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ILLINOIS STATE BOARD OF EDUCATION

IMPARTIAL DUE PROCESS HEARING

SPECIAL EDUCATION SERVICES

[Redacted]

) Case No.: 2010-0299

Student,

)

and

) IMPARTIAL DUE PROCESS HEARING
DECISION AND ORDER

[Redacted]

District.

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**Decision and Order
Jurisdiction**

This matter is before the undersigned hearing officer for a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA 2004"). 20 U.S.C. 1400 et seq. (2004). This hearing officer has jurisdiction pursuant to 20 U.S.C. 1415 et seq. (2004), 34 CFR 300.532, 105 ILCS 5/14-8.02a and 8.02b et seq., and 23 Ill. Adm. Code 226.600 et seq.

Procedural History

A due process request was filed by the parents on February 23, 2010, received by the District on February 25, 2010, and forward to ISBE that same day. The hearing officer received notice of appointment on February 26, 2010. The District filed their response to the Due Process Complaint on March 4, 2010. Parents were initially pro se, and then retained counsel as indicated by the notification letter filed by [Redacted] of [Redacted] on March 10, 2010. An Amended Due Process Complaint was filed on April 28, 2010, a revised scheduling order was sent out on April 29, 2010 and the District filed its response to the Amended Due Process Complaint on May 10, 2010. On May 27, 2010 a notice was filed by [Redacted] that he was no longer representing parents. They proceeded pro se. The parties attempted to mediate, and were unsuccessful in resolving the issues in dispute.

The prehearing conference was convened via teleconference on July 19, 2010 and concluded July 23, 2010. The Prehearing Conference Report was issued on August 2, 2010. The Due Process Hearing was convened on August 19, 2010 at the [REDACTED]. The hearing was reconvened August 23 and concluded the evening of August 24, 2010. The District was represented by [REDACTED] of the [REDACTED], the Student was represented by her parents, mother [REDACTED] and stepfather [REDACTED].

Issues Presented and Remedies Requested

1. Whether [REDACTED] provided a free appropriate public education during the period from February 25, 2008 to the present time based on:
 - a. Failure to identify learning impairments in a timely manner, despite evidence of academic difficulties, in violation of the child find requirements of IDEA;
 - b. Failure to conduct timely and adequate evaluations of all areas of suspected disability by completing inadequate psychological evaluations, inadequate occupational therapy assessments, failure to assess for assistive technology needs, failure to conduct a functional vision assessment, and failure to conduct a comprehensive vocational assessment.
2. Whether the student's IEPs for the past two years failed to provide a free and appropriate public education, in that they:
 - a. Lack specialized instruction in math;
 - b. Fail to offer nursing, occupational therapy, social work and assistive technology services and support;
 - c. Fail to provide direct instruction appropriately designed to address the student's functional, developmental and academic delays;
 - d. Fail to offer appropriate accommodations and modifications to ameliorate challenges resulting from student's complex medical conditions;
 - e. Fail to offer adaptive physical education;
 - f. Fail to offer a transition plan;
 - g. Fail to offer extended school year services.
3. Whether procedural violations resulted in a denial of FAPE in that, among other things, District:
 - a. Failed to provide a written denial of the parents request for an evaluation in March, 2009;
 - b. Failed to conduct a timely and appropriate domain meeting for the student's triennial evaluation in 2009;
 - c. Failed to comply with the hearing officer's order and provide evaluation reports prior to the 4/23/10 eligibility/IEP meeting and copies of email correspondence.

Student's Requested Remedies

1. That [REDACTED] pay for independent educational evaluations in the areas of identified need including cognitive and academic skills, attention and executive functioning, assistive

technology, occupational therapy assessment, a functional/behavioral vision assessment and a comprehensive vocational assessment.

2. That [REDACTED] offer related services in sufficient intensity to allow student access to educational opportunity, including:
 - a. At least 60 mpw of social work and/or psychological services;
 - b. Assistive technology services as may be recommended by an independent evaluator;
 - c. Occupational therapy services to address functional, developmental and organizational concerns, as recommended by independent evaluator;
 - d. Vision therapy services as may be recommended by independent evaluator.
3. Transition support services.
4. That [REDACTED] provide compensatory education services for the loss of FAPE for the past two years, including:
 - a. Tutoring two hours per week after regular school hours by a certified special education teacher until the student graduates from high school;
 - b. An additional 30 mpw social work services for two years.
5. Direct [REDACTED] to convene an IEP meeting that will consider results of evaluations and implement the foregoing relief, and;
6. Other relief that may be determined appropriate.

District's Requested Remedies

1. A finding that the District provided Student with a free, appropriate public education; and,
2. A determination that the District did not commit any procedural violations resulting in a denial of FAPE; and,
3. That the relief the parents are seeking be denied.

Witnesses

Following are the witnesses who were present and offered testimony in this case.

1. [REDACTED] Academic Administrator, [REDACTED]
2. [REDACTED], Student Services Administrator, [REDACTED]
3. [REDACTED], Registrar, [REDACTED]
4. [REDACTED] Social Worker, [REDACTED]
5. [REDACTED], Special Education/504 Case Manager, [REDACTED]
6. [REDACTED] Special Service Administrator, [REDACTED]
7. [REDACTED] Occupational Therapist
8. [REDACTED] High School Advisor, [REDACTED] (no longer employed)
9. [REDACTED] Mother

Documents Offered Into Evidence

Both parties presented extensive binders of documents into evidence, the District binder containing Exhibits page numbered 1-313 and Parents Exhibits tabbed 1-19. All documents contained therein were received and accepted into evidence.

Burden of Proof

As the moving party, the parents have the burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

Finding of Facts

Student is a 14 year old freshman at [REDACTED] where she has been attending since 7th grade. She was born with spina bifida, and had surgery as early as the second day of her life to insert a shunt to drain fluid from her brain. She still has a shunt today. As a result of her spina bifida, Student has neurogenic bowel and bladder, requires the use of a catheter, and wears AFOs to ambulate. Student received early intervention services until approximately age 2, and was found eligible for special education services in the year 2000 under the category of physical disability.

Student lives with her mother, stepfather and 23 year old sister. The family has a house and an apartment in [REDACTED] where they stay at various times. Her biological father also lives in [REDACTED]. Student is shy and quiet, enjoys reading and writing in her journal. She has poor self-esteem and self-confidence related to her disability. She has been teased since first grade and became more withdrawn starting at that time. (SD 76) Student describes her 23 year old sister as her best friend (SD 78), and says she has two friends at school.

Parent is an administrative assistant for the [REDACTED] for the city of [REDACTED] working 5 days a week. Her daughter, the subject of this case was born with spina bifida, she had surgery to insert a shunt for hydrocephalus, that she has bowel and bladder problems, difficulty walking, numbness and balance problems. Student is quiet, shy, doesn't complain or ask for help. Student was made fun of at school because of her disabilities at a young age which is one of the reasons they enrolled her at [REDACTED] and she is happier at home. Parent believes remote education is the best option for Student because she doesn't have to miss school for doctor's appointments.

Student is struggling academically. Her [REDACTED] first quarter progress report of 11/16/09 showed all F grades (SD 141). Parent didn't show Student right away because she didn't want to discourage her. Parent did not speak to any of Student's teachers after she got her grades; instead she had a family discussion regarding what they needed to do in order to help her pass her classes.

