

Case Number: 2012-0025

[REDACTED] vs. [REDACTED]  
Hearing Officer: [REDACTED]

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

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## Impartial Due Process Hearing Decision Cover Page

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District Name [REDACTED] Phone: [REDACTED]  
Superintendent [REDACTED]  
Address [REDACTED]  
Represented by [REDACTED]

Parent Name [REDACTED] Phone: [REDACTED]  
Address [REDACTED]  
Represented by [REDACTED]

### Date and Timelines

Date of Written Request: 07/27/2011  
Date of Pre-hearing Conf: 08/29/2011

Date of Hearing: 09/30/2011 to 09/30/2011  
Date of Decision: 10/05/2011

### Summary of Decision

The Parent fails to meet the required burden of proof in a due process complaint notice (DPCN) brought by the Parent. The Parent sought to have a finding that the District denied the Student a FAPE by failing to implement the IEE's and/or recommendations provided by the Student's treating psychiatrist, psychologist, and educational advocate. Further, the Parent alleged that the District failed to provide the Student a FAPE by not providing the Student ESY during the summer of 2011 as requested by the Parent at the May 5, 2011 IEP meeting. Finally the Parent alleged that the District failed to provide the Student with a FAPE by not approving a private therapeutic day placement as requested by the Parent at the Student's IEP team meeting in May of 2011. While it was evident from the Parent's testimony, and the Parent was very credible in [REDACTED] belief and commitment to provide the Student with a program to meet [REDACTED] needs, the preponderance of the evidence submitted by both parties supported a finding that the District prevailed on all five issues alleged by the Parent.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

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v.

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ISBE CASE NO. 2012-0025

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Impartial Due Process  
Hearing Officer

**BACKGROUND**

On Friday, September 23, 2011 at 9:00 AM, an Impartial Due Process Hearing was convened by D. Michael Risen, the hearing officer, on behalf of the student, █ (Student), at the Administrative Center located at █

█ There were two additional days of hearing, September 29 and September 30, 2011. The hearing officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14 – 8.02a et seq., 23 Illinois Administrative Code 226.600 et seq., the Individuals with Disabilities Education Act 20 USC 1400 (IDEA), and 34 CFR 300.507 et seq. Alfred Spitzeri, attorney-at-law, represented the Parents, █ and on behalf of the student (Parent). █ attorney-at-law, represented the █ (District).

Student is a █ year old █ born █ who was last enrolled as a student in the District's program known as TAP, a therapeutic day program operated by District. During the 2010-2011 school year, a dispute arose between Parent and District over the placement of Student. Parent filed this request for a hearing on July 27, 2011. A pre-hearing conference was conducted on August 29, 2011 (HO █ 46-50).

Joint documents numbered SD 1- SD 204, were submitted by the parties and entered into evidence. In addition, the hearing officer entered exhibits documenting the procedural background of the case, HO █ 1 through HO █ 63.<sup>1</sup> The Parent submitted fourteen (14) exhibits during the conduct of the hearing. Those exhibits are numbered P Ex 1 – P Ex 14. During the 2.5 days of hearing, testimony was heard from eight (8) witnesses: Carol Dimas, Educational Advocate, █ the Student, and █ (Parent), the

<sup>1</sup> A court reporter recorded the hearing however the transcript was not completed or available to the hearing officer at the time of writing the decision.

Mother of the Student, all testified for the Student. Testifying for the District were [REDACTED] TAP Director, [REDACTED] Language Arts and Social Studies teacher, [REDACTED], Social Worker, [REDACTED] Math and Science teacher, and [REDACTED] school psychologist. Closing briefs were neither requested by the hearing officer nor submitted by the parties. The record was closed at 3:30 pm on September 30, 2011 and the matter taken under submission.

### ISSUES PRESENTED

1. **Did the District deny the Student a FAPE by failing to give due weight to the evaluations, reports, and recommendations of the Student's treating psychologist?**
2. **Did the District deny the Student a FAPE by failing to give due weight to the evaluations, reports, and recommendations of the Student's treating psychiatrist?**
3. **Did the District deny the Student a FAPE by failing to give due weight to the evaluations, reports and recommendations of the Student's educational advocate?**
4. **Did the District deny the Student a FAPE by failing to provide the Student with ESY?**
5. **Does the District have an obligation to place the Student in a private therapeutic day program as opposed to the District's recommendation of placement in TAP in order to provide the Student with a FAPE?**

### FINDINGS OF FACT

- 1) On November 10 and 17, 2007, a complete psychological was completed by Dr. [REDACTED] Licensed Clinical Psychologist and is reflected in D244-D252. Her findings regarding the Student included Disorder of Written Expression, Learning Disability NOS: auditory-verbal processing, Mood Disorder NOS, Hx. Of Depressive Disorder NOS, Attention Deficit Hyperactivity Disorder –Predominantly Inattentive Type and Oppositional Defiant Disorder (D250-D251). Overall reading was in the low average range (27<sup>th</sup> percentile), overall written language was in the borderline range (12<sup>th</sup> percentile), spelling was low average (23<sup>rd</sup> percentile), written expression borderline at the 12<sup>th</sup> percentile (D 247) and general arithmetic was average (39<sup>th</sup> percentile) (D48).
- 2) On April 9, 2008 the Student was first identified as a student with a disability by [REDACTED] previous school district in [REDACTED] during grade [REDACTED] primary disability at the time was noted as OHI (Other Health Impairment) (SD

162). [REDACTED] medical diagnoses at that time were: Mood Disorder, NOS, Depressive Disorder, NOS, ADHD, predom inattentive, Oppositional Defiant Disorder (ODD) by [REDACTED] in 2007 ([REDACTED]).

- 3) On or about that same period of time in 2008, the Student moved to the District and the District designed an IEP on May 13, 2008 for the Student for resource room services for the remainder of [REDACTED] ([REDACTED]) with a primary disability of OHI. Parents concerns were noted that "Parents are concerned with the Student's academic functioning in the classroom, and they are worried that the gap will widen as the curriculum becomes more rigorous and abstract. Parents would like the gap to narrow. Written expression is a particular area of concern" ([REDACTED]). The IEP called for ninety (90) minutes of pull out services with the Special Education teacher for the remainder of [REDACTED] ([REDACTED]).
- 4) On May 13, 2008, the new IEP developed for the Student also reflected the projected minutes for [REDACTED]. The IEP reflected a reduction of minutes from 100 minutes per week of pull-out services with the Special Education teacher to ninety (90) minutes of pull out services [REDACTED].
- 5) On February 17, 2009, another psychological was completed by [REDACTED] [REDACTED] M.A. from [REDACTED] after a referral from the Student's therapist, [REDACTED] to assess her emotional functioning [REDACTED]. [REDACTED] diagnosis concluded the Student suffered from Post-Traumatic Stress Disorder (PTSD), Chronic Major Depressive Disorder, Severe with Psychotic Features, Rule Out Pervasive Developmental Disorder, NOS, and Rule-Out Obsessive Compulsive Disorder (OCD) [REDACTED]. Incidents of note in the student's life included "antibiotics at birth, history of RSV during infancy, gastrointestinal problems, intermittent diurnal enuresis, father's death at age 6, mother's recent marriage and blending of families, lack of social interaction with peers" [REDACTED].
- 6) On September 16, 2009, the District and Parent met to discuss the Parent's concerns expressed in the IEP as follows: "Parents are concerned about Math and the fact that [REDACTED] might fall behind and that (the Student) needs to understand social cues, and initiating social interactions" (D 126). There was not a change in the amount of services provided reflected in this IEP. (D 125) listed new accommodations to be provided for the Student related to speech and language,

math facts strategies, and social interactions. The issue of retention was discussed but rejected by the IEP team.

