

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

██████████

v.

██████████

)
) ISBE CASE NO. 2012-0523
)
) Stacey Stutzman
) Impartial Due Process
) Hearing Officer

RECEIVED

OCT 11 2012

SPECIAL EDUCATION
SERVICES

DECISION AND ORDER

Procedural Background

This matter is before the undersigned impartial hearing officer for a due process hearing concerning Parent's request for Orders that District provide Student with compensatory education, including placement in the general education program at District's high school due to denial of *FAPE* for the 2011-2012 school year, assign a staff member to communicate with Student regularly, remove all disciplinary actions, including suspensions and expulsion, from his records, and develop an IEP responsive to Student's disabilities. The hearing officer has jurisdiction to hear and decide this matter under *105 ILCS 5/14-8.02a(g)(2012)*. The parties have been informed of their hearing rights under *23 ILAC 226.625(2007)* and *34 CFR 300.512(2006)*. The undersigned hearing officer has also advised the parties that there are and have been no personal or professional conflicts which prevent her from conducting a fair and impartial hearing and rendering a fair and impartial decision in this cause.

Student is a 17 year old male, who was enrolled by Parent in the District as a high school sophomore general education student for the 2011-2012 school year. He currently has a proposed IEP, developed by a District IEP team, recommending eligibility for special education and related services due to a specific learning disability, and which includes a proposed placement in a public therapeutic day school. However, Parent did not participate in either the eligibility conference or the IEP meeting, and she has not consented to the proposed eligibility, IEP, or placement.

Parent requested the due process hearing in this matter, while unrepresented by counsel, on May 30, 2012, and the District received her request on May 30, 2012. The request for hearing was submitted subsequent to a domain conference held on May 15, 2012, an expedited evaluation of Student by District pursuant to Parent's written request for evaluation, made subsequent to a disciplinary hearing for Student as a general education student, and an eligibility conference held on May 29, 2012. District responded in writing to Parent's hearing request on June 7, 2012. The District convened a resolution session on June 11, 2012.¹ The parties also participated in ISBE sponsored mediation on July 2, 16, and 30, 2012.

The undersigned Impartial Hearing Officer was appointed to this matter through the Illinois State Board of Education Special Education Database System (*ISBE SEDS*) on June 12, 2012, following the substitution of a previously assigned hearing officer by one of the parties, pursuant to Illinois statute. The request was not designated as a request for an expedited hearing by Parent, District, or by *ISBE SEDS*. The undersigned convened a telephone conference with Parent and District's counsel on June 14, 2012, wherein the parties confirmed that the hearing was not to be expedited, and they also confirmed that Student's former school district, although referenced in the request, was not a party to the Parent's request in this matter.²

On July 2, 2012, Parent's attorney submitted his Appearance on Parent's behalf. On August 8, 2012, with leave of this I.H.O., he submitted Parent's Amended Due Process Hearing Request. District responded to the Amended request in writing on August 17, 2012.

¹ Parent considered this meeting an IEP meeting and did not believe it to be a resolution session. See H.O.'s *Report of Telephone Conference*, 6/14/12.

² See I.H.O.'s *Report of Telephone Conference*, 6/14/12. Parent's May 30, 2012 Request for Due Process Hearing contained allegations against both District and Student's previous school district of attendance, where Parent testified at hearing her permanent address is located.

The original date established by the ISBE SEDS for Pre-Hearing Conference in this matter was July 2, 2012. The Pre-Hearing Conference was held on September 10, 2012, following the joint requests for continuances by the parties, as delineated in the Pre-Hearing Conference Report, dated September 11, 2012.³

At the time of the Pre-Hearing Conference, the due process hearing was scheduled to begin on September 24, 2012 at 2:00 p.m. for the reason that Parent's witness, [REDACTED], was not going to be able to testify on September 25 or 26 due to scheduled surgery⁴. An additional two days of hearing were scheduled at the parties' requests for September 25 and 26, 2012.