Parent believes Student did well at [REDACTED] for 7th and 8th grade in the Mastery program because she had no deadlines, except to get work in by the end of the year. She stated that Student experienced problems this year because of the increased workload and the deadlines. Though Parents aren't challenging Student's placement, when asked if Student would benefit from being in a classroom with a teacher who could assist her with assignments and check her work, parent said Student was in a school like that before and was failing, but maybe if she were in a special school with other children with disabilities.

Educational Achievement and Grades

Student had IEPs from 2000 on under the disability category of Physical Disability. In Student's grade reports for reading and math from the years 2000 to 2007,

student showed a steady decline. In the 2001-2002 school year, student earned a C+ in reading and B- in math. In 2002-2003, she earned a C+ in reading and a D+ in math. In 2003-2004 she earned D's in both reading and math. In 2004-05 she earned a D in reading and an F in math. No grades appear for the 2005-06 school year; however by the 2006-07 year, student received a grade of F in both reading and math. (SD 136).

Similarly, Student's Science grade went from C's to an F in 2006-07. Her Social Studies grade went from a C- in 2000 to F's from 2003 forward. (SD 138). She received A's and B's in Art and Music (SD 138). In her sixth grade report card from [REDACTED] dated 3/2/07, Student was failing reading, math, social sciences, and PE, and was below average in science, average in learning technology and above average in art. (SD 132). In the comments under Reading, it states "Student is failing due to non work, low averages and incomplete assignments." Under social science, the comments read "Student is currently failing due to low test scores and missing assignments. Student needs to study harder and put forth more effort in Social Studies. (SD 132). Student's 2007 ISAT scores placed her at the 2nd stanine in Math (below average) and the 6th stanine in reading (average). (SD 13).

In eighth grade Student achieved Mastery in all her classes; no letter grades were given. (SD 142). On her 8th grade ISAT, Student was meeting standards in reading, below standard in math, and at the academic warning level in writing (SD 169).

Her first quarter progress report from the 2009-2010 school year showed she was earning F's in all subjects, Algebra, Literary Analysis and Composition, Physical Education, Fine Art, French I and Biology. (SD 141). Student's 9th grade PLAN test score, a test which helps measure readiness for college level work found her below the benchmarks in math, reading and science and at benchmark in English. (SD 146)

Her final grades for the 2009-2010 school year were: Algebra I- F; Art- F; Literary Analysis and Composition I-F; Physical Education-D; Biology-F; French I-D. Student earned .5 credits for each of her two D grades, completing the 2009-2010 school year with a total earning of 1 course credit. (SD 183).

Student's IEP dated 2/14/08 identified Student as eligible in the category of Physical Disability. She is noted to be a good speller, loves to read, write in her journal, works well on the computer, and is loving and likeable. (Parents 12). Parent noted she wanted Student to improve in math, express herself verbally and make more friends. (SD 13). Similarly in the IEP drafted at the annual review 3/24/09, it is noted under Parent Concerns that Parent had concerns with Student's cognitive functioning and academic progress, especially in mathematics. (SD 27)

Student was receiving modifications/accommodations including: computer, tape recorder, calculator, visual aids, graph paper, note cards with mathematical formulas, graphic organizers, manipulatives and flash cards. A physical disabilities itinerant teacher provided 60 minutes per quarter of service. (SD 18) Student was receiving restroom breaks, cueing and prompting to maintain focus, Student was to repeat concepts to check for understanding; she was encouraged to participate in class, and use the handrail and get assistance in emergencies. (SD 17)

On the IEP Summary Sheet, it is noted that Student had difficulty following directions, processed information slowly, had difficulty following concepts, and

expressing thoughts or ideas orally. It was recommended that Student have extended time for class and homework assignments, write assignments and give verbal instructions, explain directions and give concrete examples, reduce load, allow for extra credit, test one concept at a time, allow use of calculator, tape recorder or computer, give simple directions with written examples, give verbal directions in clearly stated steps, and provide motivation and verbal rewards on a daily basis. (SD 23)

██████████ is a virtual school. Students attend a brick and mortar school for 2 ½ hours per week and the rest of their education is completed virtually. The parent has a significant role in the ██████████ student's education, serving as their Learning Coach/Mentor. While no specific qualifications are needed to become a learning coach (Parents 18 page 12), ██████████ does have a process of certifying Learning Coaches. (Parents 18).

The Learning Coach is required to be an active participant in the child's education, ensuring that students are completing their coursework as assigned by the content teachers, and that students ask for help when it is needed. (Parents 18 Page 15, 19). The Learning Coach for the high school student is required to check student's academic progress and work with the teachers, and to motivate student and keep them focused and organized. (Parents 18 Page 15). The Learning Coach is not expected to be a content area expert. Similarly, there is no requirement that the students at ██████████ have the skills to be self directed or to work independently.

The Online School, or OLS, drives the ██████████ internet based curriculum. The OLS is where Learning Coaches and students access their lessons, assessments, attendance, progress, planning and teaching tools. (Parents 18, Page 25). Middle school and high school students are required to have their own account on the OLS, including their own KMail account to communicate with their teachers. Active participation in the OLS is one of the criteria teachers use when considering whether to promote a child to the next grade level.

The Learning Management System (LMS) is where the student's online high school classes are housed and where they find their lessons and assignments. Students access a list of their courses every day. (Parents 18, Page 37). At ██████████ students also participate in Elluminate and "Class Connect" sessions. Elluminate is a web based tool that facilitates synchronous learning with the teacher and classmates online at a particular time. If a teacher schedules an Elluminate class, students are required to attend or to provide a valid excuse for their absence. (Parents 18, page 15). Though the curriculum is available 24 hours a day 7 days a week, students are expected to log in to every class appearing in their My Courses list for at least 60 minutes a day, where they will find weekly course requirements and assignments and instructions for both online and offline work. (Parents 18 page 37).

██████████ uses a system called "KMail" which is their internal email and communication system. (Parents 18, page 14). Learning Coaches are advised to check KMail several times throughout the day as this is where teachers and staff communicate important messages and reminders.

Students attend class at The Learning Center one day a week at a preassigned day and time for 2 ½ hours. (Parents 18, Page 21). The Parent Room at the school is a place for students, parents, Learning Coaches, family members and friends to gather before and after class. (Parents 18, Page 22). The Parent Room is also where Learning Coach sessions are held. (Parents 18, Page 22).

Because [REDACTED] is a virtual school, the Student's physical education requirement is met by submitting weekly logs of their activity which may include participation in athletics, sports teams, running, biking, walking, dancing or other forms of activity. (Parents 18 page 36).

In addition to their substantive coursework, students are required to complete Service Learning Hours before completion of sophomore and senior years. Service Learning revolves around the student identifying an area of concern and developing a plan for service in that area. Students journal, discuss and make a presentation on their experience. There are a variety of projects students can participate in to earn Service Learning Hours. (Parents 18, Page 37). Sophomores are required to complete 20 service learning hours, and seniors have to complete 40 hours by the end of 12th grade. (Parents 18, page 37).

Course work is due on midnight of the day indicated in the teacher's plan. Work is accepted until the following Sunday at midnight for full credit. Thus, if a teacher assigns work due on Thursday, it can be submitted until Sunday for full credit. (Parents 18, Page 38). After that, the student will receive a zero.