- 7) On June 1, 2009, the IEP reflects Parent's concerns were continuing to be related to "(the Student's) academic skills, especially in math. They are also concerned with (the Student's) social skills. "Parent believed (the Student) is falling farther behind socially and has not made much progress" [REDACTED]. The IEP also noted "An outside psychological evaluation (PBHP, 2/14/09) (D 237) indicated that (the Student) is diagnosed with Post-Traumatic Stress Disorder and Depression, Rule-Out Pervasive Developmental Disorder\_NOS, Rule-Out Obsessive-Compulsive Disorder. [REDACTED] takes Focalin (3 times/day 15 mg, 5 mg, 2.5 mg), Prozac (60 mg) and Risperdal 1 mg 2x/day). In 2007, (the Student) was diagnosed with Mood and Depressive Disorder, ADHD, and ODD. The IEP also reflected "(the Student) is receiving resource services and is progressing well academically. Overall [REDACTED] is at grade level, but there are some areas where [REDACTED] struggles. (The Student's) teacher reports that [REDACTED] needs some help with multiplication, division, and multi-step problems. [REDACTED] also has some difficulty with reading comprehension in regards to higher level thinking. (The Student) also receives help for writing" [REDACTED]. The IEP continued to call for 90 minutes of resource pull out for the 2009-2010 school year [REDACTED].
- 8) On November 20, 2009, an IEP meeting was held to discuss that the "Parent is concerned about (the Student's) emotional well-being. [REDACTED] stated (the Student) is frustrated in the classroom (D 61). It is important to note the following Present Level of Performance from this IEP on (D 62): "Reading-(the Student) is reading an average of 92 words per minute<sup>2</sup> on a [REDACTED] grade Curriculum Based Measurement. This score is at about the 20<sup>th</sup> percentile and within the average range for fall of [REDACTED] grade. Average is between 86 and 122."<sup>3</sup> This IEP also described considerable disagreement between the Parent and the District at the IEP meeting (D72 – D74). Further, this IEP reflected a change in placement from 90 minutes of resource pull out programming to 1735 minutes of ED instructional to begin on 11/23/09 at [REDACTED] and then transfer to [REDACTED] beginning

- 8/24/10 [REDACTED]. The Parent was seeking an outside therapeutic placement at the time and this disagreement is noted in the IEP at [REDACTED].
- 9) On June 1, 2010, an IEP was developed for the Student and in the box labeled "Education concerns presented by the Parent(s) it stated "Letter presented per advocate" [REDACTED]. The letter referenced was not attached to the IEP submitted by the District. IEP notes reflect that the Parent's advocate again requested therapeutic placement and references a hospitalization for the Student (though reasons for this are not provided). The IEP notes on [REDACTED] are handwritten and difficult to discern in many instances. It is clear in these notes that Parent through the advocate was asking for Private Therapeutic Day programming due to the Student's continual lack of success in "generalizing" skills from school to the broader environment as noted by the Speech and Language Therapist [REDACTED]. The IEP team placed the Student for 1350 minutes per week in the TAP program to begin on 08/24/10 [REDACTED]. There is no explanation for the reduction in minutes from 1735 in the most recent ED placement to the projected 1350 in the placement in the District's TAP.
- 10) On August 11, 2010, the Student was evaluated by [REDACTED] Psychiatrist with Family Behavioral Health. [REDACTED] diagnoses included: "Autism 299.00<sup>4</sup>, Bipolar Disorder NOS 296.80, ADHD NOS 314.90, Anxiety Disorder NOS 300.00 and ODD 313.81(D 232).
- 11) On November 16, 2010, school district psychologist [REDACTED] M.Ed. M.A. NCSP, completed the WIATT-III individual achievement test with the Student. [REDACTED] results reflected Word Reading in the borderline range (4<sup>th</sup> percentile), reading comprehension, sentence composition, essay composition in the average range (percentiles 47, 34 and 58 respectively), and Pseudoword Decoding and Numerical Operations in the low average range (percentiles 18 and 10 respectively) ([REDACTED]).
- 12) On November 22, 2010, an IEP meeting was completed. Parent's concerns are noted by [REDACTED] expressed numerous concerns in her parent

<sup>4</sup> [REDACTED] notes: "to clarify Autism symptoms are partly defined by: problems with social interactions, perseveration, Somatosensory Disturbances, Atypical Communication and Development" (D 232).

<sup>5</sup> The report did not have specific recommendations but reflected they would be discussed at the IEP meeting [REDACTED].

questionnaire” [REDACTED]<sup>6</sup> The IEP submitted reflected several pages of handwritten notes but it was not clear who the author was or what meaning the notes had to either the IEP or its development [REDACTED]. IEP notes reflect the Student experienced a successful year in the TAP program. Mother is quoted as agreeing “that (the Student) is happier in the smaller setting at TAP” [REDACTED]. The notes further reflect the Student’s continued eligibility for services under OHI and that the Student would benefit from ESY (D 30). Also noted was the Student was given the Jerry Johns Basic Reading Inventory by school staff and that she scored an independent vocabulary level of [REDACTED] grade and instructional vocabulary level of [REDACTED] grade [REDACTED].

13) On February 24, 2011, a Neurobehavioral/Cognitive Evaluation was completed with the Student by [REDACTED] II, Psy.D. Test results demonstrated verbal comprehension (percentile 8) and processing speed (percentile 5) in the borderline range, with perceptual reasoning (66 percentile) in the average range, working memory (percentile 18) in the low average range and Full Scale in the low average range (percentile 14) and [REDACTED] general ability index in the average range (percentile 30) [REDACTED].<sup>7</sup> His diagnoses reflect “ Bipolar Disorder NOS, Autistic Disorder, ODD, ADHD NOS [REDACTED]. ([REDACTED]) reflect 39 specific recommendations from I [REDACTED]

14) On June 1, 2011, the IEP team met to continue the IEP discussion that began on May 5, 2011.<sup>9</sup> The 5/5/11 IEP meeting was requested by the Parent to consider outside assessments and to review placement options [REDACTED] ESY was also considered and “Team does not see regression of skills to warrant eligibility for ESY” (D 1). However, the team did recommend 45 minutes per week of ESY social work services (D 11). Student grades in PE, LA, Math, Science, Art & SS for the second semester in 2011 reflected a straight “A” average<sup>10</sup> (D 6). Present level of performance behaviorally reflected that the Student “graduated off the progress card as [REDACTED] was not displaying any negative behaviors as of January 2011” (D 7). Further, the progress notes the Student is a “role model” (D 7). On

<sup>6</sup> The referenced questionnaire is not included with the IEP submitted by the District.

<sup>7</sup> In a comparison chart on (D 224) it is interesting to note that all areas tested reflect a decrease in cognitive function from testing completed in 2007.

<sup>8</sup> Further discussion of these recommendations will be reflected in discussion related to witness testimony.

<sup>9</sup> The 5/5/11 meeting adjourned to enable the Parent to visit therapeutic placement options (DI).

