

Case Number: 2012-0138
[REDACTED] vs. [REDACTED]
Hearing Officer: Stacey Stutzman

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: 10/07/2011
Date of Pre-hearing Conf: 11/07/2011

Date of Hearing: 02/6/2012 to 02/14/2012
Date of Decision: 02/24/2012

Summary of Decision

Parents of an 8 year old female unilaterally enrolled by her Parents in a private therapeutic day school at the end of her 2nd Grade year alleged District's failure to provide a free appropriate public education to Student since Fall of her 1st Grade year and sought relief in the form of payment for a private neuropsychological evaluation and reimbursement for various expenses they incurred in the provision of private services they secured for Student, including tutoring and occupational therapy assessment and services, and private school tuition and transportation of Student to and from the private school. District requested hearing on the issue of whether it appropriately evaluated Student prior to Parents' unilateral withdrawal of Student from her public school, a magnet school chosen by Parents for Student in 2008, and requested an Order that District should not be responsible for payment for the private neuropsychological evaluation performed in December 2011 following the submission of the due process hearing request in this cause or for any private assessments obtained by Parent prior to requesting an IEE at District expense.

HELD: For District

ORDERED: That Parents' request for relief is denied.

DECISION AND ORDER

This matter is before the undersigned impartial hearing officer for a due process hearing concerning District's request for an order upholding its denial of Parents' request for an Independent Educational Evaluation of Student at District expense and upon Parents' request for orders requiring District to pay for a private neuropsychological evaluation of Student performed by Dr. C at Parents' request in December, 2011, that District reimburse Parents for private occupational therapy assessments performed at Parents' request in November 2009 and September 2011, for tuition and fees paid to the private school in which they have enrolled Student unilaterally since June 2011, for the expenses they incurred for transportation of Student to and from the private school since June 2011, and for private speech/language and occupational therapy service and tutoring expenses incurred by Parents. The hearing officer has jurisdiction to hear and decide this matter under *105 ILCS 5/14-8.02a(g)(2010)* and *34 CFR 300.512(2006)*. The undersigned Hearing Officer has advised the parties that there are and have been no conflicts which have prevented her from conducting a fair and impartial hearing and rendering a fair and impartial decision in this cause. The parties have been advised of their due process hearing rights.

Procedural History

Parents' attorney submitted a *DUE PROCESS REQUEST AND REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATIONS* to District Superintendent dated October 7, 2011. Upon receipt of same, District forwarded the Parent's request to the Illinois State Board of Education and simultaneously submitted District's request for due process hearing on the issue of evaluation. District's counsel responded to Parent's hearing request in writing, dated October 18 2011, denying that District deprived Student of a free appropriate public education as alleged by Parents and also responding that District's alleged failure to provide Parents with Student's school records was not an issue for due process hearing.

The parties participated in a resolution session in this matter on October 24, 2011. The Pre-Hearing Conference was held on November 7, 2011, the date designated by the Illinois State Board of Education Special Education Database System. The *Pre-Hearing Conference Report*, dated November 9, 2011, is attached to and incorporated into this Decision as *Hearing Officer Exhibit A*.

At the time of the Pre-Hearing Conference, Parents' counsel, with agreement from District counsel, advised that he wished to resolve the issue relating to production of Student's records with District counsel and did not wish to submit a motion on same at that time. He also requested a postponement of the due process hearing, tentatively scheduled for November 21, 2011, until sometime after January 2, 2012 to allow completion of a private neuropsychological evaluation. District counsel also requested time to convene an IEP conference to consider the report of that evaluation. Parents' counsel requested that three days be set aside for the hearing. The parties therefore agreed to hearing dates of February 6, 7, and 8, 2012.

On November 18, 2011, Parents' attorney submitted a *Motion for Interim Order* seeking to compel District to produce certain school records, alleging that Parents' attorney submitted a request for copies of Student's records in writing to District's Student Records Administrator by facsimile and U.S. mail dated August 9, 2011, and that District provided copies of records in response to his request on August 17, 2011. However, Parents' attorney believed that further records were available but had not been produced. Prior to filing his motion, he proceeded with the resolution session and the Pre-Hearing Conference in this cause, advising the hearing officer that he wished to resolve the issue of outstanding records directly with District counsel.

District counsel responded via emails regarding her efforts to secure and provide copies of all Student records, and Parents' counsel requested that ruling on his motion be deferred until the search was complete. On December 21, 2011, District counsel submitted an email advising that all available records had been produced, and she included a certification of same by the Records Custodian. *Memorandum and Interim Order on Parents' Motion to Compel the*

Production of Certain School Records denying Parents' motion to compel production was therefore entered on December 28, 2011.

On December 18, 2011, Parents' attorney submitted a *Motion for Interim Order* seeking to compel District to allow Parents' private neuropsychological evaluator, [REDACTED] access to the public school previously attended by Student in the 2010-11 school year, hereinafter designated as *School N*, and to the staff at that school. District submitted its Response to the motion on December 28, 2011, with leave of the undersigned hearing officer. *Memorandum and Interim Order on Parents' Motion to Compel Private Neuropsychologist Access to Public School* denying Parents' motion was entered on December 29, 2011.

On January 5, 2012 Parents' attorney submitted correspondence seeking reconsideration of the above orders of December 28 and 29, 2011. *Memorandum and Interim Order on Parents' Requests for Reconsideration of Prior Orders on Parents' Motions*, determining that both prior orders would stand, was entered on January 6, 2012.

Due to the aforesaid request for postponement of the hearing, this Decision is not being issued within 45 days of the initiation of the statutory 45 day timeline. It is being issued within 10 days of completion of the hearing.

The hearing in this matter was convened as scheduled on February 6, 7, and 8, 2012 at School N. In attendance at the hearing of this matter were both Parents, [REDACTED], attorney for Parents, and [REDACTED] and [REDACTED], attorneys for District. The hearing was reported by [REDACTED] (312-368-0029) on February 6 and 8, 2012, and by [REDACTED] of [REDACTED] (312-368-1228) on February 7, 2012. Witness testimony concluded after 5:00 p.m. on February 8, 2012, at which time both counsel requested leave to submit written closing arguments by 5:00 p.m. on February 14, 2012 in lieu of oral arguments, and their request was granted and entered as a continuance on the Illinois State Board of Education Special Education Database System as directed by the System.