Students who are performing poorly may be placed on Academic Probation. (Parents 18 Page 40). Reasons for being placed on probation include infrequent logins to LMS, missing assignments, and falling below 60% either in a particular course or as an overall course average. Once a student is placed on Academic Probation, they are contacted by the High School Advisor, and required to meet with the Advisor either online or face to face, and to attend mandatory tutoring sessions. (Parents 18, page 40).

According to [REDACTED], previous High School Advisor, students must attend weekly tutoring until their average rises to 60% or above, and may find themselves on probation repeatedly depending on their course average. Student was in [REDACTED] Learning Center classes. According to the Learning Coach Handbook, students who are unable to show improvement after being on probation repeatedly will be required to attend a meeting with their Parent, Academic Administrator, Advisor and possibly their content area teacher. (Parent 18, Page 40). [REDACTED] testified that in spite of the fact that Student was on academic probation seven times second semester of the 2009-2010 school year, no such meeting was held to discuss her academic progress.

[REDACTED] is the [REDACTED] Academic Administrator. [REDACTED] is familiar with Student, but does not provide direct instruction to her or any student. [REDACTED] assisted at an IEP meeting in coming up with appropriate language regarding changing the due date of assignments in the web based platform for Student as required by the modifications agreed to in her IEP revisions of 12/18/09.

According to [REDACTED], the Learning Management System (LMS) is set up to establish dates or deadlines for a whole group or class and can't accommodate individual due dates for individual students. For a student with an IEP or 504 plan,

however, [REDACTED] works with students to make the necessary modifications or accommodations.

For high school students, they are expected to be online an hour a day per class, at least 6 hours per day. [REDACTED] has content area teachers assigned for each class, and students take a minimum of 6 classes per semester. Teachers have Class Connect sessions, virtual open office hours and targeted and individualized instruction for students when needed. Students are expected to go online if there is scheduled session.

[REDACTED] Student Services Administrator at [REDACTED] manages the Special Education program, among others. She doesn't provide direct instruction or develop IEPs, but does provide resources to the special education team. Parents came to her in November, 2009 and February, 2010 with concerns over the occupational therapy evaluation done on student, the manner in which it was conducted, the fact that they weren't notified in advance and weren't present. [REDACTED] brought the concerns to [REDACTED] and asked for a review of Student's file in email dated 11/12/09. (Parents 9, page 4). She then researched and followed up with parents on 2/16/10 (Parents 4, Page 1). In her response she wrote that since the parents had only consented for Student to be evaluated in motor ability, the meeting was only to discuss those services. [REDACTED] informed them that if they had additional concerns they should bring those to the case manager to set up a domain meeting where they could discuss additional concerns and determine if additional testing was necessary.

Parent contacted [REDACTED] again in April 2010, along with several other [REDACTED] staff to get clarification on the extended time policy for assignments. (Parents 5, page 4, 16). [REDACTED] said that for [REDACTED] high schoolers their assignments are due on Sunday of the week they're assigned. Student was provided an extra week on particular assignments.

[REDACTED] social worker for eight years is part of the special education team. She conducts individual, group and classroom group therapy. She participates in evaluations, domain meetings, IEP meetings, and eligibility determinations. [REDACTED] attended the 12/09 domain meeting, finding the social/emotional domain relevant. She completed her social work evaluation on Student 2/5/10 and finalized it on 4/8/10. (SD 76-80).

As part of her evaluation, she interviewed Parent and Student. [REDACTED] found her to have low self-esteem and confidence, and that Student doesn't like having a disability and feels like she doesn't belong. [REDACTED] said that Student does want to make friends, and though she wants to maintain relationships she doesn't have the skills.

At the 6/18/09 IEP meeting, [REDACTED] recommended 30 minutes per month of social work services, for one on one and group services, helping her get acquainted with her classmates and learn social strategies. [REDACTED] recommended another 30 minutes of consult services, and believes 60 minutes total to be appropriate. (SD 102, 112-113). [REDACTED] believes her assessment was valid and reliable. She testified that Student will be in her caseload at the beginning of 2010-2011 school year, and that if the IEP had been completed in April, student could have been on her caseload in as little as ten days after that.

██████████ is the ██████████ Special Education Case Manager where she has been since August, 2009. She organizes and facilitates meetings, evaluations and conferences, and serves as a liaison between ██████████ and ██████████ dealt directly with Student and her family as Student's name came up for reevaluation October 24, 2009. ██████████ contacted the parents regarding consent necessary for the reevaluation and to set a domain meeting, and testified that she reviewed prior IEPs in the Students' file, and was familiar with the IEP dated 3/24/09, where it is noted that Parent has concerns with Student's cognitive functioning and academic progress, especially in mathematics. (SD 27).

██████████ emailed Parent 9/16/09 regarding scheduling a meeting 9/18/09 to discuss Student's three year reevaluation. (Parents 1, page 1). Parent responded that she couldn't attend 9/18 but was available after 9/22. (Parents 1, page 2). ██████████ wanted to continue with the 9/18 date, as she said the team was only meeting to determine what evaluations they were recommending. (Parents 1 page 1). A Consent for Evaluation Assessment Plan was prepared by ██████████, and Motor Abilities was the only domain checked off on the form. (SD 38). Parent signed a consent for evaluation on 10/9/09. (SD 42), and says she understood her consent to be given for whatever evaluations the team decided were necessary.

This testimony is contradicted by both ██████████ and Parent's husband. ██████████ asserts that Parents refused to consent to any domain other than Motor Abilities. ██████████ talked to Student's stepfather on 10/13/09 to determine whether they wanted to set up a domain meeting to address any other concerns. Stepfather said he was unwilling to waive the ten day notice of a meeting and would not accept or deny the meeting. He said he needed to talk to his wife and would let them know. Parents (SD 196).

At the time of the reevaluation, Student was supposed to be receiving 90 minutes per quarter of physical disability itinerant services; however, no one was employed to provide that service. Compensatory services were discussed, and then tabled due to the pending action. ██████████ sent a KMail to Parent 10/1/09 asking for parents to consent to a PT evaluation and for parents to waive the 10 day notice of conference. (Parents 3, page 1). ██████████ wrote "Then, we can schedule a meeting with the whole team, not just the physical disability itinerant, to hear your academic concerns. That way there will not be a lapse in services to Student." On October 9, 2009, parents signed consent for evaluation which was to address motor ability only. ██████████ handwrote "We will schedule an additional meeting to address additional concerns," at the bottom of that document (Parents 9 page 7, SD 42).

Parent expressed her concern over Student's academic performance and cognitive functioning several times, and believes that expressing this concern was tantamount to requesting an evaluation. She believed that expressing her concerns meant she was requesting the case manager schedule an evaluation. She never put her request for an evaluation in writing, and testified she wasn't aware she needed to. Her understanding was she was to bring issues to the case manager and that individual would handle the request. Parent expressed these concerns to the previous case manager last year, who told her to wait for the new school year and the reevaluation. Her concerns were documented in the 2/14/08 IEP as well as the 3/24/09 revision to the IEP (SD 26-27). Parent attended the 3/24/09 meeting, and didn't file any dissent because she wasn't aware she could.