(D 13) of IEP notes, Parent is quoted as expressing concerns with academic/social growth due to not seeing generalization of behaviors to other environments. Parent notes the Student is continuing to see her Psychiatrist [REDACTED]. Parent's advocate is quoted as having serious concerns with staff questioning the Student in regards to the results of neuropsychological report recently completed.<sup>11</sup> Parent is also quoted as having again requested ESY and the notes reflect "Educational team does not see regression of social or academic skills during the extended breaks during the 2010-2011 school year."<sup>12</sup> During the continuation of the IEP, notes reflect the Parent requested additional ESY and placement in Private Therapeutic Day School due to the Student showing regression in the school/community (D1).

**DISCUSSION OF TESTIMONY, FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

*Contentions of the Parties*

- 1) The Parent's position, as stated during the opening statements, is the Student is a student eligible for special education. The Parent asserts the District has failed to provide evidence for refusing ESY during the summer of 2011 and that the current placement provided by the District has failed to enable the Student to engage in the educational process. Parent indicates this is evident by the Student who continues to demonstrate non-compliant oppositional behaviors, has had a documented cognitive decline and suffers from learning deficiencies including reading, slow processing, and behaviors demonstrated by incontinency, screaming, head banging, cutting, and a suicide attempt in June of 2010. The Parent alleges the Student is not making educational progress in the current placement. The Parent provided a history indicating the child was diagnosed with autism at an earlier age and at age [REDACTED] witnessed the overdose death of [REDACTED] biological father and has suffered from the various mental diagnoses ever since. The Parent is asking that the hearing officer order the District to enroll the Student in a Private Therapeutic Day program, provide ESY in that program consistent with the Student's demonstrated needs.

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<sup>11</sup> Testimony reflects three staff members questioned the student regarding this testing. Discussion will be addressed during review of testimony.

- 2) The District's position is that the professional staff has provided for the Student since she moved into the District in the [REDACTED] grade when [REDACTED] was given an IEP for resource room pull-out services that continued into the [REDACTED] grade. At the end of the [REDACTED] grade the District placed the Student in an ED instructional program for the [REDACTED] grade. Then at the end of that school year, the District placed the Student in the District's new TAP (Therapeutic Academic Program) for the [REDACTED] grade, continuing to the present [REDACTED] grade. The District asserts the Student has made great progress and that the Student is a different child at school than the one described by the Parent when the child is at home and in the community. The District describes the Student as academically self-confident, takes initiative and works at one grade level higher, routinely participates in class and is age appropriate socially and emotionally including being friendly, jovial, thoughtful and empathetic. The District acknowledges in the opening statement that the Student has had a negative change in her behavior the past weeks but asserts the change coincides with the filing of the DPCN. The District asserts the change in behavior is caused by or related to the Student being worried about the financial impact on the family, concerns by the Student that [REDACTED] needs to go to a different school so that the family would not need to pay for an attorney and that the Student is struggling with burdens the Student perceives from home. The District also asserts that the current placement is the most appropriate LRE and that not providing the Student with ESY has not harmed the Student. The District states that the private report of the psychiatrist was considered and that the private psychiatrist neither attended the IEP meeting nor wrote a recommendation for the team to consider. With regards to the independent psychologist's report, the district asserts that more than 20 of the 27 recommendations have been implemented by the District. The District asks that the hearing officer determine the TAP placement is the most appropriate placement in the least restrictive environment.
- 3) Testimony from the Parent's educational advocate, [REDACTED] (hereinafter [REDACTED]) was provided during the first day of the hearing. [REDACTED] curriculum vitae reflects training in both regular education and special education and experience teaching in these areas. Graduate training of 18 hours has been completed and a Masters

Degree is currently being pursued. Background and training reflect a broad basis of experience covering many years working with students in various settings from classrooms to one on one. [REDACTED] testified her primary focus is self-advocacy. [REDACTED] spent 45 minutes observing the Student in TAP during language arts when the students were reviewing the novel Lord of the Flies. [REDACTED] expressed the Student complained to the teacher the book was “too hard.” Student was observed wanting to color rather than to participate in class. [REDACTED] also testified that the Student did not appear to her to be engaged in the lesson during the time she observed. When asked to testify whether the current novel Lord of the Flies was at the Student’s reading level, [REDACTED] reflected the book was not at the Student’s current reading level.<sup>13</sup> [REDACTED] and other witnesses spent considerable time testifying and being cross examined on submitted student work that was labeled as an essay on “Seals.” The submitted work can be found at P Ex 4 and 5. Both of these documents are typed and not signed. Besides the testimony of [REDACTED] on these documents, there was conflicting testimony by District staff as well. There was no way to independently verify whether the Student actually completed either or both of these exhibits and there was no convincing testimony submitted that resolved this lack of verification. Therefore, testimony about these documents by [REDACTED] and others was not considered in this decision. [REDACTED] further testified regarding parent exhibits labeled P Ex. 6, 7 and 8. These letters were written by the Student according to [REDACTED] who testified the letters in P EX. 6, 7, and 8 were the work of the Student, the Student testified as being [REDACTED] work, and the Math/Science teacher testified as being the Student’s work. [REDACTED] testified that these letters were simplistic in their sentence structure, contained omissions in the wording and had missing vowels in words. [REDACTED] testified that these misspellings were demonstrations of phonemic awareness issues on the part of the Student. Parent exhibit labeled P. Ex. 9 was a worksheet on the novel Lord of the Flies. [REDACTED] testified that this document failed to reflect answers in complete sentences, no evidence the Student understood the directions for the assignment, six of the twelve worksheet questions were left unanswered, and the others that were answered suggested the Student had “no clue” what [REDACTED] was doing with the

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<sup>13</sup> District testing reflects an instructional reading level of grade [REDACTED] (D 37). *Scholastic online* reflects that Lord of the Flies is a reading level of 8.1, interest level of 9-12.

assignment.<sup>14</sup> [REDACTED] also testified under direct examination that the Student did not seem to be motivated behaviorally by the TAP point system designed to improve student behavior. [REDACTED] testified the Student had no change in her affect when the teacher reported points and that the Student had not earned any, that the Student refuses to carry [REDACTED] point card with [REDACTED] and the Student listed one of her goals on the behavior card as “purple pen.”<sup>15</sup> [REDACTED] testified that [REDACTED] theory as to why the Student’s behavior in school is so inappropriate is due to frustration. [REDACTED] testified hearing the Student exclaim to the teacher during a lesson on the novel Lord of the Flies “this is too hard.” [REDACTED] testified [REDACTED] was confused by the District’s consideration for mainstreaming of the Student since the Student’s behavior continues at the levels noted and that the Student at age 12.5 years carries an Elmo backpack, exclaims [REDACTED] wants to color, talks in baby talk at home and in the community and that mainstreaming a student who is “so below her typical peers would subject her to bullying” in a mainstreamed middle school classroom. [REDACTED] testified the Student does not have any friends, does not have after school connections and therefore is not experiencing generalization of any skills that may be learned at school. [REDACTED] recommended the Student would benefit from a Private Therapeutic Day program that would include ESY and embedded social work services in the program. [REDACTED] testified there has been definite regression from the prior year both in school and in home/community settings. [REDACTED] described this regression as acting out, defiance and baby talk that was not present the prior year. [REDACTED] testified [REDACTED] observed the Student being read to during the school observation and expressed concerns as to how the Student could access the educational program on [REDACTED] own if [REDACTED] needed to be read to. [REDACTED] testified that [REDACTED] professional opinion was that the TAP offered by the District was a good and effective program for certain types of students but not for this Student.