23 witnesses testified over 3 days of hearing. The following witnesses were called to testify on behalf of both parties: [REDACTED], District Chief Officer of the Office of Special Education; [REDACTED], School N First Grade Teacher; [REDACTED], former School N Social Worker; [REDACTED], School N Counselor/Case Manager; [REDACTED], School M Special Education Teacher; [REDACTED], School N Principal; [REDACTED], Manager in District Office of Special Education; [REDACTED], School N Occupational Therapist; [REDACTED], School N Second Grade Teacher; [REDACTED], School N Special Education Teacher; [REDACTED], Private School Social Worker; [REDACTED], Student's private tutor; [REDACTED], Private School Occupational Therapist; [REDACTED], Private School Executive Director; [REDACTED], Private School Teacher; [REDACTED], Neuropsychologist/ private evaluator; [REDACTED], District Citywide Teacher; [REDACTED], Student's private Occupational Therapist; [REDACTED], District Special Education Administrator; [REDACTED], School N Psychologist; [REDACTED], School N Teacher; [REDACTED], Parent. Parents also called Parent [REDACTED] to testify on their behalf.¹

Parents' counsel submitted copies of 726 pages of documents in his disclosure packet at the disclosure deadline for possible use at hearing. District counsel submitted copies of 379 pages of documents in her disclosure packet at the disclosure deadline in this matter for possible use at hearing.² Parents added, with agreement from District, 2 pages, numbered PD727 and 728, and District added 10 pages, numbered SD47a through 47d, SD52a and 52b, and SD380 through 383, with agreement from Parents, during hearing. The documents admitted by reference during witness testimony, including those to which the parties stipulated, are listed on the *Appendix* included with this Decision and Order.

Both parties submitted written closing arguments by email on February 14, 2012, as previously requested and agreed to by counsel. In addition, Parents' counsel submitted copies of

¹ At the disclosure deadline, Parents' counsel did not include P.L. on his final witness list and District counsel advised that she wanted P.L. to testify. P.L. attended the entire hearing, and Parents' counsel called her to testify, although District counsel advised that she did not want to call her and therefore objected to Parents' counsel calling her. Over that objection, P.L. was allowed to testify, as there was no prejudice or surprise to District in allowing Parent's testimony under the circumstances.

² Parent documents are referenced hereinafter with a *P* preceding the page number and District documents with a *D* preceding the page number.

Kevin T. v. Elmhurst, 36 IDELR 153 (N.D. Ill. 2002), and also *Knable v. Bexley*, 238 F.3d 755(6th Cir. 2001); *Loren F. v. Atlanta*, 349 F.3d 1309 (11th Cir. 2003), and *Sarah M. v. West*, 111 F. Supp.2d 695 (D.Md. 2000). District counsel submitted copies of *Johnson v. Duneland*, 92 F.3d 554 (7th Cir. 1996); *Lachman v. ISBE*, 852 F.2d 290 (7th Cir. 1988); *James and Lee Anne D. v. Aptakisik-Tripp*, 642 F.Supp.2d 804 (N.D. Ill. 2009); and *Richman v. Sheahan*, 415 F.Supp. 929 (N.D. Ill. 2006); and also *Burlington v. Massachusetts*, 736 F.2d 773 (1st Cir. 1984); *Doe v. Metropolitan*, 133 F.3d 384 (6th Cir. 1998); *Schoenfeld v. Parkway*, 138 F.3d 379 (8th Cir. 1998); and *Fort Zumwalt v. Clynes*, 119 F.3d 607 (8th Cir. 1997).

Issues

1. Whether District conducted appropriate and timely assessment and evaluation of Student in accordance with applicable state and federal special education statutes and regulations and therefore has appropriately denied Parents' request for IEEs at public expense?
2. Whether District denied Student a free appropriate public education since October 7, 2009 by failing to develop and/or implement IEPs that included:
 - A. Accurate present levels of performance;
 - B. Appropriate measurable annual goals and objectives based on the Student's individual needs and her levels of performance;
 - C. Related services appropriate to Student's needs and of sufficient intensity to allow her to benefit from special education, including social work, speech language, occupational therapy, and assistive technology services;
 - D. Effective research based teaching methodologies of sufficient intensity to enable Student to make progress commensurate with her cognitive ability; and
 - E. Extended School year services of at least six weeks duration in summers 2010 and 2011?
3. Whether District denied Student a free appropriate public education since October 7, 2009 by failure to provide Parents with objective written reports of Student's progress on her IEP goals?
4. Whether District denied Student a free appropriate public education by failure to provide Parents with copies of all of Student's school records upon a proper written request for same in this cause?

Findings of Fact

The material facts relevant to the issues in this matter are as follows: Student is an eight year African American female old female, adopted at birth by her Parents, who is currently enrolled unilaterally by Parents in 3rd Grade at a local private therapeutic day school. [REDACTED] She is eligible for special education under the *IDEA* in the category of Specific Learning Disability pursuant to an eligibility determination made while she attended 2nd Grade in the District on December 14, 2010, following referral completed and submitted by District staff, and Parents' signed consent for evaluation dated October 5, 2010. ([REDACTED]; P58-59, 65, 83-84; D47-48). Student's cognitive ability and her academic performance fall in the average range. [REDACTED]; P90, 145, 602)

School N is a public elementary school within the District, designated as a Magnet School, to which Student was admitted at Parents' request pursuant to the previously existing policy of "Principal's Discretion", at the beginning of her Kindergarten year in Fall 2008. [REDACTED]

[REDACTED] Parents desired enrollment at School N, rather than Student's neighborhood school, because of the fine arts curriculum and diversity among the student population. Student attended School N through the end of 2nd Grade in Spring 2011. Student's younger sister attends School N. [REDACTED]