On October 14, 2009, ██████████ sent email to ██████████ Special Services Administrator for ██████████, seeking clarification on what to do if parents weren't consenting to evaluation in other domains though they said they had other concerns. (SD 131). ██████████ responded that if the only assessment that was done was an OT evaluation, that an eligibility determination could not be made. ██████████ and ██████████ both said that usually if the motor ability domain was relevant, it was an indication that other domains were present and should be evaluated. (SD 186) ██████████ stated that even if the team felt that Student didn't have academic issues, the academic domain should be deemed relevant and evaluated to make that determination. (Parents 9, page 1). ██████████ also admitted that parents are not responsible to tell the case manager what domains they want evaluated.

When ██████████ contacted ██████████ to ask her about how to handle the case, ██████████ said it should be handled like any other, including an evaluation of all the domains. ██████████ said that just because the motor ability domain was the only one addressed in the past, this didn't mean it was the only one relevant at this time. (Parent 9).

██████████ assisted in the writing of Student's IEP goals in June, 2010 regarding modifying the curriculum by 50% related to her medical condition, fatigue and difficulty completing tasks. She said that the team agreed on limiting the amount of work Student would do as long as the appropriate topics were covered. ██████████ considered this a significant modification.

██████████ stated that old IEPs are looked at both when considering eligibility and when developing a new IEP. Whether prior goals were appropriate and achieved, and whether student is still exhibiting the issues that led to the creation of the prior goals, accommodations and modifications are considered.

██████████ had a conversation with parents about compensatory services because of the lack of the Physical Disability Itinerary (Parent 9 page 28) but didn't feel she could commit ██████████ at that time, particularly because the parties were in the middle of a due process proceeding on those issues.

On November 4, 2009, ██████████ took Student out of class for an OT evaluation. She "made eye contact" when she came to get Student. She told Student she was going for an OT evaluation. Parents were upset that they were not called about the OT evaluation in advance. ██████████ stated that once a consent is signed, parents don't need to be informed when testing is to be done.

██████████ contracted occupational therapist, was assigned to ██████████ last year. At that time, she evaluated Student for occupational therapy needs. (SD 47-53). She used the ██████████ and the Developmental Test of Motor Integration as her evaluation tools.

During the evaluation, ██████████ found Student was active and attentive, she participated and followed directions. ██████████ found student independent in self care, eating dressing and largely independent in toileting, as well as safe within the school environment, and exhibiting of good judgment. (SD 51) She found Student was able to manage her materials. She determined Student had a mild muscle weakness in her right arm, and mild decrease in hand strength, but adequate movement overall. ██████████

found that Student had weakness in her distal fingers, more right than left, and weakness and fatigue.

Previous accommodations had included using handrails up and down stairs, rest breaks for transitioning or long distances, bathroom breaks and extra time as needed for personal care. It was also noted that if Student were to attend a different school, adult supervision for hygiene may be needed. (SD 49). ██████ testified that it wasn't until later that she found out Student had been upset that she was called out of class for the evaluation, because she never mentioned it to ██████ during their time together.

██████ noted that Student was originally assessed by the Low Incidence Team in December 2000, and received OT for 45 MPW at that time, with a goal of printing simple words legibly. Services continued until 2007, when OT was discontinued. Physical disability itinerant services were to be provided for Student's issues in safety, independent functioning and accessing the school environment.

██████ found that the decrease in hand strength might influence how Student positions her hands rather than create an inability to complete tasks. ██████ found Student's printing is legible, with speed improving when she is knowledgeable or interested. She also found that Student preferred keyboarding, using the first three fingers of the left hand along with her right index finger to type. Because most assignments are completed on the computer, handwriting is not often required. ██████ noted that Student had a significant problem in organizing and managing her schedule, that she was missing assignments, not checking her KMail, and not taking advantage of ways to bring up her grades.

On the Developmental Test of Visual Motor Integration 5th edition, ██████ found Student's results from 2006 to the present re-test were consistent, with scores placing her in the low range of visual perception and very low range on motor (SD 52). She found that she had neither progressed nor lost skill. ██████ noted that the mild decrease in muscle strength remains a factor in skilled writing and possibly endurance (SD 51).

██████ scheduled a November 6, 2009 meeting with parents, originally to discuss the OT's motor ability findings. That day, she cancelled the meeting when the OT was not available; however, the Parent was already in the building. ██████ testified that she may have tried to call the parents that morning to cancel. Parent said ██████ told her the OT evaluated student and determined she didn't need an IEP. Parent, ██████ and ██████ discussed the situation regarding Parents displeasure with the OT evaluation, how Student was removed from class, that parents hadn't consented and weren't present, nor did they know what day Student was to be evaluated. (SD 215). Parent says Student was asked by ██████ to "lie" to her teacher and say she had to use the bathroom in order to leave class for her OT evaluation.

The meeting originally scheduled for 11/6/09 was then rescheduled for 12/11/09. On that day, Parent was on her way out the door when ██████ called her and told her that day's meeting had once again been cancelled and rescheduled for 12/18/09, the last day of the semester. Finally, on 12/18/09, the team met for a domain meeting, which ██████ facilitated. She later returned later when they were revising the 3/24/09 IEP (SD 63-67). A consent for evaluations in several domains including health, social/emotional, academic and general intelligence was signed by parents 12/16/09 in

advance of the 12/18 domain meeting. (SD 54). ██████ testified that even though consent was signed and evaluations were to be completed within 60 days, they weren't done because when a due process request is filed there is a freeze or hold on the evaluations.

When questioned whether Parent concerns regarding academic performance and cognitive function were addressed, ██████ stated no, because those sections were not being revised at that meeting. ██████ stated she took the items that were modified from the previous IEP (SD 31) and listed the modifications and accommodations only for the items that were going to be changed on the new IEP (SD 67). The revisions numbered 1-8 specifically related to the Student's health condition and accommodations needed for that. The revisions to the 3/24/09 IEP expanded on some of the modifications and accommodations Student was receiving, particularly regarding rest breaks, toileting and other self care and safety items.

DECEMBER 18, 2009 MEETING

The 12/18/09 meeting was convened to discuss Student's motor abilities and to discuss other domains as well as to draft some revisions to the 3/24/09 IEP including accommodations and modifications related to Student's health and safety.

██████ discussed motor domains at the 12/18/09 meeting, and read her occupational therapy evaluation, spending about 2 hours on that domain. ██████ said the 12/18 document was considered an interim document because they were specifically focused on safety and medical concerns. (SD 62). ██████ interviewed the parents at the 12/18 meeting and finalized her OT evaluation after that (SD 70). She shared her findings at the 4/23/10 eligibility meeting, and agreed with Student's eligibility categories of Learning Disabled and Other Health Impaired.

██████ testified that allowing a student to type assignments was an appropriate accommodation based on her tendency to fatigue (SD 108-109), that extending the time to complete homework and assignments by 50% was an appropriate accommodation (SD 109), and that modifying the length of assignments themselves by 50% was an appropriate accommodation. Though she recommended 15 minutes per month of service, she admitted it could increase based on how student was doing.

██████ a ██████ occupational therapist attended the 12/18/09 meeting, and has assisted ██████ on the case. ██████ agreed with ██████ and ██████ finding that when motor ability is a concern there is often a cognitive component. ██████ recommended a full evaluation be conducted.