- 4) Also testifying was the Student. The Student would be described as a [REDACTED] year old [REDACTED] with [REDACTED] colored hair and presented as unusually shy and reserved. When spoken to [REDACTED] would typically only answer in one or two word responses in a rather soft tone that could only be described as “baby talk,” particularly when

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<sup>14</sup> Hearing officer concurs with this assessment and notes many of the Student’s responses to the prompts are unreadable.

<sup>15</sup> District witness testimony also reflected similar testimony regarding the Student’s use of the card and listing “purple” as a goal on the card, which was inappropriate according to district witnesses.

considering the Student will be [REDACTED] years old on [REDACTED] next birthday. Prior to testimony, and in an effort to connect with the Student who was clearly shy and unsure of the surroundings [REDACTED] was being asked to function in, the hearing officer introduced [REDACTED] and commented that [REDACTED] used to be a teacher and a principal and the Student's response was "Why?" When the hearing officer tried to continue that effort the Student turned away in a clear effort to avoid being engaged. The Student was sworn in by the court reporter after being able to state [REDACTED] first and last name and spell both in a hushed and immature tone and voice. However, it was not clear the Student understood the process as the Student had difficulty with knowing how to raise [REDACTED] right hand and it took several efforts and demonstrations from the court reporter to fulfill this function. Under direct examination, the Student was able to answer questions correctly as to where [REDACTED] lived, who [REDACTED] lived with, and the names of [REDACTED] pets. When asked if [REDACTED] had a favorite number [REDACTED] responded "yes." When asked to share that number with the hearing officer by [REDACTED] attorney, [REDACTED] responded "5992." When asked why that number, [REDACTED] responded "I got it off Elmo."<sup>16</sup> When asked if the Student liked Elmo, [REDACTED] responded he was funny. When asked who else the Student likes, the Student responded "Sponge Bob," "Arthur," (a dog that talks). It is notable that the Student brought a stuffed rabbit toy with [REDACTED] to hold the entire time. In addition, while testifying, and in between responding, the Student was regularly sucking on the long ears of the toy rabbit. When asked if [REDACTED] "bunny" had a name [REDACTED] said no. When asked if the Student liked crafts the Student responded that [REDACTED] liked to play with beads and lizards and snakes with the beads. The Student also indicated that the Student liked music but was unable to identify either a specific genre or song or artist. Then when asked if the Student liked school, the Student responded it was too hard and that it seemed like it was [REDACTED] grade work. The Student testified that the class was reading the novel Lord of the Flies when asked by [REDACTED] attorney. [REDACTED] also responded to the question about damaging [REDACTED] book by indicating [REDACTED] "tore up the entire book."<sup>17</sup> The Student was asked if the Student went on field trips, had any friends at school, and whether [REDACTED] knew about the hearing process prior to the last couple weeks and the Student responded "no" to

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<sup>16</sup> Elmo from Sesame Street

<sup>17</sup> Other testimony indicates the Student tore two pages and glued others together.

each of these questions. Through a series of questioning about Parent Exhibits 4 and 5 the Student maintained that the Student did not write one of the typed reports. These are the same exhibits noted in the testimony of the educational advocate [REDACTED] that it was noted there was no clear evidence to establish authorship, timeline, or validity of the work. This testimony from the Student did not illuminate the issue of whether the Student did the assignment as the educational advocate described or as other school staff described. As a result, this evidence has been disregarded as non-instructive due to lack of validation. Under cross examination by the District, the Student was asked through a series of questions if the Student had shared concerns with one of the teachers, [REDACTED] that [REDACTED] was acting out in school so that [REDACTED] could go to a new school. In each instance, the Student responded no. When asked specifically if the Student had ever told [REDACTED] that the Student was in charge of [REDACTED] behavior the Student responded "no." When asked what the Student would like [REDACTED] indicated [REDACTED] would like to go on field trips, not go to school in a dungeon and that [REDACTED] wanted to learn and not to do [REDACTED] grade work. The District's attorney finished questioning by asking a series of questions related to money and the cost of the attorney and whether [REDACTED] was acting out because of her concerns about this and the Student responded "no" to each question. The Student was also asked if the novel Lord of the Flies was too hard for [REDACTED] and [REDACTED] indicated "yes" and responded the same when asked if the Student told the teacher the book was too hard. When asked if the teacher gave the Student packet summaries to help [REDACTED] with the novel the Student responded "yes." When asked if the packet summaries were helpful, the Student responded "no." When asked if the Student's behavior this year was the same as the Student's behavior last year the Student responded "yes." Finally, the District's attorney asked the Student if the Student had told school staff that the Student did not want to write any work down because the Student was afraid the staff would use it in court against [REDACTED] and the Student responded "no." On rebuttal, the Student was asked about an incident in school this year when the Student refused to go to art class.<sup>18</sup> The Student responded this way after acknowledging the Student did not want to go to art class to finish a project the

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<sup>18</sup> The Student responded in complete sentences to this question and this was one of the few times the Student responded in complete sentences.

Student was working on: "The doorman called the pig and the pig couldn't do it (by do it the hearing officer interpreted this to mean encourage or get the Student to comply). Then the pig called squirrel and the squirrel couldn't do anything. Then the squirrel called Abraham Lincoln and Abraham Lincoln couldn't do anything. Then Abraham Lincoln called Kirby<sup>19</sup> and that's Santa Claus and he couldn't do it and then they all cornered me in the corner and they still couldn't do it." When questioned for clarification by the Student's attorney the Student confirmed the individuals [REDACTED] was naming were staff members and [REDACTED] had these names for them. When asked how the whole incident made [REDACTED] feel the Student indicated that it made [REDACTED] feel afraid. The Student's attorney then asked her a series of questions about whether or not the Staff would read tests to [REDACTED] and give [REDACTED] the answers and the Student responded "yes" to each question. When questioned by the District's attorney regarding this testimony about the art program incident and reading the test and/or giving answers to tests to the Student, the Student affirmed [REDACTED] previous testimony. The testimony of the Student was unusual and inconsistent and therefore not credible.

- 5) The Parent testified next. The Parent revealed her employment is for an a [REDACTED] in [REDACTED] working as a [REDACTED] and [REDACTED] (Student's step-father) is a [REDACTED]. The Parent testified that the Student's [REDACTED] was a [REDACTED] and overdosed on crack cocaine when the Student was [REDACTED] years of age. Parent confirmed much of the findings of fact detailed herein and noted that the first IEP for the Student only came as a result of [REDACTED] employment of the educational advocate [REDACTED] and only after several months of efforts by [REDACTED] with the previous school district. The Parent shared that the Student is immature, impulsive, has difficulty relating to people, and communicating with people.<sup>20</sup> The Parent also described issues with the Student that included incidents of head-banging, anger, scratching [REDACTED] and the incident in June of 2010 when the Student cut [REDACTED] with scissors in an apparent attempt at suicide and was hospitalized for seven weeks under the care of a Psychiatrist. The Student was also described by the Parent as hearing voices, people talking to [REDACTED] an evil snowman that laughs at the Student, that the Student is argumentative, sensitive to

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<sup>19</sup> TAP program Director

<sup>20</sup> This description of the Student was also observed during the Student's testimony by the hearing officer.