Student had difficulty separating from Parent and entering the school building and the classroom at the beginning of her 1st Grade year. The previous counselor/case manager brought Student into the classroom during that time. However, the behavior resolved within the first month of school, and Student integrated into her classroom and participated and performed at the

expected level for the first part of 1st Grade. She received average and above average grades on her 1st Grade report cards during the 2009-2010 school year, with the exception of a D in Writing Standards for the 3rd quarter ending in April 2011. Her teacher addressed Student's academic needs in the areas of reading and spelling as they arose in the later part of the school year with interventions in accordance with School Based Problem Solving and Response to Intervention policies. While attending School N, Student developed friendships with her peers at School N, including a best friend who moved away. She was introverted and well-behaved in school, she listened and spoke appropriately, but she did not volunteer answers during class discussion. (██████████ P568; D63-67, 81)

Concerned about Student's behaviors at home and the difficulties Parents had observed with transition and separation, Parents had Student assessed by a private occupational therapist in November 2009, who found no atypical motor skills or development, but recommended occupational therapy to address symptoms of emotional dysregulation and sensory sensitivity based upon her clinical observation of Student and upon Parents' reports of Student's behavior. The private occupational therapist who did the assessment also recommended that Parents obtain an assessment of Student by "...a psychologist who uses a DIR/Floor time approach to evaluate separation anxiety, emotional dysregulation, and emotional expression." (P150-152) Parents subsequently secured private occupational therapy services for Student outside of school, and those services have continued to the present time at Parents' expense. Currently, the occupational therapist secured by the Parents participates in improvisation classes with Student at Second City. (██████████)

As recommended by the private occupational therapist, Parents obtained a private evaluation of Student by ██████████, a neuropsychologist, in April 2010 near the end of Student's 1st Grade year. ██████████ reported her diagnosis of anxiety disorder and a "provisional diagnosis of a Reading Disability", although she found no significant discrepancy between Student's average intellect and her average academic achievement, and she provided her written report to Parents on or about May 11, 2010. (██████████ P142-149, 547) Parent asked the 1st Grade teacher about the process of requesting a special education evaluation referral, and she Parent provided a copy of ██████████ report of evaluation to Student's 1st Grade teacher by depositing it in the teacher's inbox on or about May 13, 2010. (██████████ P544-45, 547) Parent asked the teacher to make a referral for an evaluation of Student to determine eligibility for special education on May 13, 2010. (██████████ P541-543)

On May 14, 2010, Student's 1st Grade teacher initiated the referral process to determine whether Student should be evaluated for eligibility for special education, and she followed up with the case manager on staff at that time, who subsequently transferred out of School N and was replaced by a new case manager for the 2010-2011 school year, and with the school psychologist, who reviewed the private report. (██████████ P541; D47) Although Parents had the option of having Student evaluated by a summer assessment team, they were encouraged to wait until Fall 2010 so that the School N staff, who knew Student, could assess her and write her IEP, if she was determined eligible for special education. (██████████ B; D346-348; P517)

Parents retained the services of ██████████ a speech/language therapist, to provide speech therapy and tutor Student outside of school beginning in the summer of 2010, between 1st and 2nd Grades. ██████████ an employee the private school Student now attends, spoke with Student's 1st Grade teacher at the end of the 2010-2011 school year, and she provided private services to Student until Student was subsequently enrolled in the private school. ██████████ had some training in and used various strategies in working with Student, including the Wilson Reading System, which she adapted to Student's needs. ██████████ identified and addressed Student's articulation of the /r/ sound, which she was able to resolve. (J.R.; P134-35)

School staff communicated and collaborated with the Parents and their private service providers regarding Student's education. (██████████; D195-96; P289-291, 296, 301, 309, 314-15, 325, 345-382, 483-576) When assigning Student's 2nd Grade classroom teacher for the 2010-2011 school year, the Principal took into account Parents' July email request for a specific type of teacher and classroom, and she assigned Student to a teacher who had received Orton-Gillingham training. (██████████; P479) Staff assessed and addressed Student's

academic needs in Reading and Math in 1st and 2nd Grade. (P. [REDACTED]; D86-94, 98, 117-150)

Student's 1st and 2nd Grade teachers communicated with Parent regarding any private information she wished to provide for completion of the referral in September, 2010, and Parent provided information from the private tutor and occupational therapist in addition to the previously provided private neuropsychologist's evaluation. ([REDACTED]; P346, 513). [REDACTED] School N's new case manager transitioned into School N for the Fall 2010-2011 school year, and it was her job to finalize the referral. She consulted the school psychologist, she obtained RTI information from the 2nd grade teacher, who had been informed of Student's status by the 1st Grade teacher, she met with Parent and staff to finalize the referral, and she accepted it. ([REDACTED]; D179; P83-84; D47a-47d) A meeting was held with Parent and staff on October 5, 2010, on which date Parent also signed Consent for Evaluation, which referenced and included the Domain sheet identifying the assessments to be performed in the areas of Health, Social/Emotional Status, General Intelligence, Academic Performance, and Motor Abilities. An IEP meeting date of December 14, 2012 was confirmed by N.C. with Parent. (M.F.; N.C.; P83-84, 346-347, 393, 395-404)

Student's Full Individual Evaluation (FIE) was conducted in the Fall of 2010 and included assessments of her Health, Academic Performance, Social/Emotional functioning, General Intelligence, and Motor Abilities. As noted on the Domain sheet, Student's communication status did not require assessment. In addition to [REDACTED] assessment and observation of Student, the information from the private neuropsychological report of evaluation of April 2010 was considered, and the school occupational therapist reviewed a copy of the private occupational therapy report from 2009 and performed an assessment of Student, including standardized testing, observation of Student, and administration of a sensory profile to Student's teacher. ([REDACTED]; D9-10, 27-30, 31-33, 34-35; 39-41)