One of the most significant revisions contained in the 12/18/09 IEP included the following: "[Student] will have ability to make up any work assignments or test up to one week past the Sunday @ 11:59 pm CT deadline (one additional week to complete work) without penalty when work is late due to health related condition. When necessary the parent and/or student will request each content area reteach or provide additional instructional resources when the student misses an assignment, test or lesson due to her health condition." (Parent 9, Pages 9-15). Parents continued to express confusion regarding the process to ensure assignments could be submitted late continued into the spring (Parent 5 page 4, 13).

██████████ explained that assignments close Sunday at midnight (Parents 1 page 5). Both ██████████ and ██████████ testified that in order for a class to be reopened, a request form had to be filled out for all students, not just special education students, indicating the reason for the request from a menu of choices. Parents assert they were referred first to the teacher, then to ██████████, then ██████████ then ██████████ then they were directed to fill out the form. Parents stated that until second semester last year, they simply asked the teacher to reopen a class and it was done.

Parent testified she didn't believe the provision allowing Student extra time to complete her assignments (SD 64) was in place for the second half of the 2010 school year, because they had never had to fill out a request form before. ██████████ and ██████████ testified that this form was required of all students who wanted to open a class past the deadline not just Student.

In spite of her disagreement with the process, Parent Kmailed ██████████ submitting the required Late Assignment Cover Sheet several times (Parents 5, page 1-24). The reasons given for a late assignment include computer glitch, assignment closed early, family emergency/illness, 504/IEP indicates modification required, and other.

Several times, Parent's requests to reopen courses were denied (Parents 7,8,9, 16, 17) based on the fact that too much time had passed since the course had closed to reopen it, that Student was to receive a one week extension after the Sunday midnight deadline, and no further. Though parent asserts there was never a time frame given for requesting an extra week, this is not supported either in the hearing testimony or the documentary evidence.

While it states on the IEP revision that Student receives an extra week over and above the extra days all the other Students get, Parent stated that it was agreed that the second week would happen automatically and that a third, nonconsecutive week would be available upon request. I can find no evidence to support this conclusion, however. The IEP revision of 12/18 plainly states that one extra week will be allowed; it is understood to be consecutive. To suggest otherwise would render assignment due dates and deadlines completely meaningless.

██████████ was brought into the room to draft language for the IEP since she knew the software. Parent testified that she asked ██████████ if Student could get an automatic extra week and she said yes. Parent testified she understood this to mean that a second week was automatic, but that we could request a third week. Parent also testified that she didn't believe the third week had to be consecutive to the first two.

After ██████████ left, Parent says that they were instructed to go to another room with the nurse to fill out paperwork. Parents remember that ██████████ came back in with a form she said the parents needed to sign or that Student wouldn't get her IEP, that they could change the IEP without parent consent. Parent testified she thought ██████████ was maliciously interfering with her daughter's IEP and services, but didn't know why she would. Parent stated the nurse told ██████████ that Parents didn't need to sign the form. The principal and other team members returned to the room and ██████████ was called on the phone. ██████████ remembered being at the meeting and on speaker, but not the substance of her conversation. No form was required to be signed, nor was one submitted into evidence.

Certain domains were recommended for testing and evaluation at the 12/18/09 meeting, including areas such as social work, psychological and nursing. (SD 62). The psychological evaluation and results are included herein:

(Parent Exhibit 8)

██████████ Report of Psychological Special Evaluation:
Report dated 4/19/2010. Evaluation conducted 1/29/2010 and 2/26/2010.

Student is a 14 year and 9 month old girl in the 9th grade. She was evaluated using Woodcock Johnson Achievement Test Form A and one subtest from Wechsler Individual Achievement Test, 2nd Edition.

Test Results:

Subtest	Age Equivalence	Grade Equivalence
Letter Word Identification	15.1	9.7
Passage Comprehension	17.10	12.0
Word Attack	29+	16.9+
Applied Problems	10.4	4.9
Numerical Calculations (WIAT 2 nd Ed.)	9.4	3.8-4.2 SS=65 1 st

The evaluator, who was not present at the hearing and did not testify as to her evaluation or the contents of her report found that Students performance on the academic assessments reveals the presence of significant strengths in reading/decoding skills, commensurate with that of someone aged 29 and above and in graduate school at college. Her abilities to analyze written passages as measured by the subtest "passage comprehension" demonstrated the presence of skills commensurate with those of typical high school seniors aged about 17.10 years. On the Letter Word Identification subtest student scored in the mid 9th grade. All together in reading ability Student scored in the average to significantly above average range when compared with her peers.

In math, on the other hand, when asked to solve problems that were read to her, Student was at a late 4th grade equivalence, and age fell to 10.4 years of age. When given examples and asked to calculate the correct answers, Student was at the end of 3rd beginning of 4th grade level, age 9.4 years.

The Psychological Instruments and Techniques used were: Wechsler Abbreviated Scales of Intelligence (WASI); Subtests from the Wechsler Intelligence Scales for Children 4th Edition; Woodcock Johnson Achievement Test Form A (individual subtests); Wechsler Individual Achievement Test 2nd Edition (individual tests); Sentence Completion Test; Thematic Apperception Test (TAT- individual cards selected).

On the WASI, the results were as follows:

IQ Scores	Percentile	90 th % Confidence Interval
Full Scale IQ: 88	19 th	83-95 (range of scores)
Verbal IQ: 97	42 nd	91-103
Performance IQ: 82	12 th	77-89

Individual Subtest Scores:

Subtest	T Score	Age	Scaled Score
Vocabulary	48	13.6	9
Block Design	32	8.6	5
Similarities	48	13.10	9
Matrix Reasoning	44	11.10	8

The psychologist reported that Student had strengths in the area of vocabulary development and abstract verbal reasoning, reflecting age equivalent scores within 9-12 months of her actual chronological age. On the other hand, the subtests measuring abstract visual reasoning skills (block design) and visual analogic reasoning skills (matrix reasoning) were extremely inferior to her expressive verbal reasoning, with manipulation of the blocks extremely difficult for Student.

Student tested in the low average range on visual reasoning and as having a mild cognitive delay on analyzing block designs and manipulating them to match designs in a test booklet. A group of subtests from the WISC 4 was administered with the resulting Working Memory IQ score an 88, within the 21st percentile nationally.

In the Summary and Conclusions, the evaluator notes that Student has a 15 point discrepancy between Verbal and Performance IQ which she finds is significant, showing low average abilities in processing and expressing visually presented information. Student's academic levels measured with Woodcock Johnson and WIAT tests reveal the presence of great strengths in reading and analyzing written passages; but the disparity between her word attack and word identification scores indicate that Student doubts herself when pronouncing new words even though she has excellent phonetic abilities. Student's math abilities, on the other hand, show she is achieving at about the grade 3.8-4.9 level, confirming that her visual reasoning skills aren't well developed despite the presence of strength in verbal reasoning.

The disparity found in this assessment is one of the pieces of evidence used to conclude that Student has a learning disability. Neither side challenged the reliability or validity of the psychological evaluation and recommendations.

APRIL 23, 2010 MEETING

Student had an initial full individual evaluation conducted on 12/2/2000, _____ referenced herein but not submitted into evidence. (SD 85). A consent was obtained 12/16/09, and evaluations were conducted across a variety of domains. A meeting was then convened 4/23/10 to discuss those evaluations and determine Student's eligibility for special education and related services.