touch, and loud noises. The Parent indicated that when the Student goes to a restaurant with the Parent where the Student perceives that it is too noisy, or during thunderstorms, the Student will use headphones similar to the headphones worn by airline mechanics. The parent also shared that the Student tends to overeat and use food for comfort and will even hide food and that [REDACTED] small pets and stuffed animals also serve to comfort the Student. The Parent also described that the Student needs to wear Depends for incontinence and this resulted from the Parent noticing the Student smelled of urine and upon inspection would see the Student was also chaffed when [REDACTED] would get off the bus from school. When asked if bathroom use at school was the problem, the Parent responded no that it also happens at home. The Parent was also asked about the art room incident and the Parent indicated that after the Parent sent an email to the Principal about the reported incident [REDACTED] was informed by [REDACTED] that "yes there were a lot of individuals called in but at any time no more than two were near the Student." The Parent also testified that the Student told the Parent that the Student also kicked the door and that the Dean held the door and let the Student continue kicking the door and did not tell her to stop or make an effort to have her stop. The Parent indicated the staff did not share anything with the Parent about this alleged incident. When asked about the District's opening statement theory that the Student was acting out this year due to the Student's concerns about the impact of the due process on [REDACTED] home, the Parent responded that the Parent was in disbelief when [REDACTED] heard this from the attorney during the District's opening statement. The Parent testified that neither [REDACTED] or the Student's step-father had ever discussed any of the issues involved in the due process in the presence of the Student and only held any discussions on the topic in their bedroom with the door closed. The Parent also testified that the Parent believed the point system utilized for behavior management for the Student in the District's TAP placement was "useless." The Parent reported significant discrepancy between what the school would report and that all points would be earned by the Student but the card when brought home by the Student would reflect that no points were earned. The Parent also testified that it appeared to the Parent that the Student would receive credit for work at school that the Student had not actually completed. The Parent also testified that the Student reports to the Parent that when the Student wants to

bring papers home the papers are taken away from [REDACTED]. The Parent questioned why the Student was not receiving ESY when other therapeutic programs [REDACTED] investigated are year round programs from 8:30 am to 2:30 pm and ESY is embedded full time into the program for all of the students in the other therapeutic programs investigated by the Parent. The Parent testified [REDACTED] was questioning how the District could call the TAP placement “therapeutic” when ESY is not part of their program for any of the Students enrolled. When asked if the Parent believed that the TAP placement was providing the Student with FAPE the Parent responded “no” and offered that the Parent has been unable to get a transition plan to get the Student away from [REDACTED] stuffed animals and was therefore concerned how the TAP placement could provide a transition plan to high school in the span of one more year.

- 6) Upon cross-examination the Parent answered “yes” to questions seeking whether the Student was still under the care of a psychiatrist<sup>21</sup> and whether the family was involved in family therapy. When questioned if the Parent had ever made statements to the Student regarding the due process or going to a new school or hiring an attorney the Parent responded “no” with the exception of one week ago when the Student was informed [REDACTED] would need to talk with the Parent’s attorney. The rest of the cross examination focused on differences reported by school staff regarding the Student’s academic progress and what the Parent reports, a disagreement between the Parent and the School staff whether academic goals had been met and if the Parent had requested academic goals. When asked if the Student was regressing, the Parent reported that the Parent has been receiving emails asking if the Student could come in early or stay late as the Student was not turning in her work. The District made the point that the staff was reporting the work was not being turned in and not necessarily that the Student could not do the work. The Parent indicated to the District’s attorney that the Parent felt the School staff was not listening. The District asked if the Parent had been offered family therapy or intervention by the District and the Parent responded “yes” but did not believe it was necessary since (as [REDACTED] had already testified earlier) that the family was receiving this therapy from an independent provider. The District also

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<sup>21</sup> Testified the Student sees [REDACTED] M.D., every three weeks, that the Student had an appointment the next day and was last seen three weeks ago.

asked numerous questions related to recommendations by [REDACTED] and whether the Parent was instituting any of these recommendations at home. The District also indicated the District believed that the majority of [REDACTED] recommendations were either "somewhat, if not entirely related to academics, and that wherever the Student was placed would it be important for the Student receive these recommendations?" The Parent responded "absolutely!" When asked if the Parent was aware of whether or not [REDACTED] had contacted any staff members, the Parent indicated [REDACTED] was not aware that [REDACTED] had but that the Parent had provided [REDACTED] with many documents related to the Student and the Student's work for [REDACTED] use during the evaluation. The Parent confirmed there were indeed many of the recommendations being followed in the home.<sup>22</sup> Parent testified that the Parent had visited [REDACTED], [REDACTED], [REDACTED] and each one offers something different. The Parent testified that the Parent believed the District's TAP was a fine program for many students but not [REDACTED].

- 7) The first witness for the District was [REDACTED] [REDACTED] (hereinafter [REDACTED]) testified [REDACTED] held an [REDACTED] degree with an Illinois Type 73 certificate. [REDACTED] testified that the advantage of the [REDACTED] placement for the Student over private placements was [REDACTED] would maintain the District's rigor with respect to the curriculum, make it easier for the Student to maintain friendships, help the Student avoid a sense of detachment, provide an easier path to mainstreaming due to electronic records, provides the Student with known staff and a known curriculum.<sup>23</sup> Upon cross-examination, [REDACTED] was asked to read the single goal listed in the Student's IEP (D 7)<sup>24</sup> and whether or not the goal addressed the three program goals.<sup>25</sup> [REDACTED] responded that the goal was related to cognitive behavioral therapy and that "this is one way we get there." When asked if there were any

<sup>22</sup> This questioning was concerning to the hearing officer since due process is not about the services being provided by the home. Due process is about the programs and services being provided by the District.

<sup>23</sup> The hearing officer noted that the response provided by [REDACTED] was generic to all students and [REDACTED] did not provide any information specific to the Student as to why a private placement would be inappropriate or why the [REDACTED] placement was the most appropriate for the Student in this DPCN.

<sup>24</sup> Single goal in the current 5/5/11 IEP reads: "By May 2012, (the Student) will discuss problematic situations and analyze whether [REDACTED] perception of a situation is being influenced by All-or-Nothing Thinking, Overgeneralizing, Negating the Positive, Jumping to Conclusions, Magnifying or Minimizing situations, and 'should' statements with 95% accuracy."

<sup>25</sup> Program Goals for the Student were testified as being to handle emotions, dealing with the world socially, getting the Student back to mainstreaming

other goals in the IEP [redacted] responded "this is the only social work goal." When asked if there was any applied behavioral analysis therapy provided, or if the Student was mainstreamed, or if the Student had any friends, [redacted] testified "no" to each prompt. In response to questions regarding [redacted] concerns related to public vs. private placement, and specifically regarding mainstreaming of the Student who is in the second year in the [redacted] placement and [redacted] has yet to be mainstreamed and [redacted] responded "correct." When asked if [redacted] was aware of any friends the Student had he responded "no." [redacted] also confirmed the Student had dropped three levels since the start of school on the [redacted] placement's behavior program.