An initial eligibility IEP meeting was convened at School N on December 14, 2010, three days before the winter recess, and within 60 school days of Parent's signed consent for evaluation. It was immediately followed by an IEP conference to develop Student's initial IEP. Parents and their private speech therapist/tutor and occupational therapist participated along with school staff, including the FIE assessors, Student's 2nd Grade teacher, and the special education teacher. ([REDACTED]; D6-26; P58-81) J.R. contributed her input regarding her work with Student using the Wilson Reading System and her recommendation for use of Wilson and multi-sensory instruction for Student. [REDACTED] A.E. contributed her input regarding Student's instructional needs, including recommendation for the use of multi-sensory instructional techniques, small group and 1:1 instruction, and visual supports, such as highlighting and color coding. (A.E.; P113-114)

The IEP of December 14, 2012 included an eligibility determination of Specific Learning Disability, with which all attendees agreed. (D14) Student's strengths and needs, including her reading, math, attention, and sensory concerns, and her present levels of performance were included in her IEP, as were goals addressing her needs in reading and mathematics. The IEP provided 400 minutes per week of special education instruction outside of the regular classroom, 200 of which were to be directed to reading and 200 to mathematics. The IEP included accommodations and modifications to address Student's needs, including maintenance of Student's attention to classroom tasks and sensory breaks. No related services were deemed necessary to permit Student to benefit from her special education instruction. The school occupational therapist advised the IEP team that Student did not require direct or consultative occupational therapy to allow her to benefit from special education, as she was functioning well in the classroom, and that any sensory concerns could be addressed by her teacher and with accommodations. The school social worker, who would have offered and provided her services to Student if they were required to facilitate her special education instruction, did not recommend services, and social work services were not requested by Student's teacher or Parents. The IEP included a statement that Student was not deemed eligible for extended school year services. The Student's IEP indicated consideration of three placements along the continuum of placement options for implementation of Student's IEP: 1) the general education classroom full time with

supplementary aides and services; 2) removal from the general education classroom for 20% or less of the school day; and 3) removal from the general education classroom for 21-60% of the day for special education instruction, which option was accepted as appropriate to meet Student's needs. Neither Parents nor their private providers objected to the IEP or requested additional instruction, accommodations, or services for Student. (██████████; D6-26, 31-33, 39-41; P58-81)

Unbeknownst to the School N Principal or staff, over the winter break that followed the development of Student's new IEP, Parent contacted the Chief Officer of Special Education & Supports in the District's central offices, and advised him of their desire for a placement for Student with "...intentional multi-sensory instruction, or staff who can provide services consistent with National Reading Panel-identified strategies." (██████████; P333-34) In response to Parents' request, ██████████ a citywide teacher with training and experience in learning disabilities and multi-sensory instruction, was dispatched to School N in January 2011 to determine whether Student's needs were being met. She determined that Student was being appropriately served at School N. She also provided professional development training to the members of the School N staff who desired it, including Student's special education teacher, in Wilson Reading and other multi-sensory instruction methodologies. (██████████)

Student's new IEP was implemented by Student's regular and special education instructors through the end of the 2011-2012 school year. Both incorporated multi-sensory methodology into Student's instruction. The special education teacher prepared IEP report cards which he provided to the Student's classroom teacher to provide to Parents with Student's regular report card. (██████████; P1-2, 55-57; D75-78) School staff continued communication with Student's private tutor and occupational therapist as well as her Parents throughout this time. (██████████) Parents did not advise staff that they were not receiving IEP progress reports. (██████████) Student met her IEP goals and benchmarks by the end of the school year. (██████████; P1-2; D75-78) Parents expressed satisfaction with the Student's progress and the efforts of Student's teachers. (██████████; P359, 477; D288, 290, 294)

During the 2009-2010 and the 2010-2011 school years, Parents applied to private schools for Student and solicited letters of recommendation from School N staff for use in their applications for Student's admission to various private schools. (██████████; D215-16, 220-230, 236, 342; P375, 379, 478, 483-485, 489-90, 494, 497, 502-503, 505, 525-527, 532, 727-728) They had her assessed for eligibility at the current private school's summer camp on December 15, 2010. (P359). In early May, 2011, Parents advised School N's Principal and Student's teacher that that Student would not be returning to School N and that she would be attending a private school which would "work intensively" with Student, and that they would then return to Student School N "after two years" at the private school. They did not express dissatisfaction with Student's IEP or the programming provided to her at School N, nor did they express any intention to seek payment for Student's private education from the District. The Principal advised them that they would have to participate in the required sibling lottery in the event that they wished to enroll Student at School N in the future. (██████████; D281; P475)

Parents enrolled Student in a private therapeutic day school for children with learning disabilities at their own expense beginning in the summer session in June 2011. They retained an attorney who sent District's CEO a letter dated August 9, 2011, informing District of their intent to place Student in that private school for the 2011-2012 school year and to "preserve their right to seek reimbursement of tuition and transportation costs" for that placement pursuant to 34 C.F.R. s. 300.148(d)(1)(2). (P285-286) Student has continued enrollment at Parents' expense for her 3rd Grade year to the present time. (██████████)

Student's private occupational therapist, A.E., administered the *Test of Visual-Perceptual Skills (non-motor)-Revised Edition* Student on September 21, 2011, subsequent to Parents' withdrawal of Student from the District. She noted that Student displayed good focus throughout all testing and scored above average on subtests of visual memory, visual spatial relationships, and visual sequential memory and below average on subtests of visual discrimination, visual closure, visual figure ground, and visual form-constancy, which her report stated "may give" Student difficulty in checking her work, identifying a whole word, recognizing an object that is

partially hidden from view, organizing school materials, and problem-solving with peers. She recommended color coding Student's materials, highlighting on assignment pages, and keeping the format of her assignments consistent. She has not observed Student at her private placement this school year. (A.E.; P93-95)