Student was evaluated in the areas of Health, Academic Performance, Social/Emotional, General Intelligence, and Motor Abilities. (SD 93-96). Student was found to be progressing at a significantly slower rate than expected of age appropriate peers (SD 97); and was found to have significantly different instructional needs that exceed general education resources in both mathematical calculation and mathematical problem solving. (SD 98). A severe discrepancy was found to exist between student's achievement and ability that is not correctable without special education and related services. (SD 98). Student was determined eligible under the categories of Learning

Disabled and Other Health Impaired. (SD 98). The entire team agreed with that assessment.

JUNE 18, 2010 MEETING

After the 4/23/10 eligibility determination, a meeting was scheduled for 6/11/10 for the purposes of drafting the IEP for Student. That meeting was subsequently rescheduled for one week later and convened 6/18/10. At that meeting, an IEP was developed for Student based on the eligibility categories of Learning Disabled and Other Health Impaired.

Goals were developed in the areas of math, post secondary education, post secondary employment, and social/emotional. (SD 106). Accommodations and modifications were identified for language arts/English/reading, math, biological and physical sciences, social sciences, world language, art, independent functioning, health/medical, social/emotional and non academic. (SD 106, 114).

Modifications and accommodations were developed for Student including reducing the curriculum by 50% and increasing the amount of time Student would have to complete her assignments. (SD 107-118). Student's grading scale was to be lowered by 10 points in all subjects (SD 107-118). Parent requested that the grading scale be modified by 20% and asked that the Hearing Officer order that as a remedy (SD 268, SD 309).

At the 6/18 meeting it was noted that Student has goals of going to college, and is interested in fashion design and photography. She also was described as withdrawn, with fragile self-esteem, embarrassed when she gets questioned about her disability, and assumes people don't like her because of her disability. She was noted to be lacking in confidence when presented with challenging tasks and frustrated when unable to complete a task. She tends to fatigue easily due to her medical concerns.

Goals developed include collaboration in the Social/Emotional area with social worker collaborating with both the general education and special education teacher 15 minutes monthly. (SD 112-113). Under Health/Medical, the nurse will collaborate with the general education teacher, school staff, parents and student 15 minutes monthly regarding student health issues. Accommodations and modifications include, among other things, that Student will be allowed to make up work missed due to time used to manage spina bifida related problems, and will not be penalized for medical appointment absences. (SD 108). Additionally, the IEP provides that school will provide modified PE, though it is unclear as to why since CVCS doesn't provide PE for its students.

Under Independent Functioning, the OT will collaborate/consult with special education teacher 15 minutes monthly to consider types of assignments and most efficient/effective means to complete work; with the parents 15 minutes monthly on types of assignments and the most efficient/effective means to complete work, writing vs. keyboarding, low technology and material set up to prevent fatigue. Accommodations and modifications include allowing student to type assignments, access to elevator, computer/keyboard, alternatives for note taking, graph paper to align math problems and a scribe. (SD 108-109)

Under Mathematics, the special education teacher will consult with general education teacher 30 minutes monthly. Classroom accommodations and modifications are to give verbal directions in clearly stated steps, ask student to summarize information to check for understanding, provide extra examples when teaching new vocabulary/concepts, extend time on task for completion of homework by 50%, explain directions and give concrete examples, allow calculator and computer, ask student to repeat directions back for understanding, provide motivation and verbal rewards on a daily basis. Parent training on learning coach and mentor training program certification.

In mathematics, language arts/English/reading, biology and physical sciences, social sciences, world languages and art, accommodations and modifications include modifying the length of assignments by 50%. (SD 109). For assessments in Mathematics, Student will have modifications and accommodations including small group, oral directions, marking answers in test booklet, computer use, extend time by 50% and provide a scribe for lengthy written assessments. For District and State assessments, Student will receive accommodations/modifications in language arts/English/reading, mathematics, biological and physical sciences, and social sciences. (SD 111).

In terms of direct service, Student will receive social work services monthly, with the following goals: to identify and discuss 4 social strategies for increasing appropriate social interaction with peers, with quarterly benchmarks to check progress. (SD 112)

Under math, present level of achievement and performance, Student is able to add, subtract and complete basic multiplication problems. She has difficulty with complex and multi step multiplication and division problems. She has some understanding of fractions but has difficulty performing operations involving fractions. The annual goal in math is that Student will analyze and solve problems using manipulatives and visuals and requiring addition, subtraction, multiplication and division with and without the use of variables with 75% with quarterly benchmarks to check progress. (SD 114). Her goal under Post Secondary Education/Training, is to research college and university programs in her areas of interest and keep a portfolio of information, researching colleges offering programs in photography and fashion, and researching the admission criteria of three colleges offering programs in her areas of interest. (SD 115). Her transition goal is to utilize the internet to research careers in her areas of interest and develop a portfolio, researching three career possibilities in the fashion industry, three careers in photography, and the skills necessary to become a personal assistant. (SD 116).

In direct service minutes, Student will receive 8 mpw social work, 150 mpw math in regular class and 30 mpw in a separate class. She will also receive consult services with the social worker, nurse, general and special education teachers, parents and OT, resulting in removal from class 3% of the time. (SD 117).

Additionally, Student will have a modified grading criteria in mathematics, language arts/reading/English, biology and physical sciences, social sciences, world language, and art, with a grading scale lowered by 10 points. (SD 119). She will be promoted based on completion of the 50% workload. Her math grade will be determined based on mastery of the IEP goals. She will be required to pass a modified Constitution test, to earn 24 credits to graduate and to complete 40 service learning hours, as well as to complete a classroom Driver Education course. (Parents 13, Page 18)

Student did not receive the services of a Physical Disability Itinerant due to unavailable resources even though this was provided for in her 2/14/08 and 3/24/09 IEP and revision. Compensatory education paperwork was brought to the 6/18/10 meeting but it was noted that this would be addressed in the context of the due process proceeding. ((SD 125-127). Student also had a referral for assistive technology filled out at the 6/18/10 meeting. As of the due process hearing, no assistive technology evaluation had been completed.

Conclusions of Law:

Determining whether a student has received a FAPE begins with the two-prong analysis set out in *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) ("*Rowley*"). First, the district must comply with IDEA's statutory procedures; second, it must develop an IEP reasonably calculated to enable the student to benefit from the special education and related services.

Once the school district has met these two requirements, the courts cannot require more; the purpose of the IDEA is to 'open the door of public education' to [disabled] children, not to educate a [disabled] child to her highest potential. *Board of Ed. Of Murphysboro Community Unit School Dist. No. 186 v. Illinois State Board of Educ.* 41 F.3d 1162,1166. (7th Cir. 1994).

The school districts are only required to provide a FAPE to students who are determined to have disabilities rendering them eligible for special education and related services. Some factors courts examine in deciding whether a student's disabilities warrant special education are: 1) Academic progress, *Alvin Independent Sch. Dist. v. A.D.*, 503 F.3d at 384; 2) Whether student is at or below grade level; *Hood Encinitas Sch. Dist.*, 486 F. 3d at 1106-1109; 3) Whether the student is performing as an average student vis a vis his classmates, *Roericus L. v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 254 (7th Cir. 1996); 4. Whether the student has difficulty learning in class on a consistent basis, *Williamson Cty. Bd. of Ed. v. C.K.*, 52 IDELR 40 (M.D. Tenn. 2009).