- 8) Testifying for the District was [redacted] (hereinafter referred to as [redacted]) [redacted] testified for a little more than two hours. Key testimony to the hearing officer is reviewed here. [redacted] testified that [redacted] held an LBS1 Illinois certification and was in the second year teaching in [redacted] and second year overall in teaching. [redacted] testified the Student was in [redacted] room for [redacted] and [redacted] and was in with two (2) other Students and that [redacted] had a paraprofessional assigned to [redacted] room as well. [redacted] testified extensively regarding the success [redacted] perceived the Student had attained during the 2010-2011 school year (last school year). [redacted] testified that the Student presented as shy with very few interactions with staff and peers but improved after a few weeks. As the year went on [redacted] testified the Student became more outgoing, developed friends within the classroom that [redacted] characterized as real friendships, the Student was able to advocate for [redacted] ask for help when needed, and described the Student as "role model" for other students. [redacted] testified that this year the Student presents with "a lot of refusal", argues about using a marker instead of a pen or pencil, doodles on [redacted] work, takes less pride in [redacted] work, has test anxiety. [redacted] testified the Student was given a reading assessment by another District staff person in November of 2010 and demonstrated no deficits with a reading level between 5.9 and 6.2. [redacted] testified that students in grades [redacted] and [redacted] are all in the same room and study the same topic at the same time. [redacted] testified that [redacted] uses novels in [redacted] from all three grade levels. When a book is not at the Student's independent reading level [redacted] testified the Students are not assigned any homework. [redacted] also testified that the Student indicated that the novel "Lord of the Flies" was "too hard." [redacted] testified that [redacted] then provided the Student with study packets and that the Student was

now participating.<sup>26</sup> [REDACTED] testified that the novel was appropriate for all of the students in [REDACTED] class.<sup>27</sup> [REDACTED] confirmed there was a change in the Student's behavior this year from last year beginning with the first or second day of school. [REDACTED] testified the Student told [REDACTED] after being prompted and bursting into tears the change in behavior was so [REDACTED] could go to [REDACTED] new school and when questioned indicated the Student had complete control over the Student's behaviors.<sup>28</sup> [REDACTED] also testified the Student refused to write anything down and the Student expressed fear that if the Student did write things down the District would use it against the Parent in the due process proceedings. When asked a series of questions of whether or not the Student ever carries stuffed animals, needs help in the restroom, crawls on the floor, talks like a baby, uses a "sippy" cup [REDACTED] testified "no" to all queries. [REDACTED] did confirm that the Student carries an Elmo backpack but that many students did so as well. [REDACTED] was asked to review the recommendations of [REDACTED] (D226 - D230) and whether or not [REDACTED] implemented into the classroom and the answer was "yes" to each recommendation with a few minor modifications and [REDACTED] confirmed the entire IEE completed by [REDACTED] was reviewed at the 5/5/11 IEP by the IEP team. When asked if the goal listed in the 5/5/11 IEP was the only goal, [REDACTED] testified "yes." When asked if the IEP team considered any academic goals, [REDACTED] testified "no one brought it up." When asked if [REDACTED] sees a need for academic goals now, [REDACTED] responded "no" and that all assessments place the Student very close to grade level. [REDACTED] testified that a private placement would not be appropriate for the Student due to the difficulty the Student would have in making and maintaining friendships when so far away, that private placements expect almost no academics from their students.

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<sup>26</sup> There was considerable discussion and questioning regarding the typewritten essays entitled "Seals" and found at P Ex 4 and 5 that have been previously identified as seriously conflicting evidence and testimony and no evidence presented by either side to resolve those conflicts. Hence, the testimony here was also not considered by the hearing officer.

<sup>27</sup> As noted earlier, *Scholastic online* reports "Lord of the Flies" is a reading level of 8.1 and interest level of 9 through 12.

<sup>28</sup> Hearing officer interpreted this to mean that [REDACTED] was suggesting that the Student was stating that the Student was misbehaving on purpose so the Student could provide evidence for the Parent to win the due process case.

9) On cross-examination, [REDACTED] was questioned about the District's psychological report (D 267 – D270) administered on November 16, 2010<sup>29</sup> and whether [REDACTED] had ever seen or reviewed the report. [REDACTED] reported that [REDACTED] had not seen the report. When asked to review the results of the WIATT-III,<sup>30</sup> specifically, the score for "Word Reasoning," [REDACTED] reported the score was in the "4<sup>th</sup> percentile and the borderline range" (D268). When asked if the District's psychological report compared to the results obtained in [REDACTED]'s report, [REDACTED] testified "yes." When asked if any programs were being used like the one recommended by [REDACTED] [REDACTED] [REDACTED] – at D 227) to improve the Student's "Word Reasoning," [REDACTED] testified the District had installed "Read 180" on the computer's in [REDACTED] classroom. [REDACTED] testified "Read 180" was installed the previous spring but the program was not being used by any of the Students. When questioned whether anyone else was present during the conversation [REDACTED] had testified to about the Student's behaviors and reasons for them, [REDACTED] testified the aide was present for a while and that the conversation took place during the first week of school this year.<sup>31</sup>

10) Testifying for the District was the school social worker, [REDACTED] (hereinafter referred to as [REDACTED]). [REDACTED] testified [REDACTED] has had [REDACTED] years' experience as a school social worker, [REDACTED] years' experience as a social worker in other agencies prior to [REDACTED] school social work and holds two Masters degrees, one in social work and one in educational leadership and holds Illinois certificates Type 73 and 75. [REDACTED] testified that the Student's behavior has changed since last year with the Student refusing to work with [REDACTED] in [REDACTED] one on one times or in group setting. [REDACTED] testified the Student this current school year "seems to hate me." [REDACTED] testified [REDACTED] believes the Student is suffering from a "loyalty conflict." This conflict, according to [REDACTED]'s testimony, stems from the Student perceiving there is "bad blood" between home and school. [REDACTED] testified that [REDACTED] has heard the Student exclaim that the teachers and [REDACTED] are preventing the Student from going to [REDACTED] new school. [REDACTED] testified that the Student has not

<sup>29</sup> Test administered during the Student's first semester in the TAP placement.

<sup>30</sup> Wechsler Individual Achievement Test Third Edition

<sup>31</sup> No evidence was presented by either side to confirm or disprove the statement relative to the aide's presence.

had an FBA<sup>32</sup> completed nor a BIP<sup>33</sup> but believes the Student would benefit from both at the current time. [REDACTED] also testified that [REDACTED] has not observed any of the behaviors in school presented by the Student as described by the Parent's testimony (and observed during the Student's testimony by the hearing officer). [REDACTED] also testified that [REDACTED] had reviewed the IEE by [REDACTED] and that the IEE was discussed by the team at the 5/5/11 IEP meeting. [REDACTED] testified that ESY for academics was not recommended as part of the 5/5/11 IEP as regression/recoupment was not observed for academic issues during the winter or spring breaks.<sup>34</sup> When questioned under cross-examination about the "loyalty conflict" testified to under direct, [REDACTED] acknowledged that the Student's behaviors attributed to the "loyalty conflict" could also be attributed to issues related to [REDACTED] current diagnoses of bipolar disorder, autism, ODD, ADHD. [REDACTED] also volunteered that all of the behaviors attributed to the "loyalty conflict" theory posited by [REDACTED] could be attributed to the single diagnosis of ODD. [REDACTED] confirmed [REDACTED] social worker logs reflect that the Student has missed 16 sessions since the beginning of this school year with [REDACTED] due to [REDACTED] refusal to participate with [REDACTED].<sup>35</sup> [REDACTED] also confirmed there was another social worker in the program but the Student has not been given the opportunity to meet with that social worker as an alternative approach.

11) Testifying for the District was [REDACTED] (hereinafter referred to as [REDACTED]) testified [REDACTED] was in [REDACTED] second year in the [REDACTED] placement as a math and science teacher and in [REDACTED] second year of teaching overall. The bulk of the testimony of [REDACTED] can best be characterized as confirming the testimony of prior witnesses for the District relative to student success last year, changes in behavior this year, conversations with Student that suggest the Student is misbehaving on purpose to assist with [REDACTED] reassignment to a new school. Much of the testimony of [REDACTED] centered on these issues and [REDACTED] offered opinions about the Student's behavior that

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<sup>32</sup> Functional Behavior Analysis

<sup>33</sup> Behavior Intervention Plan

<sup>34</sup> Regression/recoupment data was never presented by the District during the hearing, although District witness testimony noted observational data did not suggest regression prior to the 5/5/11 IEP meeting.