Parents' attorney subsequently requested a due process hearing on October 7, 2011, seeking payment and reimbursement for various assessments, services, and tuition, which he clarified at the time of the Pre-Hearing Conference in this matter, and including his request for an IEE at public expense. Parents then had Student reevaluated by [REDACTED] in December 2011, and she issued a report of that evaluation dated January 23, 2012. As in her April 2010 report, [REDACTED] noted Student's average intellect and average achievement, and indicated that Student "continues to remain at-risk for reading difficulties". She also included a statement that her "overall diagnostic impressions are consistent with Pervasive Developmental Disorder, Not Otherwise Specified, and ADHD, Predominantly Inattentive Type." [REDACTED] P594-604)

District has 11 multi-sensory classrooms situated in various public schools within the District, which begin at the 3rd Grade level, and which are considered the most restrictive placements for students with learning disabilities within the District. [REDACTED].) The multi-sensory classroom at School M has been taught by [REDACTED] for 8 years. It offers the students multi-sensory instructional immersion with small class size, exposure to typical peers, and access to any related service provision called for in a student's IEP. ([REDACTED].) Parent and Parents' private neuropsychologist visited that classroom prior to the due process hearing in this matter. [REDACTED] Parent observed E.D. instructing a student 1:1 in Wilson Reading, while 2 other students were working at their desks independently. ([REDACTED])

Conclusions of Law

At a due process hearing convened pursuant to the provisions of the Illinois School Code, it is incumbent upon the District to present evidence that, at all times relevant to the issues in the case, it properly evaluated and identified Student's needs and either provided or offered to provide her with a free appropriate public education in the least restrictive environment. *105 ILCS 5/14 8.02a (g-55)(2010)* The burden of persuasion is on the party seeking relief. *Schaffer v. West*, 546 U.S. 49 (2005) In this case, District bears the burden of persuasion on Issue No. 1, whether it appropriately denied the request for an IEE at public expense, and Parent bears the burden of persuasion on all remaining issues.

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

Each special education student is to be placed in the least restrictive environment in which he can receive a satisfactory education, which is to be determined by where his IEP providing him with FAPE can be implemented. *20 U.S.C. 1412(a)(5)(2005)*; *105 ILCS 5/14-8.02(d)(2008)* And see *James and Lee Anne D. v. Aptakisik-Tripp*, 642 F.Supp.2d 804 (N.D. Ill. 2009).

The material facts in this case are largely undisputed by the parties, although, according to their closing arguments, counsel disagree on the interpretation of the evidence presented, and District's summation provides a more accurate reflection of the evidence relevant to the issues herein. The attorneys have cited a number of federal court decisions from within and outside of this jurisdiction in support of their respective positions, most decided prior to the IDEA 2004 and

its 2006 regulations, wherein the existing case law was codified. To the extent that the cited case law adds any significant precedential support under the facts of this case, it has been cited herein.

Parents in this matter do not seek, nor would they be legally entitled to under these facts, Orders requiring placement of Student in a private therapeutic day school or Orders of provision of related services or compensatory services by District. Clearly they desired a private placement for Student prior to and at the time of her from the public school, and they intend to keep her privately enrolled. They seek only Orders requiring District to pay and reimburse various costs of private assessment, education, and services provided to Student over the past 2 years, including the period of time preceding referral and identification as a special education student. As the District's initial evaluation was performed in the Fall of 2010, resulting in an eligibility determination and IEP developed for Student on December 14, 2010, and since it has been deemed appropriate, as discussed under Issue No. 1 below, Parents are not entitled to payment for or reimbursement of [REDACTED]'s recent re-evaluation nor for any other private assessments performed thereafter.³ The testimony elicited from [REDACTED], and various personnel from the current private placement was not determinative otherwise, especially in light of the clear, credible, and compelling testimony elicited from District personnel here.

In reference to Parents' request that District reimburse them for costs associated with the private tutoring and occupational therapy they secured and their unilateral enrollment of Student at the private school she continues to attend, the educational placement of a child must be driven by the student's unique individual needs as designated by the goals to be addressed and the accommodations and related services required to assist her in reaching those goals in her IEP. The district must make a continuum of placement options available, ranging from a regular classroom in the student's neighborhood school to private residential facilities, and must place each student in the least restrictive environment in which her IEP goals can be implemented with the designated supports and services. *23 ILAC 226.240(2007), 34 CFR 300.114-116(2006)*

Only where the educational program proposed by a school district is inadequate is it necessary to address the question of whether Parents' unilateral private placement is appropriate and whether they are entitled to payment for that chosen placement pursuant to the *IDEA*. *34 CFR 300.148(2006)*. However, in this matter District complied with the law by providing Student with FAPE and placing Student in the least restrictive environment in which her IEP could be and was properly implemented. The evidence does not support a finding that she required any more than 400 minutes per week of specialized instruction provided by qualified teachers and certainly not a self-contained classroom or a separate day school to address her needs. Neither the nature nor extent of Student's disability legally required the IEP team to place her more restrictively than they did in December 2010. Parents certainly had the right to withdraw their child from the public school system and pay for a private education, but they are not entitled to reimbursement from District when the public system in this case has provided an appropriate education in a less restrictive environment. Furthermore, although District has available a multi-sensory program and has offered it to Parents for Student at this time, the IEP team was not required to include it as an option on Student's December 14, 2010 IEP because, as [REDACTED] testified, it is the most restrictive public placement offered to students with learning disabilities in the District, and it was not required for Student, whose needs could be and were in fact appropriately addressed at School N with modifications and accommodations and special instruction.

The testimony elicited from District personnel was significant in the decision of this case. The teachers who worked with Student at School N, including [REDACTED], were most credible and impressed the undersigned hearing officer as honest, skilled, knowledgeable, professional, and indeed very collaborative. Other District personnel, including [REDACTED] were also persuasive in their testimony. [REDACTED] reports and her testimony did little to support Parents' position here in terms of Student's educational needs or District's alleged failure to provide FAPE. Although she added new "overall diagnostic impressions" of PDD and ADHD to her December 2011 assessment, Student's IEP of 2010 addressed Student's

³ Parents do not seek reimbursement for Dr. C's April 2010 evaluation.

attentional and sensory issues with both special instruction and accommodations and modifications. Likewise, ██████████ September 2011 assessment, which was performed prior to Parents' October 7, 2011 request for IEE, does not offer information that had not already been programmed for in Student's IEP. It is clear that both private evaluations had more to do with Parents' desire to present testimony at this hearing and little to do with Student's actual need to be re-evaluated a year or less after her initial FIE and eligibility determination, which Parents did not question until their attorney submitted the request for hearing seeking reimbursement and payment for privately incurred expenses. Likewise, although Parents certainly had the right to provide their child with every perceived educational advantage at their own election and expense, the testimony provided by the private providers, ██████████ and ██████████, was not persuasive that District failed to address and meet Student's educational needs in accordance with the law. The testimony of staff from Student's private school was neither persuasive nor relevant to the issues here, since the program offered by District was appropriate, and therefore an analysis of the propriety of the private school need not be addressed.

