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SPECIAL EDUCATION SERVICES

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

In the Matter of a Special Education Due Process Appeal Between: [redacted] ("[redacted]") By [redacted] Parents, [redacted] And [redacted] ("District"), Local Education Agency ("LEA")	ISBE Case No. 2012-0020

DECISION AND ORDER

[redacted] Hearing Officer:

This matter is before the undersigned for a Due Process Hearing concerning the Parents' request that [redacted] be found eligible for a special education program and they seek placement at [redacted]. They also request they be awarded reimbursement of expenses. The Hearing Officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02a *et seq.*, 34 C.F.R. 300.507 *et seq.*, 23 Ill. Admin. Code 226.600 *et seq.*, and the Individuals with Disabilities Education Improvement Act, 20 U.S.C. 1400 *et seq.*, ("IDEA"). The parties were informed of their rights under 105 ILCS 5/14-8.02a.(g.), 34 C.F.R. 509, and 23 Ill. Admin. Code 226 Subpart G.

PROCEDURAL HISTORY

The Parents filed a Due Process Hearing Complaint with the District on July 14, 2011. The Hearing Officer received notice of his appointment on July 28, 2011. The Hearing Officer

issued a Preliminary Scheduling Order on August 2, 2011. The parties decided they would meet at a resolution session on August 11, 2011. After this effort was successful, the Parents withdrew their Complaint. However, on August 15, 2011 they rescinded their withdrawal and reinstated the Complaint. On October 21, 2011 the Parents filed an Amended Due Process Complaint. After mediation was conducted on November 10, 2011 the Parents rejected the District's proposed Agreement. It was agreed by both sides that a Pre-Hearing Conference would be held on December 2, 2011. The Pre-Hearing Conference was held on that date, and the Hearing Officer sent the parties a Pre-Hearing Conference Report. With the agreement of both parties, the Hearing was scheduled for January 12, 13 and 30, 2012. Both parties submitted educational histories and pre-hearing statements. In addition, each party submitted lists of documents and witnesses. Upon agreement of the parties, the evidentiary hearing was conducted on the above dates in [redacted] Illinois. At the hearing, the Parents were represented by attorney [redacted] and the District was represented by attorney [redacted] Both parties submitted post-hearing statements, and the Hearing Officer received the last brief with exhibits on February 20, 2012.

BACKGROUND FACTS

[redacted] was born on [redacted] and [redacted] has attended school in [redacted] Illinois which is a small community northwest of [redacted] Illinois. Throughout elementary school, [redacted] was an average to above average student. [redacted] usually received A's and B's in [redacted] classes. [redacted] standardized test scores also revealed average to above average scores.

In November 2008, [redacted] was diagnosed with juvenile idiopathic arthritis. [redacted] takes prescribed medications to treat [redacted] condition, and [redacted] sometimes incurs side effects of nausea

and headaches after taking medications. When [redacted] arthritis flares up, it causes [redacted] to experience pain and fatigue and difficulty performing certain tasks.

[redacted] was [redacted] years old during [redacted] grade school year in [redacted] On February 22, 2010 [redacted] Parents requested a Section 504 Plan be put in place at school to give [redacted] accommodations for [redacted] arthritis. In response to this request, the District convened an Individualized Education Program ("IEP") meeting on March 15, 2010, and [redacted] was found eligible for special education under the category of Other Health Impairment ("OHI"). An IEP was developed which listed several accommodations for [redacted] when [redacted] experienced a flare up of [redacted] arthritis and [redacted] was given 20 minutes per week of consult special education. One of [redacted] teachers, [redacted] obtained a laptop computer for [redacted] use when [redacted] was having difficulty using writing instruments. [redacted] was also allowed to stay on one floor in [redacted] of [redacted] classroom to rest when [redacted] was having a flare up so that [redacted] did not have to climb stairs to reach classrooms on the second floor. [redacted] stayed in these classrooms on a few occasions.

As time progressed, [redacted] experienced negative reactions from certain students and a teacher because of [redacted] accommodations. [redacted] felt different than the other students because of [redacted] accommodations, and [redacted] thought [redacted] was made fun of for receiving special treatment. [redacted] also encountered other problems.

On January 27, 2011 [redacted] had an episode at school where [redacted] fainted and was thought to have experienced a "panic" attack. In February 2011 [redacted] had an occurrence at home where [redacted] cut [redacted] wrists. [redacted] did not seek medical help for this incident. In March 2011 [redacted] had an incident where [redacted] discovered another student wrote about [redacted] in that student's notebook. [redacted] proceeded to bring this incident to the attention of the school staff which responded with coping strategies.