Under IDEA and corresponding State Law, students with disabilities have the right to a free appropriate public education (FAPE). 20 USC 1400 et seq. FAPE means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's IEP. 20 USC 1401(9).

Compliance with Procedural Requirements

One of the two prongs of *Rowley* requires that LEAs comply with statutory procedural requirements. These include, among other things, written notice and participation requirements. According to 23 Ill. Adm. Code 226.520, "The written notice a school district is required to provide to a parent prior to a proposal or refusal to initiate or change the identification, evaluation, or educational placement of, or the provision of FAPE to, a child shall conform to the requirements of 34 CFR 300.503. That notice must be provided whenever the public agency (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) Refuses to initiate or change the identification, evaluation, or

educational placement of the child or the provision of FAPE to the child. (Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1))

According to 23 Ill. Adm. Code 226.530, with respect to parents' participation in meetings, school districts shall conform to the requirements of 34 CFR 300.322 and 300.501. For purposes of 34 CFR 300.322(a)(1), "notifying parents of the meeting early enough to ensure that they will have an opportunity to attend" shall mean notification no later than ten days prior to the proposed date of the meeting. In addition, the district shall take whatever action is necessary to facilitate the parent's understanding of and participation in the proceedings at a meeting, including arranging for and covering the expense of an interpreter for parents who are deaf or whose native language is other than English. (Source: Amended at 31 Ill. Reg. 9915, effective June 28, 2007)

It is clear that adequate parental notice, involvement and participation in planning the student's IEP are necessary to fulfill procedural requirements. *Alexis v. Bd. of Educ. For Baltimore Cnty. Pub. Sch.*, 40 IDELR 7 (Md. 2003). It is undisputed that minor procedural flaws or technical violations do not automatically require a finding that a district has denied the student a FAPE. *Heather S. v. State of Wise*, 125 F.3d 1045, 46 (7th Cir. 1997).

In this case, notice of meetings most often came less than ten days prior to the meeting. Often, however, parents waived the notice and participated, negating the failure to notify claim. What is more troubling, however, is the second part of the requirement, which is that the "district is also required to take whatever action is necessary to facilitate the parents 'understanding of and participation in' the proceedings at a meeting." (*infra*).

It is clear from testimony elicited at hearing that most of the time the parents didn't know if they were at an IEP meeting, a domain meeting, an evaluation, assessment or something else, much less the purpose of that meeting. It is equally obvious that parent was not clear on the procedure for requesting an evaluation. And, yet, it is also clear that the District attempted to address parent's academic concerns when [REDACTED] sent a KMail on 10/1/09 requesting that parents waive the 10 day notice for the PT and then convene the entire team to discuss academic concerns.

From the parties' posture at hearing, it is clear that hostilities got in the way of reaching agreement on how best to provide service to this Student. That being said, it was incumbent on the District to ensure that parents could understand and participate in the proceedings, and this, by and large, they did not do. While one might argue that a parent who has had a child in special education for a decade should be cognizant of the lingo and the procedures, I find parent's testimony that she believed she was requesting an evaluation when she raised concerns about her daughter's academic performance and cognitive functioning to the IEP team to be persuasive, notwithstanding the District's testimony that Parents consented to the motor ability only evaluation.

Failure to Evaluate

Under IDEA a district must assess a student in all areas of suspected disability using a variety of assessment tools and strategies to gather functional developmental and academic information to determine if the student has a disability. 20 USC 1414(b)(2)(A); 20 USC 1414(b)(3)(B).

A district must ensure that it recognizes a student's needs and completes a full and individualized evaluation. *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 36 IDELR 153 (N.D. Ill. 2002). The failure to fully evaluate a student leads to inadequate programming. *Bd. of Educ. of Oak Park and River Forest High Sch. Dist. No. 200 v. Kelly E.*, 21 F.Supp. 2d 862, 875 (N.D.Ill. 1998).

In *Kelly E.*, the court held that the failure of the school district to respond to the MDC recommendation that psychological testing be conducted to better assess Kelly's possible learning disability was not a "de minimis procedural violation" but a denial of FAPE.

In the present case, student has had a significant disability from birth—spina bifida and hydrocephalus, requiring the insertion of a shunt. She received early intervention services, and has had IEPs since the year 2000 under the eligibility category of Physical Disability. No domain other than motor appears to have been found relevant since then.

What is clear is that despite consistently failing grades, and a clear recognition in the IEP summary sheet from the 2/14/08 IEP that Student had processing difficulties and a host of other issues is that student should have been evaluated for the presence of a learning disability or other disability. This is especially so given the fact that when pressed to evaluate her, District evaluators in fact did identify student as having a learning disability. An examination of the record shows a pattern of failing grades, and worsening grades over time, one of the strong indicators that learning disability has been present and undiagnosed for some time. And even if the failing grades were not indicative of the presence of a learning disability, at the very least they should have triggered an examination into what was going on with this Student so a more appropriate IEP could be developed for her.

While evaluations were begun in November, 2009, when the OT evaluation was conducted, it took until April for the social work, psychological, nursing and academic evaluations to be conducted. These evaluations are a beginning, but they are not enough. Student needs to have a complete set of evaluations done to determine if there are needs in assistive technology, attention and executive functioning, functional/behavioral vision, and vocational areas of concern.

An IEP Reasonably Calculated to Confer Educational Benefit

The second prong of Rowley provides that the IEP developed for a child with disabilities must be "reasonably calculated to confer educational benefit." *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). The IEP should include the following information: (1) a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum; (2) annual goals and short term objectives for improvements; (3) a description of the specifically designed instruction and services that will enable the child to meet those objectives; (4) a statement of how the child's progress toward the annual goals will be measured." *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 36 IDELR 153 (N.D. Ill. 2002).

An IEP must contain specific goals, and the goals and objectives must provide measurable criteria against which the student's achievement can be measured. *Independent Sch. Dist. No. 701, Hibbing Pub. Sch. v. J.T.*, 45 IDELR 92 (Minn. 2006). Additionally, the student must receive more than a nominal benefit from specialized instruction and related services. *T.H. v. Bd. of Educ. of Palatine Comm. Consol. Sch. Dist.*, 55 F. Supp. 830 (N.D. Ill. 1999). *Rowley* does not mean that a de minimis benefit is sufficient. *M.C. v. Cent. Regional Sch. Dist.*, 81 F.3d 389,393 (3rd Cir. 1996).

In accordance with *Rowley*, the regulations governing IDEA require that IEPs should be based on the child's unique needs and not on the child's disability. 34 CFR 300.300(a)(3)(ii). A student's intellectual potential must be considered in determining whether the student benefited from his educational program. *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 2002 WL 433061 (N.D. Ill. 2002).

In *Kevin T.*, the court said that to determine if Kevin's IEPs were reasonably calculated to confer sufficient educational benefits, it must assess Kevin's intellectual potential, given his disability and then determine the academic progress Kevin made under the IEPs designed and implemented by the district. Though Kevin possessed average intellectual potential, his scores decreased on IQ and academic achievement from 1990 to 1999. Despite knowing of the decrease, the district did not review or revise his IEPs to address the academic difficulties.