Application of state and federal special education statutes and regulations to the facts in this case necessitate a determination that District must not be held responsible for the cost of an IEE of Student and that District offered Student a free appropriate public education in the least restrictive environment at all times relevant to the issues in this case, and specifically as follows:

1. The preponderance of the evidence supports District's assertion that its personnel conducted appropriate and timely assessment and evaluation of Student, and that District has therefore appropriately denied Parents' request for independent educational evaluation of Student at public expense.

No child shall be eligible for special education without a carefully completed case study, currently defined as a full and individual evaluation (FIE), fully reviewed by professional personnel in a multidisciplinary staff conference and only upon the recommendation of qualified specialists. *105 ILCS 5/14-8.02a(b)(2008)* Children who are already receiving special education must be reevaluated by the District at least once every 3 years unless the parents and the district agree that a reevaluation is unnecessary. *23 ILAC 226.120(2007); 34 CFR 300.303(2006)* The school district must inform parent of the domains in which assessment is needed and obtain parents' consent for evaluation, after which the evaluation is to be conducted and an eligibility meeting convened within 60 days of the signed consent. *105 ILCS 5/14-8.02(b)(2008), 23 ILAC 226.110(2007)*

A full and individual evaluation is one that provides for the assessment of a child in all areas of suspected disability and which uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. Assessments must be selected to ensure that the results accurately reflect the child's aptitude or achievement, and the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. *23 ILAC 226.110(2007), 34 CFR 300.304(2006)* Additionally, an evaluation of a child suspected of having a specific learning disability must include a formal observation of the child in her school classroom during classroom instruction. *34 CFR 300.310(2006)* Beginning no later than the 2010-2011 school year, school districts have been required to implement a process to determine a child's response to scientific, research-based interventions, commonly referenced as *RTI*, as part of an FIE for any student suspected of having a specific learning disability. *23 ILAC 226.130 (2006)*

When an IEE at public expense is requested and the school district does not agree to fund it, a parent has the right to secure the IEE at her own expense to determine the nature and extent of a student's educational needs, not just for the purpose of eligibility determination, and present it to the District for consideration. She can present the IEE findings to a due process hearing officer, and, if the District's evaluation is found to be inappropriate, the District shall be ordered to pay for the IEE. *105 ILCS 5/14-8.02(b)(2010)*

In this matter, the referral for evaluation was submitted in a timely manner by the 1st Grade teacher when Parent requested it, it was completed appropriately, consent was signed with

reference to the Domains to be assessed, and the evaluation was completed within 60 school days of the consent, as required by law. In addition to being timely, the FIE performed in the Fall of 2010 was sufficiently comprehensive to allow the IEP team to determine eligibility and to accurately identify Student's needs and to develop an IEP to appropriately address those needs.

As to this issue as well as all remaining issues, District staff were most credible. The 1st and 2nd Grade teachers who worked directly with Student and contributed to the referral for evaluation were knowledgeable and professional. They were attentive and responsive to Student's needs at all times, and they went above and beyond the call of duty in communicating and collaborating with Parents and their private providers and in their efforts to address Parents' concerns for their child. In spite of the allegation of some missing DIBELS documentation, due to the size of the District and management of its student records system, a transition in case managers at School N, and the fact that Student had been withdrawn from the District for several months at the time her records were requested for this case, it cannot be said that there were any procedural errors on the part of the District that resulted in a deprivation of FAPE or educational benefit to Student or which in any way impeded her Parents' participation in the IEP process.

2. The preponderance of the evidence does not support Parents' assertion that the District denied Student a free appropriate public education since October 7, 2009 by failing to develop and/or implement IEPs that included:

- A. Accurate present levels of performance;**
- B. Appropriate measurable annual goals and objectives based on the Student's individual needs and her levels of performance;**
- C. Related services appropriate to Student's needs and of sufficient intensity to allow her to benefit from special education, including social work, speech language, occupational therapy, and assistive technology services;**
- D. Effective research based teaching methodologies of sufficient intensity to enable Student to make progress commensurate with her cognitive ability; and**
- E. Extended School year services of at least six weeks duration in summers 2010 and 2011?**

A child's IEP must include, among other things, 1) a statement of her present levels of academic achievement and functional performance; 2) a statement of measurable annual goals that reflect consideration of the State Goals for Learning and the Illinois Learning Standards, as well as benchmarks or short-term objectives developed in accordance with her present levels of educational performance; 3) a statement of the special education and related and supplementary services she requires, based on peer-reviewed research to the extent practicable, to advance appropriately toward attaining her goals, progress in the general curriculum, and to participate with her peers; and 4) a statement as to whether she requires the provision of services beyond the district's normal school year, or extended school year (ESY) services, in order to receive FAPE. *23 ILAC 226.230 (2007), 34 CFR 300.320 (2006)*

As soon as possible following development of a child's initial IEP, special education and related services must be provided to the child in accordance with the IEP. *23 ILAC 226.200(2007); 34 CFR 300.323(c)(2006)*

The evidence presented at hearing was sufficient to show that Student's IEP was reasonably calculated to confer meaningful educational benefit upon Student, pursuant to the *Rowley* standard. See *James and Lee Anne D. v. Aptakisik-Tripp*, 642 F.Supp.2d 804 (N.D. Ill. 2009). The testimony of District's staff regarding the development and implementation of Student's IEP was credible and compelling. Student did not have an IEP, and was not legally entitled to an IEP under the facts of this case, during the 2009-2010 school years. The IEP developed by the IEP team, including her Parents and her private providers, on December 14, 2010 and based on the information obtained from her FIE, included all of the information required by law, as set forth above, and it was promptly implemented by Student's 2nd Grade and special education teachers, both of whom were experienced and well-trained teachers who incorporated multi-sensory strategies into their instruction, while Student remained in attendance at School N for the duration of the 2010-2011 school year.