<sup>35</sup> 5/5/11 IEP stipulates 150 minutes per week of social work services (D 10). The IEP does not contain a goal specific to the social worker that illuminates how the 150 minutes would be utilized.

would generally be offered by staff trained in either psychology or social work, training [REDACTED] acknowledged during cross-examination that [REDACTED] does not have.<sup>36</sup>

12) Finally, testifying for the District was District school psychologist [REDACTED] (hereinafter referred to as [REDACTED]). [REDACTED] testified that [REDACTED] has [REDACTED] years' experience as a school social worker and [REDACTED] years' experience as a special education teacher. [REDACTED] testified [REDACTED] only contact with the Student was when [REDACTED] completed the WIATT-III testing in November of 2010 as part of a requested re-evaluation of the Student. When questioned about the Student's borderline score in word reasoning and how this would be addressed by the IEP, instead of a goal for this, [REDACTED] testified that accommodations would be offered to address this type of deficiency. [REDACTED] testified that [REDACTED] had reviewed "thousands" of reports during [REDACTED] career and believed that there was information missing from the IEE completed by [REDACTED].<sup>37</sup>

13) Parent recalled the Student's Mother as a rebuttal witness to the District's theory that Student's regression in behaviors this year is due to the financial strain placed on the family by the need to hire an attorney to facilitate the Parent's DPCN. Parent was asked if in fact the DPCN and associated costs have placed a financial burden on the family and the response was "no." Parent then testified that as a [REDACTED] Parent is paid \$62,000 annually. Parent also testified the death benefit received from the biological father's insurance policy was \$100,000 and the Parent received excess proceeds from the sale of her previous home when the Parent sold it and moved in with the step-father when they were married. The Parent testified the step-father is back to work after a few month lay-off (April of 2011) and is back to making \$82,000 per year. During the time the step-father was laid off he was provided with four (4) weeks of severance pay and eight (8) weeks of vacation pay. Parent testified that while the Student knew the step-father was laid off [REDACTED] did not know the Student had any concerns about the

<sup>36</sup> The hearing officer notes that [REDACTED], as the math and science teacher, was neither asked nor volunteered any testimony as to the Student's past or current levels of performance in either subject.

<sup>37</sup> The hearing officer calculates that the school psychologist would have to review one to two psychological reports each and every day for the [REDACTED] years of [REDACTED] experience to actually review "thousands" of reports as testified under direct examination. When asked under cross-examination how many reports [REDACTED] completes annually, [REDACTED] testified 15 to 20 reports per year. This difference and unlikely scenario raised an issue of credibility in the mind of the hearing officer and further review of testimony by [REDACTED] is not warranted. This raised some credibility issues with the hearing officer. Testimony by [REDACTED] was not given much weight in the analysis completed by the hearing officer when considering the possible legal conclusions.

financial well-being of the family as the Parent had not ever discussed those issues with the Student. Parent made a point during the rebuttal testimony that prior to the filing of the DPCN and continuing today the Parent has been able to provide for the Student's needs through providing for a psychiatrist, psychologist and educational advocate. Parent's testimony and accompanying statements regarding access to financial assets were credible in the estimate of the hearing officer.

### *Legal Conclusions*

- 1) The Parent, through the five (5) issues identified in the DPCN, alleged that the District violated the procedures of the IDEA. The Parent alleged:
  1. **Did the District deny the Student a FAPE by failing to give due weight to the evaluations, reports and recommendations of the Student's treating psychologist?**
  2. **Did the District deny the Student a FAPE by failing to give due weight to the evaluations, reports, and recommendations of the Student's treating psychiatrist?**
  3. **Did the District deny the Student a FAPE by failing to give due weight to the evaluations, reports and recommendations of the Student's educational advocate?**
  4. **Did the District deny the Student a FAPE by failing to provide the Student with ESY?**
  5. **Does the District have an obligation to place the Student in a private therapeutic day program as opposed to the District's recommendation of placement in TAP in order to provide the Student with a FAPE?**
  
- 2) When considering a dispute regarding a student with a disability and the student's school district that alleges a failure to provide a Free Appropriate Public Education (FAPE), the hearing officer must first begin by considering the Supreme Court decision in Rowley (*Board of Education of the Hendrick Hudson School District, Westchester County et al. V. Rowley* by her Parents, Rowley et ux. 458 U.S. 167 (1982)).<sup>38</sup> In Rowley, the decision is directed by the Supreme Court which set forth a two pronged test for determination of a (FAPE) in the least restrictive environment (LRE). The first prong directs any hearing officer decision to determine whether or not the District has complied with the statutory procedures required by the Individuals with Disabilities Education Act (IDEA) 20U.S.C. 1401 et seq. Rowley indicates that any substantial denial of procedural

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<sup>38</sup> The Rowley decision was also offered as one of the case law decisions submitted by the District for hearing officer consideration.

safeguards that result in adverse impact on the parents' participation or the Student's education in so much as the result is a loss of educational opportunity then there has been a denial of the law's requirement for FAPE. This first test of Rowley provides for relief only when the procedural violations result in substantial harm to the student (*W.G. v. Board of Trustees*, 960F.2d 1479, 1484 (9<sup>th</sup> Circuit 1992)).

- 3) In this DPCN, the issues identified by the Parent as listed in 1-3 above are procedural issues related to 34 CFR §300.502 (c) (1) which states in part: "Parent-initiated evaluations...Must be considered by the public agency, ...in any decision made with respect to the provision of FAPE to the child;..." An independent educational evaluation provides parents with the opportunity to obtain their own evaluation of their child to counteract the evaluation obtained by a district. It is a procedural safeguard guaranteed by the IDEA. The question this hearing must answer relative to issues 1-3 is whether or not the Parent provided evidence to support the burden of proof carried by the Parent that the District did not consider the evaluations/recommendations submitted by the treating psychiatrist, psychologist or educational advocate. "Consideration" and not "due weight" is the statutory obligation the District has relative to the Parent's three submitted IEE's from the attending psychiatrist, psychologist, and education advocate. Neither the IDEA nor its 2006 regulations elaborated on what steps a district must take to meet its obligation to consider an IEE, nor are there any requirements that specify the weight that must be assigned to it. In researching the issue, the US Department of Education did not address the issue when it had the opportunity to do so in its discussion of the 2006 final IDEA regulations. In fact, ED declined to elaborate or expand the regulations beyond its current language. Instead, in responding to the request for clarification of what it means to consider an IEE, ED focused on the issue of whether the IEE meets agency criteria, as it relates to such duty:<sup>39</sup> In the case of *T.S. ex rel. S.S. v. Board of Education of the Town of Ridgefield* (2d Cir 1993), the Second Circuit ruled that, in the absence of a statutory or regulatory definition, the plain meaning of considered -- to reflect on or think about with some degree of care or caution - seemed appropriate. Using that standard, the court found the district in question had properly considered the

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<sup>39</sup> See "Special Ed Connections," Understand district's duty to consider IEE's.