On March 17, 2011 [redacted] also had an incident in the community in which [redacted] an [redacted] family were involved in an altercation with another student and [redacted] family. Thereafter, a "Stalking No Contact Order" was entered in a legal proceeding against [redacted] which in part stated [redacted] "may go to [redacted] schools for school purposes only but may not approach protected parties." (Dist. Ex. 4) The school had to keep [redacted] and the othe[redacted] apart as much as possible.

On March 22, 2011 [redacted] and [redacted] mother attended a regular District Board of Education meeting. [redacted] mother discussed home schooling [redacted] at the closed session. Superintendent [redacted] and [redacted] mother agreed that [redacted] would receive homebound tutoring services for 10 hours a week for the remainder of the school year. On April 18, 2011 the IEP team met and agreed to change [redacted]s placement to a homebound instruction program due to a "problematic environment" at school.

After [redacted]s parents filed for Due Process in July, 2011, a domain meeting was held on August 19, 2011. An IEP meeting was also held for the 2011-2012 school year until evaluations were completed. The District contemplated that [redacted] would have a slow transition back to [redacted] School. The Parents rejected the IEP and requested a stay put placement in the homebound instruction program.

Evaluations were conducted, and on September 15, 2011 the IEP team met to consider the evaluations and [redacted]s eligibility for special education services for [redacted] grade school year. The team determined [redacted] met criteria for OHI and Emotional Disturbance ("ED") disabilities, but it found [redacted] was no longer eligible for special education services since [redacted] was receiving good grades and [redacted] did not require specially designed instruction to meet her physical or emotional needs. The team decided to meet on October 6, 2011 to develop a 504 Plan to

implement recommended accommodations and a transition plan for her return to [redacted] School.

Meanwhile, the District contacted [redacted] School District and asked if it would accept a student with a 504 Plan or IEP under a serving school agreement. [redacted] was unwilling to do that, but it was willing to enroll an out-of-district student. [redacted] was approached because its [redacted] school is in a one-story building and [redacted] had expressed interest in attending [redacted]. An unsuccessful mediation session was conducted on November 10, 2011. The meeting to consider the 504 Plan was rescheduled and eventually held on December 16, 2011. The 504 Plan listed numerous accommodations for [redacted] and it included a placement at [redacted] School [redacted], a nearby [redacted] school that has an elevator in its building. The Parents rejected the proposed placement at [redacted]. On January 9, 2012 the Parents unilaterally enrolled [redacted] at [redacted] to begin school on January 10, 2012.

POSITIONS OF THE PARTIES

Parents:

The Parents contend the District denied [redacted] a free and appropriate public education ("FAPE") in several ways. They claim the District committed procedural and substantive violations of the provisions of IDEA in the way the District provided [redacted] education after February 2010. The Parents maintain the IEP team originally failed to find [redacted] eligible for special education under the ED category, and they claim the IEP team was wrong when it found [redacted] ineligible for special education at the September 15, 2011 meeting. They also argue the District denied [redacted] proper placement in a small, one-story building like [redacted]

District:

The District denies it committed procedural and substantive violations of the requirements of IDEA. It contends it responded to [redacted]s needs by agreeing to include multiple accommodations in [redacted]s initial IEP and a homebound instruction program in the second IEP. It points out the IEP team at the September 15, 2011 meeting agreed [redacted] met the criteria for OHI and ED disabilities, and it claims the IEP team correctly found [redacted] education was not adversely effected by her disabilities. The District also contends [redacted]s proper placement is at [redacted] School which is a school that has an elevator, and it points out this placement is included in the 504 Plan that was developed on December 16, 2011.

ISSUE

Did the District's actions regarding [redacted]s education constitute violations of IDEA; and if they did, what relief is appropriate?

DISCUSSION, CONCLUSION OF LAW AND DECISION

As an initial matter, it is noted that the Parents' Amended Complaint lists issues that pertain to IDEA, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act, 42 U.S.C. § 12131. The Hearing Officer's jurisdiction is limited to matters that pertain to IDEA as they are listed in the Amended Complaint for a Due Process Hearing. This decision discusses the pertinent issues as they relate to IDEA.

Under Illinois law, the burden of proof is on the school district in a due process hearing to show by a preponderance of evidence that it provided or offered the student a free and appropriate public education ("FAPE") in the least restrictive environment, consistent with procedural safeguards and in accordance with an individualized education program. 105 ILCS

5/14-8.02(g-55). However as the party filing the Due Process Hearing Complaint, the Parents bear the burden of persuasion on the issues in the proceeding. Schaeffer v. Weast, 546 U.S. 49, 57-58 (2005).