In addition to the accommodations and modifications required by her IEP, Student received 40 minutes each day of specialized instruction in Reading and 40 minutes per day in Math from [REDACTED] a well-qualified and attentive teacher, outside of the general classroom, as well as the instruction received in the general education classroom from [REDACTED] and [REDACTED], all of whom testified credibly and knowledgeably. In response to Parents' request to the District's chief special education administrator, a special professional development was provided to School N staff in multisensory methodologies. Student progressed on her math and reading goals as the school year proceeded, and she met her goals by the end of the school year. She was also able to maintain average to above average grades for the last semester of the school year at the magnet school.

It is also very important to note the praise for Student's teachers and recognition of "tremendous progress" received by District from Parents during that time. The evidence certainly does not support a contention that the teachers at School N did not employ effective methodologies in their instruction of Student or that Student required any more extensive intervention than she was receiving in order to receive an appropriate education. Nor does it indicate that ESY should have been provided for in the Student's IEP. Clearly, Parents had already made the decision to send Student to private school, regardless of the efficacy of the program provided for her at School N. Parents' belief that their choice of a private school is better for Student than the program designed and implemented at School N does not mean that District's IEP deprived Student of FAPE. See *Lachman v. ISBE*, 852 F.2d 290 (7th Cir. 1988)

3. The preponderance of the evidence does not support Parents' assertion that District denied Student a free appropriate public education since October 7, 2009 by failure to provide Parents with objective written reports of Student's progress on her IEP goals.

Each child's IEP must include a statement of when it will provide periodic reports of the child's progress toward her IEP goals. 34 CFR 300.320(3)(ii)(2006) Student did not have or legally require an IEP during the 2009-2010 school year. The IEP developed and implemented during the 2010-2011 school year in this case designated a quarterly schedule for determining progress on Student's IEP goals. The IEP was being implemented from January through mid-June of 2011, and it included benchmarks dated February, April, and June, 2011. The special education teacher testified that he completed IEP progress reports, which he identified during his testimony, and provided them to the 2nd Grade teacher for provision to Parents with the Student's regular report card. Although Parent testified that she only received one IEP report card, she did not advise school staff that she had not received the others, even though she frequently communicated with Student's teachers regarding her child. The testimony of the teacher in regard to the reporting of Student's progress on her IEP goals was credible, and the evidence therefore does not support Parents' allegation that Student was denied FAPE in regard to the procedural requirement relating to the provision of written progress reports. The evidence further shows that Parents were aware of the progress Student was making and were complimentary of the work being performed by her teacher toward that progress.

4. The preponderance of the evidence does not support Parents' assertion that District denied Student a free appropriate public education by failure to provide Parents with copies of all of Student's school records upon a proper written request for same in this cause.

The parents of a child with a disability must be afforded an opportunity to inspect and review all of her education records with respect to identification, evaluation, and educational placement and the provision of FAPE. 34 CFR 300.501(a)(2006) When copies of any Illinois student's school records are requested by the parents or their authorized representative, they must be produced by the District no later than 15 school days after the date of the receipt of such request by the official records custodian. 105 ILCS 10/5(2008) In the event of a request by the Parents of a special education student, the records must be provided before any meeting regarding an IEP, or any special education due process hearing or resolution session. 34 CFR

300.613(2006) In this matter, Parents' attorney submitted a request for copies of Student's records in writing to District's Student Records Administrator by facsimile and U.S. mail dated August 9, 2011, and District provided copies of records in response to his request on August 17, 2011. Parents' attorney believed that further records were available but had not been produced, but he proceeded with the resolution session and the Pre-Hearing Conference in this cause, advising the hearing officer that he wished to resolve the issue of records directly with District counsel.

Parents' counsel requested an Order to compel the production of certain documents on November 18, 2011, but he also asked that hearing officer delay her ruling on his motion to allow District additional time to search for records. District counsel produced all of the records that she and the School N Case Manager, [REDACTED] could find, and she so advised Parents' counsel and hearing officer of same and submitted [REDACTED] certification that the records had been produced. Therefore, the pending motion was denied, and upon Parents' counsel's request that the ruling be reconsidered, the ruling stood, and counsel was advised that he would be entitled to an evidentiary presumption at hearing where appropriate. (See discussion under *Procedural History* above)

Additional records, including emails protected by attorney/client privilege which District counsel submitted to show that she had asked school personnel to search for Student records, were produced by District during the hearing as witnesses testified, including a complete copy of the Referral prepared online by school staff beginning on May 14, 2010; copies of [REDACTED] letters of recommendation to two private schools, as solicited by Parent, which [REDACTED] testified that she kept on her personal computer, and a little over 1 page of very brief Progress Notes dated 6/4/10 through 2/3/12 entered by the school psychologist, social worker, occupational therapist, and nurse relating to intervention assistance and Student's FIE, which counsel and the case manager had been unable to access on the District's records system previously. Parents' attorney was advised that he could recall any witnesses if he felt it necessary to his case when additional documents were located and produced during the hearing.

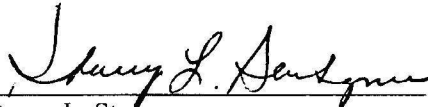
Parents' hearing exhibit book includes 728 pages of documents, including the 2 pages of [REDACTED] recommendation letters that she produced during the hearing. District's exhibit book includes 383 pages of documents, including the 10 pages produced during the hearing. In his closing argument, Parents' counsel argued that District produced only the June 7, 2011 DIBELS official assessment results for Student, and that the same form of results should be available for other DIBELS that were administered. Even presuming that the form of printed results he alleges do or did exist and were not produced due to inability to locate or access them, any presumption in Parents' favor has been overcome by the credible testimony of personnel who administered the tests and the recording of Student's DIBELS scores elsewhere in her records.

