by the educational staff of the residential facility that are specifically designed to enable the Student to make up for lost credits during his freshman year and fall semester of his sophomore year. The District

will bear this obligation of paying for these courses equivalent to the number of failures the Student incurred during his freshman year and first semester of his sophomore year. Such payment will be due to the residential facility (or the Parent if payment is advanced by the Parent and a receipt for same is produced by the Parent) upon successful completion of the recommended course(s) by the Student. If the Student fails to perform satisfactorily in any recommended independent study course or advanced placement course such that the course will not be used to make up for current lost credits, then the District will be relieved of the responsibility to pay for that particular course(s).

- b. If the Student returns to his regular High School without having the opportunity to make up credits lost during the freshman year and first semester of the sophomore year, the District will be obligated to reimburse the Parent for any independent study course or advanced placement course the Student completes satisfactorily, provided that such completion can be applied to making up the Student's previously identified lost credits. Again, should the Student enroll in such courses after returning to his regular High School but fails to perform satisfactorily such that the grade(s) earned in the enrolled course(s) fails to meet the criteria necessary to qualify as replacement for his lost credits for graduation, then the District's obligation to reimburse the Parent is nullified.

- VI. Also as a form of compensatory education, the District is ordered to fund the Parent's costs for once monthly visits with the Student for the duration of the Student's time at the residential facility. The District's obligation to provide these monthly visits at public expense shall be limited to no more than two nights and three days each month. Such reimbursement shall be for lodging, travel (round trip economy class, non-refundable air fare if by air travel) and per diem meals consistent with the policies on reimbursement for such expenses at the then current rates as stipulated by policies of the Board of Education of [REDACTED] for reimbursement of travel expenses. Receipts for all travel related expense, consistent with definitions of same contained herein, are to be presented by the Parent to the Superintendent of Schools (or his designee) at least one week prior to each regularly scheduled Board of Education meeting so that the Parent may be reimbursed after each Board meeting where approval for the payment of monthly bills incurred by the Board of Education has been acted on

by the Board of Education.

- VII. The District is ordered to convene an IEP meeting within 10 calendar days of receipt of the electronic mail copy of this decision as date stamped thereon and ordered to incorporate the orders reflected in items I-VI above. Hence, the IEP meeting must be completed by March 23, 2010.
- VIII. The District shall provide proof of compliance with all aspects of this Order within 35 calendar days of first receipt (electronic mail date stamp) of this Order. Therefore, said proof shall be submitted by April 17, 2010 at 5:00 PM to the Office of Due Process and Mediation, Illinois State Board of Education, 100 N. First Street, Springfield, IL 62777

#### **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: March 13, 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]

and

[REDACTED]  
Illinois State Board Of Education  
100 N. First St.  
Springfield, IL 62777-0001

(USPS only)

before Noon on March 13, 2010

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