Resolution of this dispute begins with consideration of the two-part inquiry for determining FAPE that is set forth in Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982): "First, (whether) the District complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" The District must identify [redacted] needs in light of her disabilities and utilize instruction and related services in an appropriate environment to meet those needs. Sch. Committee of the Town of Burlington, MA. v. Department of Educ. of Mass., 471 U.S. 359, 368, 105 Sup. Ct. 1996, 2002 (1985).

The Parents contend deficiencies occurred in the IEP process, and they claim these inadequacies denied [redacted] the opportunity to obtained FAPE. In resolving this matter, several factors must be considered. First, were procedural violations committed by the District? And second, did [redacted]s IEPs follow Rowley's requirement that they be reasonably calculated to confer educational benefit to the student? 458 U.S. 176, 206-207 (1982). In this case [redacted] had three IEPs. The first occurred on March 15, 2010 when [redacted] received formal accommodations ("March 2010 IEP"). The second occurred on April 18, 2011 when [redacted] was placed on homebound instruction ("April 2011 IEP"). The third occurred on September 15, 2011 when [redacted] was found ineligible for special education ("September 2011 IEP").

1) Procedural Issues

A) Failure to conduct an occupational therapy and physical therapy evaluation in the March 2010 and April 2011 IEPs.

The District had notice o[redacted] arthritic condition since at least November 2008 when school nurse [redacted] sent notice of that fact to [redacted]s teachers. (Dist. Ex. 1). The District received a February 26, 2010 letter from [redacted] Hospital in [redacted] that recommended accommodations in [redacted]s school program. The March 2010 IEP included a list of accommodations but not evaluations for physical therapy ("PT") or occupational therapy ("OT"). The District had evidence [redacted]s physical condition affected [redacted] education. It was not appropriate for the District to fail to conduct these evaluations for this IEP.

The District received a February 15, 2011 worksheet from [redacted] hospital (Jt. Ex. 11) that recommended "Physical and Occupational Therapist evaluations" and an IEP that includes "OT and PT." When the April 2011 IEP was developed it was composed without the benefit of PT or OT evaluations. The District relied on existing accommodations, but it did not determine the effectiveness of these services. It was not appropriate to fail to conduct these evaluations. 34 CFR 300.304 (c)(4) and (6).

B) Failure to conduct a social development evaluation.

The District was aware of [redacted]s behavior incidents in the first three months of 2011, including "panic" attack, cut wrists, classmate harassment, and a fight in the community (as discussed above). However, it did not conduct a social development evaluation for April 2011 IEP. The District relied on informal counseling given to [redacted] but it did not conduct a formal evaluation. It was inappropriate not to conduct the social work evaluation.

C) Failure to include school nurse at IEP meetings.

[redacted] was aware of [redacted]s medical condition and that [redacted] was taking several medications to trea[redacted] arthritis. At the March 2010 IEP meeting, team members discussed and selected accommodations to respond to [redacted]s condition without [redacted] attendance. Nor di[redacted] attend the April 2011 IEP conference that was held after the District received the February 15, 2011 worksheet of recommended accommodations from [redacted] Hospital. The District points out [redacted] attended the September 2011 IEP meeting. However, [redacted]s medical condition was as important for the first two IEP meetings as it was for the September 2011 meeting. It was inappropriate for [redacted], or someone in [redacted] capacity, not to attend the first two IEP meetings in whic[redacted] medical condition played an important role in the decisions made to provide her an educational program.

D) Failure to conduct adaptive technology evaluations.

The District was aware of [redacted]'s problems with using writing instruments, but it did not conduct an evaluation to assess this problem. A teacher obtained a laptop computer for [redacted]s use, but no formal evaluation was performed. It was inappropriate to fail to conduct an assistive technology evaluation when available information showed that it was necessary.

Procedural problems do not necessarily result in a loss of FAPE. 34 CFR § 300.513(a)(2)(i and iii) provide that a violation of FAPE can be caused by procedural violations "if they impede a child's right to FAPE" or "caused a deprivation of education benefit." The failure to perform the evaluations mentioned above is significant because the IEPs did not benefit from the findings of these evaluations. The IEPs developed educational programs that did not fully include responses to [redacted]s needs. The compound effect of the absence of these evaluations contributed to a deprivation of educational benefit.

2) Substantive Issues

A) The Accommodation to go to an Alternative Classroom when [redacted] was having physical problems (March 2010 IEP).