In light of the above, it cannot be said that the District's failure to provide copies of Student's records to Parents' attorney, in spite of District's good faith efforts to do so, although it may be a technical violation of the regulations governing production of student records, impeded the student's right to FAPE, the parent's right to participate in the decision making process, or caused the student to be deprived of an educational benefit.

IT IS THEREFORE ORDERED:

That Parents' request for relief is denied.

DATED: February 24, 2012


Stacey L. Stutzman
Impartial Hearing Officer

APPENDIX TO DECISION AND ORDER
(Case No. 2012-0138)

Parent Documents used at hearing:

P 1 - 2, 55 - 57 IEP Report Card 2011
P 3 - 54 Private School Progress Report/ILP 2011-2012
P 58 - 81 IEPs 12/14/10
P 83 - 86 Draft Consent/Assessment Planning 10/5/10
P 89 - 92 Report of Psychological Evaluation performed by Dr. B 12/2010
P 93 - 97 Private O.T. assessment results and goals 9/2011
P 108-112 Report of District O.T. assessment 12/14/10
P 113-114 Private O.T. Update 11/12/10
P 121-124 Private goals 5/2011
P 128-133 Private goals 12/2010
P 134-135 Private Informal Assessment Summary 5/2010
P 142-149 Report of 4/2010 Private Neuropsychological Evaluation by [REDACTED]
P 150-152 Private O.T. Evaluation of 10/9, 11/09 and Treatment Plan, undated
P 165-168 Sensory Profile Teacher Questionnaire 12/7/10
P 182-240 Strategic Teaching & Evaluation of Progress Literacy Assessment
2/10/09 through 5/11

P 241 WRS Wordlist Chart
P 242-247 DIBELS Oral Reading Fluency
P 248-249 Report Card 2010-2011
P 250-254 RTI Summary
P 280 Referral
P 281 email 10/4/11
P 285-286 correspondence from Parents' attorney re: unilateral placement 8/9/11
P 289-291 emails 1/5 through 1/7/11
P 296 email 1/17/11
P 301 email 1/19/11
P 309 email 2/17/11
P 314 email 3/4/11
P 315 email 3/8/11
P 325 email 5/10/11
P 329 email 8/14/11
P 333-334 emails 1/3 and 1/5/11
P 345-382 emails 9/21/10 through 2/23/11
P 392-393 emails 11/2/10
P 395-404 email with private O.T. observation notes 12/3/10
P 452 email 3/1/11
P 475-482 emails 5/3 through 6/1/11
P 483-576 (by stipulation of the parties) emails between [REDACTED] and [REDACTED] 9/8/09
through 12/22/10

P 582-583 Court Order 1/13/12
P 587 Standardized Test Scores 6/7/11
P 591 Mapquest driving directions
P 594-604 Neuropsychological Evaluation Report of [REDACTED] 1/23/12
P 608 email 12/12/10
P 611-614 Private O.T. Treatment Update 4/7/10
P 615-654 Private School ILP 1/29/12
P 655-657 Private School 2011-2012 Assessment Record
P 658-659 Private School Fall tuition payment agreement 4/21/11
P 660-711 billing/invoice and payment records

P 713-714 billing/invoice and payment records
P 716-717 billing/invoice and payment records
P 722-726 billing/invoice and payment records
P 727-728 Correspondence from ██████ to private schools

District Documents used at hearing:

D 1 - 2 Memorandum and document checklist/certification 11/28 and 12/20/12
D 6 - 26 IEP 12/14/10
D 27 - 30 Report of Psychological Evaluation performed by Dr. B 12/2010
D 31 - 33 Report of District O.T. assessment 12/14/10
D 34 - 37 Draft Consent/Assessment Planning 10/5/10
D 39 - 41 District Social Work Evaluation 12/14/10
D 47 - 48 Student Referral and Determination Notification 5/14/10, 10/5/10
D 51 - 52 Service Records
D 53 - 60 Report of 4/2010 Private Neuropsychological Evaluation by Dr. C
D 63 - 67 RTI Summary
D 69 - 71 Private O.T. assessment results and goals 9/2011
D 75 - 78 IEP Report Card 2011
D 79 - 82 Report Card
D 86 Standardized Test Scores 6/7/11
D 87 - 88, 91- 94 Oral Reading Fluency progress monitoring
D 89 Second Grade Speaking Rubric
D 90 WRS Wordlist Chart
D 98 Math summary
D 117 -150 Teacher's literacy assessment documents
D 179 email 9/8/10
D 195 - 197 emails 11/18 through 11/21/10
D 198 - 202 private O.T. observation notes
D 215 - 216 emails 12/17 and 12/22/10
D 220 - 230 emails 1/5 through 1/14/11
D 236 emails 2/7/11
D 281 emails 5/10/11
D 288 email 6/4/11
D 290 email 6/10/11
D 294 email 6/14/11
D 342 email 5/18/10
D 346 - 348 emails 5/19 and 5/20/10
D 368 - 369 Wilson Language Training Certified Teacher List
D 380 - 383 emails 10/11 through 10/12/11

RIGHT TO REQUEST CLARIFICATION

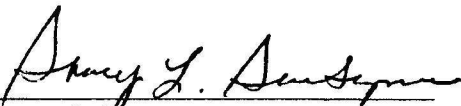
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought,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

RIGHT TO FILE A CIVIL ACTION

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

CERTIFICATE OF SERVICE

The undersigned due process hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parents and Parent's counsel, District and its counsel, and the Illinois State Board of Education at their respective addresses by depositing same with the United States Postal Service at Libertyville, IL, certified mail postage prepaid, on February 24, 2012 before 5:00 p.m.



Stacey L. Stutzman
Impartial Hearing Officer