IEE at issue, despite the fact that a copy of the full report was not distributed to every evaluation team, when: 1) the report was read in full by the director of special education at the IEP meeting; 2) portions of the report were read in full at the IEP meeting, with the balance summarized; and 3) the minutes of the meeting reflect some subsequent discussion of the issues raised by the IEE.<sup>40</sup>

- 4) In this case, the evidence supports that the February 24, 2011 IEE completed by [REDACTED] was considered at the May 5, 2011 IEP. Each District witness testified the report was considered at the May, 2011 IEP and several District witnesses testified that many of the recommendations contained in [REDACTED] IEE were being implemented in the Student's program as accommodations. The Parent did not present any evidence to the contrary. Similarly, the Educational Advocate was present and participated in the May 5, 2011 IEP team meeting and was given an opportunity to share [REDACTED] recommendations for the Student to the rest of the IEP team. The recommendations of the attending psychiatrist, [REDACTED], M.D.,<sup>41</sup> were not shared with the District until July 6, 2011 which was after the May 5, 2011 IEP meeting and the District did not have the opportunity to consider this letter and its recommendations before the Parent filed the DPCN on July 27, 2011. Finally, there is nothing in the statutory language or case law that suggests "consideration" of an IEE translates into an obligation to implement any, let alone all, of the recommendations in an IEE.
- 5) Issue number four (4) suggests the District failed to provide the Student with a FAPE by failing to provide ESY to the Student during the summer of 2011. The ISBE states that no single factor is determinative of the need for extended school year services. Extended school year services must be provided only if the child's IEP team, on an individual basis and in accordance with the district's IEP procedures, determines that ESY services are necessary to insure FAPE (34 CFR §300.106). As with all IEP decisions, the final determination of what services will be provided must be individually determined based on the needs of the student. The ISBE also requires that a variety of factors must be examined when considering if a student should receive ESY services. These factors include, but are

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<sup>40</sup> Ibid.

<sup>41</sup> See: (D 220)

not limited to: the degree of impairment, ability of child's parents to maintain child's level of skills, whether the service is extraordinary to the child's condition, and the child's rate of progress, retrospective data such as past regression and rates of recoument of skills (*Johnson v. Independent School District No. 4 of Bixby*, 921, F.2d 1022 (10th Cir. 1990)). *Cordrey v. Euckert*, 917 F.2d 1460, (6th Cir. 1990) also recommends consideration of "emerging skills" in the ESY eligibility analysis.<sup>42</sup>

The ISBE also notes that reliable sources of information for determining the presence of these factors may include: (1) progress on goals in consecutive IEPs; (2) progress reports maintained by teachers and others having direct contact with the student before and after interruptions in the educational program; (3) observations and opinions from teachers, parents and others; and (4) results of criterion referenced tests, assessments and other equivalent measures.<sup>43</sup> The Student's most recent IEP dated 5/5/11 under the Present Level of Performance section at (D 7) essentially describes a Student who has made excellent progress. Words like the Student has consistently "made [redacted] day" when describing the Student's daily behavior assessments, "maintains 'A's' in all of her classes," and "(the Student) is functioning very well in the [redacted] program" are common throughout the discussion of the Student's Present Level of Performance. The Parent provided significant evidence that the Student has regressed dramatically this Fall Semester. In fact, in all instances of Staff testimony, the Staff agreed the Student has demonstrated significant regression in most aspects of the Student's present level of performance. However, this regression will be considered as part of the District's decision to determine ESY for the end of the current school year. The Parent's allegation in issue number four (4) alleges failure by the District to provide ESY this past summer. The Parent did not provide any evidence that the Student had regressed after any winter or spring break to substantiate the claim the District had an obligation to provide ESY during the summer of 2011.

- 6) The fifth and final issue before the hearing officer is whether or not the District denied the Student a FAPE by failing to provide the Student with a Private Therapeutic Day School placement as requested by the Parent at the May 5, 2011 IEP meeting. The question raised by this issue brings to bear the second prong of Rowley. The second prong of the Rowley test is to determine whether or not the

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<sup>42</sup> See: "Illinois State Board of Education Communication on Extended School Year Services For Students With Disabilities November 20, 2001."

<sup>43</sup> Ibid.

individualized program developed through such procedures is reasonably calculated to enable the Student to receive educational benefit. Each IEP developed by the District since the [REDACTED] grade has considered whether or not the Student was receiving educational benefit. When the Student demonstrated that the Student was struggling at the end of [REDACTED] grade, the evidence demonstrates the District provided a new IEP with a more intense and restrictive program. When the evidence during the [REDACTED] grade demonstrated the Student was still struggling, the evidence demonstrates the District provided the Student with a new IEP with a more intense and restrictive program in the [REDACTED] placement. Several staff members testified that now that the Student is currently experiencing a regression in both of [REDACTED] behaviors and academics that they would recommend the District complete a FBA and a BIP within the current IEP in an effort to address these demonstrated regressions.

### **BURDEN OF PROOF**

It was readily apparent from the testimony of the Parent and the Student's Educational Advocate that there has been a sincere and credible effort on their part to provide an educational and home environment in the best of the interest of the Student. It needs to be noted that the evidence presented at hearing does reveal that the Parent has made a tremendous effort to provide appropriate outside evaluations, counseling and support for the Student. The Parent's care and concern for this Student was very evident in the testimony of the Parent and documentation provided by the Parent. However, it is the conclusion of this hearing officer that, by a preponderance of the evidence, Parent has not met her burden of proof [*Schaffer v. Weast*, 546 U.S. 49, 62 (2005)]. It is also noted that there were concerns relative to the Student's IEP and some interactions between the Student and staff that were noted in the testimony and evidence presented. However, the preponderance of the evidence presented by the Parent when considered along with the noted concerns (mostly noted in footnotes) was not sufficient to meet the Parent's burden of proof. When considering the first three issues of this DPCN, the District provided ample evidence that the IEE's presented to the District at the May 5, 2011 IEP were considered by the District consistent with statutory and case law expectations. While the evidence is also clear that the District did not implement 100% of these recommendations (including placement in a private therapeutic day program), such implementation is not

required by the statutes or applicable case law, When considering the fourth issue regarding the provision of ESY for the summer of 2011, the District presented sufficient evidence to support the District considered regression/recoupment data based upon the student's then present level of performance and the testimony of observed behaviors by multiple staff members in an effort to insure the Student had not experienced regression during the 2010-2011 school-year that would warrant ESY. In fact, evidence jointly submitted by the parties and cited herein demonstrated the Student performed very effectively during the 2010-2011 school year. Finally, with regards to the District having an obligation to provide the Student with a private therapeutic day placement, the District's evidence supports the most appropriate placement in the least restrictive environment is indeed the District's current [REDACTED] placement. Evidence supports that progress was made during the 2010-2011 school year and the Student was clearly accessing the educational program at that time. Evidence also supports the District's acknowledgement that the Student is now demonstrating regression and the testimony of each District staff member supported their acknowledgement of the need for an FBA and a BIP for the Student during this current school year. The District should be afforded the opportunity to meet this obligation that has developed during the first several weeks of this school year. As noted herein, the District is clearly obligated to consider the outside evaluations presented to the District when making the placement decision, the evidence and testimony presented at the hearing clearly demonstrated this was done consistent with both the statutory expectations and controlling case law.

**ORDER:**

Since the ruling is a finding in favor of the District on all five (5) issues, no order is required.

**RIGHT TO REQUEST CLARIFICATION**

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

**RIGHT TO FILE A CIVIL ACTION**

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

  
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HEARING OFFICER

ENTERED: October 6, 2011

**CERTIFICATE OF SERVICE**

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

[REDACTED]

And

[REDACTED]

And

[REDACTED]

before 5:00 PM on October 6, 2011

[REDACTED]