Similarly, in *Nein*, 95 F. Supp 2d at 972, the student's IQ score dropped twenty points in three years but the district didn't make any changes to the IEP to address the change. The court held "that where a child with a severe learning disability but significant potential makes no transferable progress in three years and where there was no indication the public school was ready and able to change direction, the limit of due weight and judicial deference to school authorities have been exceeded." *Id* at 975.

In *Board of Education of Oak Park & River Forest High School District No. 200*, 21 F. Supp. 2d at 877, the court found the student's poor academic record indicated that the educational benefit she was receiving was minimal. Student had failed half her classes and except for passing several pass/fail classes and making one B she received Ds in the remaining half. The court agreed that the district failed to institute a "systematic and comprehensive plan to deal with the student's reading difficulties" and that "such a failure was manifested by the absence of any goals or objectives that specifically addressed these reading deficits." *Id.*

Similarly, in the present case, student has seen her grades plummet over the years from C to D and to F. She failed all her substantive coursework for the 2009-2010 school year. In spite of this continued failure, the only services provided were physical disability itinerant consult services for the last couple of years, and limited occupational therapy before that. This cannot be what the *Rowley* court had in mind when they said the IEP should be reasonably calculated to confer an educational benefit, when in fact Student received no benefit whatsoever.

Least Restrictive Environment

The least restrictive environment ("LRE") provision provides that "To the maximum extent appropriate, children with disabilities, including children in public or

private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Beth B. v. Mark Van Clay*, 282 F.3d 493, 496 (7th Cir. 2002). *see also Kerry M. v. Manhattan School District #114*, 2006 WL 2862118 (N.D. Ill. 2006); *Bd. of Educ. of LaGrange Sch. Dist. v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915-16 (7th Cir. 1999)); *Bd. Of Educ. Of Chicago v. Ill. State Bd. Of Educ.* 46 IDELR 219 (ND IL 2006).

The LRE is the one that allows the disabled child to be educated with her nondisabled peers, known as mainstreaming, to the greatest extent appropriate. *Beth B. v. Mark Van Clay* 282 F.3rd 493, 496 (7th Cir. 2002).; *Casey K. v. St. Anne Comm. High School District 302*, 46 IDELR 102 (DC Central Dist. IL 2006).

The LRE requirement shows Congress' strong preference in favor of mainstreaming, but does not require, or even suggest, doing so when the regular classroom setting provides an unsatisfactory education. *Beth B.* 282 F.3d at 497. A disabled child may be removed from the regular classroom when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.* The IDEA requires mainstreaming to the maximum extent appropriate, not the maximum extent possible. *Id.*

Student in this case is at a virtual charter school, being educated under the tutelage of her mother and 23 year old sister. While neither parents nor district formally challenged the placement in this matter, parent admitted that she would consider a different placement for Student. I am not convinced that given Student's learning disabilities, social difficulties and the fact that she appears to be left to her own devices for a good portion of the day due to her parent's work schedule as well as other concerns, that this current placement at [REDACTED] is the least restrictive environment for Student, particularly given her total lack of progress and achievement.

Remedies

One of the remedies requested by student, and which a hearing officer is empowered to provide is compensatory education. "Compensatory education" is a "legal term used to describe future educational services" which courts award to a disabled student under the IDEA "for the school district's failure to provide a FAPE in the past." *See Kevin T.*, *infra*.

The compensatory education award ""should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." *Reid v. Dist. of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005). Designing [the child's] remedy will require a fact-specific exercise of discretion. *Id.* at 524.

When an IEP fails to confer some (i.e. more than de minimis) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by IDEA. It seems clear, therefore, that the right to compensatory education should accrue

from the point that the school district knows or should know of the IEPs failure. *M.C. and G.C. v. Central Regional School District*, 81 F.3rd 389, 397 (3rd Cir. 1996). This student should have been found eligible for special education as an individual with learning disabilities as early as February 23, 2008; her right to compensatory education accrues from that date.

Parent requested as a remedy that this hearing officer order implementation of the 6/18/10 IEP retroactive to the beginning of the 2009 school year and change the grades for the year to reflect grading on 50% of the curriculum and a grading scale lowered by 20%. Parent also requested that I credit Student with 20 service learning hours for the 2009-2010 school years and reduce the service learning hour requirements by 50%.

I find that neither of these are appropriate relief in this case. It is impossible to take a grade of F, reduce the curriculum in half and come up with the grade student might have gotten if she only had to master half the curriculum. On the request to credit and/or waive the service learning hours, I don't find this an appropriate remedy, either. Service learning will give the Student the opportunity to identify an issue of interest to her, to engage with a group or organization working on that issue, and to have a positive impact. This is likely to improve her social skills, increase her circle of friends, and improve her self-confidence and self-esteem. Further, it will provide her with skills that will help her transition from high school to postsecondary education and in time, a life as an independent young woman.

It is Ordered That:

1. [REDACTED] shall conduct independent educational evaluations in the areas of assistive technology, executive functioning and attention deficits, functional/behavioral vision assessment, and a comprehensive vocational assessment. Such evaluations must be completed within 30 calendar days of this order. Parents are ordered to provide all necessary consents to effectuate these evaluations.
2. [REDACTED] shall convene a meeting to review the results of these evaluations, and to determine if [REDACTED] is the LRE for student given her learning disabilities and other challenges. If it determines [REDACTED] is not the LRE, [REDACTED] is directed to consider a range of placements including, but not limited to, therapeutic day school. This meeting shall be convened within 45 calendar days of the date of this order.
3. [REDACTED] shall provide Student with adapted physical education in settings with both disabled and nondisabled peers and transportation services necessary to participate from the beginning of the 2010-2011 school year.
7. [REDACTED] shall provide compensatory education to Student for the loss of FAPE for the last two years as follows:
 - a. Tutoring two hours per week after regular school hours by a certified special education teacher qualified to teach students with learning disabilities for the next two years;
 - b. An additional 30 mpw social work services for one year to increase student's self-confidence, self-esteem and socialization skills;
 - c. Peer counseling, 30 minutes per week individual and 60 minutes per month group, and transportation services to attend such sessions as required for one year. Appropriate peer counseling providers to be

identified in consultation with social worker and other appropriate members of IEP team.

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 the Illinois State Board of Education. After a decision is issued, the hearing officer may not make substantive changes to the decision. The right to request such clarification does not permit a party to request reconsideration of the decision itself, and the hearing officer is not authorized to entertain a request for reconsideration.

Right to File Civil Action

This decision is binding on the parties unless a civil action is timely commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

The undersigned Hearing Officer certifies that she served copies of the aforesaid Decision and Order upon Parents and District, through counsel, and the Illinois State Board of Education at their stated addresses by depositing same with the United States Postal Service at Chicago, IL via certified mail, with postage prepaid before 5 p.m. on September 4, 2010.

Dated this 4th day of September, 2010


LINDA MASTANDREA
HEARING OFFICER

CERTIFICATE AND AFFIDAVIT OF DELIVERY BY EMAIL

The undersigned hereby certifies that the attached Order was delivered via email to the parties at the addresses listed herein on September 4, 2010:



Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001

Linda Mastandrea

Linda Mastandrea
Due Process Hearing Officer
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lindalmastandrea@aol.com