When [redacted] had a flare-up with [redacted] arthriti[redacted] could go to [redacted] o[redacted] [redacted] classroom for part of the school day and [redacted] would ge[redacted] class work from teachers to complete in the alternative classroom. The Parents claim this arrangement caused [redacted] to miss instruction and denied [redacted] a FAPE. However, the record reveals [redacted] only used this accommodation a few times each semester. This accommodation helped [redacted] avoid using stairs whe[redacted] arthritis flared-up. The Parents have not proven this accommodation resulted in a loss of educational benefit.

B) Claims of Harassment and Bullying at School.

The record shows that [redacted] was subject to some harassment at school because of accommodations for [redacted] disability. However, this mistreatment was an occasional experience and it did not prevent [redacted] from attending school or receiving instruction i[redacted] class. The Parents rely on the case of Greenbush School Community v. Mr. and Mrs. K., 949 F.Supp. 934 (D.C. Maine 1996) for the proposition that harassment may require a student to be placed in another school setting. However, the Parents have not shown the harassment [redacted] endured was sufficiently severe or pervasive to preven[redacted] from receiving an education benefit. Additionally, school staff responded to incidents [redacted] reported to them.

C) Homebound Instruction Program.

The District provided [redacted] with homebound tutoring services for the last quarter of the 2010-2011 school year. [redacted] received 10 hours of 1:1 tutoring each week during that period. [redacted] received assignments from [redacted] classroom teachers and took tests on the material assigned by

the teachers. The Parents and District agreed to this placement arrangement after [redacted] and [redacted] mother appeared before the [redacted] on [redacted] This placement was formalized in the April 8, 2011 IEP where it was recorded that placement was due to a "problematic environment." At this time, [redacted] was a special education student with a primary disability of OHI who was attending general education classes with accommodations.

As a special education student, [redacted] is to receive an educational program in the least restrictive environment with removal from the regular education environment occurring only when the severity of [redacted] disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A). The evidence shows after the March 17, 2011 altercation with another student's family, [redacted] and [redacted] mother approached the District and asked for home-based instruction. The District and IEP team complied with the Parents' wishes. Homebound instruction is not [redacted]s least restrictive environment. However, it is the placement requested by the family. Considering the circumstances of this placement, it cannot be concluded the District violated the requirements of FAPE in arranging homebound instruction.

The participant section of the April 2011 IEP shows that [redacted] [redacted] mother and the family's advocate attended the April 18, 2011 IEP meeting where the participants agreed to a homebound instruction program for [redacted] The IEP document does not show any opposition to this placement. Nor does it contain a parent statement objecting to the placement determination. The Parents have not shown that receiving a placement they sought denies [redacted] an educational benefit.

Likewise, the same reasoning applies to [redacted]s homebound instruction placement in the fall of 2011. On August 19, 2011 [redacted]s Parents invoked a stay put placement so that [redacted]

would continue homebound tutoring for that term until the termination of the due process proceeding. This placement was selected by [redacted]s Parents by exercising their rights in a due process hearing. The District cannot be held accountable for this restrictive placement.

D) Homebound Program's effect on Extra-Curricular Activities.

The Parent argues the District violated the provisions of 34 CFR 300.117 which provides "each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child." However, the record shows the District was following the terms of the "Stalking No Contact Order" which required [redacted] to stay 300 feet away from the protected persons. The Parents have not proven the District's actions were pretextual or not in accordance with the Court Order.

E) [redacted]s September 15, 2011 IEP was not appropriate.

The IEP team found [redacted] ineligible for special education for the 2011-2012 by using IDEA's three-step inquiry for determining the need for special education. 20 U.S.C. 1401(3)(A). After reviewing evaluation reports in the areas of Physical Therapy, Occupational Therapy, Social Development and Psychology, the IEP team determined [redacted] has disabilities in OHI and ED. The team then decided these disabilities do not have adverse effects on her academic performance because "she maintains an A/B average." Third, it also found she does not need special education to address educational needs.

The Parents contend [redacted]s absences from school due to arthritis and fears of returning to [redacted] could impact her educational performance. In response to this claim, the District points out "A student is not eligible for special education services pursuant to IDEA if his/her

needs can be met through the implementation of accommodations in the general education setting. *See*, Marshall Joint School District v. C.D., 616 F.3d 632 (7th Cir. 2010)." (Parent Brief, p. 23) The Marshall decision relates the standard is whether the disabling condition does, in reality, effect educational performance.

The record shows that with the assistance of accommodations in the general education curriculum [redacted] is an average to above average student. [redacted] has consistently received passing grades, advanced from grade level to the next grade level without any difficulty and received average to above-average scores on standardized tests. The factors can show satisfactory academic progress. Alex R. v. Forrestville Valley Comm. Unit Sch. Dist., 375 F.3d 603, (7th Cir. 2004). The Parents have not shown that [redacted] needs additional instruction or services to academically perform at [redacted] expected grade level, and they have not shown that [redacted] disabilities do in fact affe[redacted] educational performance.

The evidence does show that [redacted] needs accommodations and modifications to continue [redacted] academic achievement, and the record shows the District is prepared to offer these services in a 504 Plan. In the Marshall case, the court gave the following pertinent advice "if a child has a health problem but only needs a related service (PT or OT) and not special education, that child is not a child with a disability." Marshall, at 641.

F) Parents' requested relief of placement at [redacted] School.

Since [redacted] was not found eligible for special education at the September 2011 IEP meeting, the IEP team did not consider the issue of a special education placement. And since this decision finds the IEP teams properly found [redacted] not eligible for special education, there is no basis for the Hearing Officer to consider the issue [redacted] s placement in a program or school

other than the general education curriculum at [redacted] in which [redacted] had been participating with accommodations and modifications.

Furthermore, the Hearing Officer's jurisdiction is limited to considering matters raised in the Due Process Complaint, or in this case the Amended Due Process Complaint, which was filed on October 21, 2011. While the Amended Complaint makes reference to the District's decision to develop a 504 Plan and the student's desire to attend a small, one-story [redacted] school, the Amended Complaint does not refer t[redacted]School. Accordingly, the Hearing Officer does not have jurisdiction to consider a specific placement at [redacted] even if that placement were found appropriate due to the District's failure to provide [redacted] with FAPE.

G) Expense of [redacted]s Evaluation.

Parents seek reimbursement for the cost of the independent educational evaluation performed by [redacted]in December, 2011. The governing statute provides: "If the school district's evaluation is shown to be inappropriate, the school district shall reimburse the parent for the cost of the independent evaluation." (105 ILCS 5/14-8.02(b)) The District's August 25, 2011 psychological evaluation was conducted by [redacted] a School Psychologist who works with the [redacted] The September 8, 2011 Social Development Study was convicted by [redacted] a School Social Worker who works with [redacted]

A main difference in the evaluations is that [redacted]s evaluation includes results of cognitive testing that was not performed by the school evaluators. [redacted] confirmed "All of [redacted] achievement levels are consistent with [redacted] intellectual expectancy. [redacted] does not meet the diagnostic criteria for any specific learning disability and regular education classes appear to be the appropriate academic placement for [redacted]" (Cushing Report, pp. 9, 10). [redacted] also stated [redacted]

OHI designation on her IEP appears appropriate." [redacted] Report, p. 10). [redacted] cognitive report did not add new information to the District's knowledge of [redacted]s academic capabilities and performance.

[redacted] and [redacted] conducted the Basic Assessment System for Children evaluation ("BASC") and they obtained similar results. [redacted] also conducted the Minnesota Multiphasic Personality Inventory-Adolescent Version ("MMPI"). However, no new information was developed or provided that was not already available to the team at is September 2011 IEP meeting. [redacted] did make recommendations regarding [redacted]s placement, but that issue is not a matter for consideration in this hearing. After considering both evaluations, it must be concluded that the Parents did not prove the District's evaluation [redacted] was inappropriate, and the Parent's request for reimbursement of the cost of [redacted] evaluation is denied.

ORDERS

1. The above-described substantive issues that were raised by the Parents are dismissed for the reasons stated in this Decision.

2. The above-described procedural issues that were raised by the Parents are sustained for the reasons stated in this Decision, and the Parents are entitled to relief for these violations. The Parents can obtain independent educational evaluations in the areas of physical therapy, occupational therapy, social development, adaptive technology, and nursing case management within ninety calendar days of the date of this Decision. After the reports are received by the District, the District is directed to pay the reasonable cost of each evaluation, within thirty calendar days of receiving the invoice for each evaluation.

3. The District shall submit proof of compliance with these orders to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777 within 35 days from the receipt of this decision.

Right to Request Clarification

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned Hearing Officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party(ies) and to the Illinois State Board of Education. The right to request such a clarification does not permit a party to request reconsideration of the decision itself, and the Hearing Officer is not authorized to entertain a request for reconsideration.

Right to File a Civil Action

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing who is aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 Ill. Comp. Stat. 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.

Certificate of Service

The undersigned Hearing Officer certifies that he served copies of the aforesaid Decision and Order upon parent/student and District/Director of Special Education, through their counsel or representative, and the Illinois State Board of Education at their submitted addresses by certified mail by depositing same with the United States Postal Service at Chicago, Illinois with postage prepaid before 5:00 p.m. on February 27, 2012.

Hearing Officer