Immediately prior to the Pre-Hearing Conference, Parent's counsel submitted his *Motion to Compel Disclosure*, and District counsel requested and was given leave to respond in writing by September 14, 2012 at the time of the Pre-Hearing Conference. District counsel submitted his Response to the motion on September 14, 2012. Parent's counsel subsequently submitted a Reply to District's Response. All submissions were reviewed by this I.H.O., and a *Memorandum and Interim Order* was entered on Parent's motion on September 18, 2012, denying the relief requested in the motion.⁵

The Due Process Hearing in this matter proceeded as scheduled on September 24, 25, and 26, 2012 at District's administrative offices. It was closed to the public at the election of Parent and her counsel.⁶ In attendance at the hearing were Parent⁷, her attorney, [REDACTED], District's Director of Special Education Services, [REDACTED],⁸ and District's attorney, [REDACTED]. The hearing was reported by [REDACTED] CSR/RPR, on September 24 and 26, 2012 and by [REDACTED] CSR/RPR, on September 25, 2012.⁹

Fourteen witnesses were called to testify during the hearing in this matter in accordance with the parties' respective pre-hearing disclosures and their elections at the time of the hearing. Testifying on behalf of both parties were **Parent, Student**, [REDACTED] District's Special Education Director, [REDACTED], District's Associate Superintendent; [REDACTED], District Psychologist; [REDACTED], District Psychologist; and [REDACTED], District Nurse. Additionally, [REDACTED], Student's former babysitter, testified on behalf of Parent. The following also testified on behalf of District: [REDACTED], District's Tutor Coordinator; [REDACTED] District Counselor; [REDACTED] District's former Dean of Students; [REDACTED], Student's former Homebound Tutor; [REDACTED], District Social Worker; [REDACTED], District Social Worker

The following were entered into evidence at hearing in accordance with the parties' respective pre-hearing disclosures:¹⁰

Parent Exhibits¹¹ : 1 (P1-36); 2 (P37-38); 3 (P39-43); 4 (P44-48); 5 (P49); 6 (P50-52); 7 (P53); 8 (P54); 9 (P55-61); 10 (P62-63); 11 (P64-70); 12 (P71); 13 (P72); 14 (P73); 15 (P74); 16 (P75); 18 (P77); 19 (P78); 20 (P79); 22 (P81); 23 (P82); 24 (P83); 25 (P84-100); 26 (P101-121); 27 (P122-123); 28 (P124-128); 29 (P129); 30 (P130-134); 31 (P135); 32 (P136-159); 33 (P160); 35 (P162-183); 36 (P184-185); P38 (P200-203); 47 (345-389)

³ This I.H.O.'s *Pre-Hearing Conference Report* dated 9/11/12 is attached to and incorporated into the record in this matter as Hearing Officer Exhibit A.

⁴ Witness A.J. did not testify on September 24 as planned. She advised Parent's attorney that an emergency with her child prevented her from appearing. She testified by telephone on September 26, 2012.

⁵ See I.H.O.'s *Memorandum and Interim Order on Parent's Motion to Compel Disclosure of Records*, 9/18/12.

⁶ See *Pre-Hearing Conference Report*, 9/11/12.

⁷ Parent attended the entire hearing with the exception of the afternoon of September 26, 2012 due to a pre-existing conflict but permitted her attorney to proceed in her absence.

⁸ Due to the parties' request for sequestration of witnesses at the time of Pre-Hearing Conference, I.H.O. required K.A. to testify first, as she was included on both parties' witness lists, in order to maintain the integrity of the sequestration requirement. At the time of the hearing on September 24, 2012, counsel for District objected to this determination, arguing that it was not permitted under 105 ILCS 8.02a(g-55). His objection was overruled for the reason that, contrary to his argument, requiring K.A. to testify first did not exclude her from assisting counsel in the presentation of his client's case.

⁹ Independent Contractors through Midwest Professional Reporting, Inc. (815) 968-0015.

¹⁰ I.H.O. requested a joint exhibit book at the time of the Pre-Hearing, but the parties were unable to comply with her request. To the extent that the parties presented duplicative exhibits, only one party's document is referenced in the findings of fact to facilitate timely completion of the Decision.

¹¹ Referenced herein by page number preceded by the letter P.

District Exhibits¹²: A (D1-16, 18, 21-22, 26-27, 32, 41); B (D45-121); C (D122-210); D (D211-212, 229-232, 234-236, 238-240, 242); E (D243-319, 326-328, 337, 370-417); F (D418-437, 441, 442, 444)

Each attorney presented his oral closing argument. Parent's counsel also submitted a written brief and copies of law at the time of his closing argument. District counsel requested and was granted leave to provide a transcript of his closing argument to the I.H.O.¹³

The Decision and Order in this matter is not being submitted within 45 days of the District's receipt of Parent's Amended Due Process Hearing Request due to the parties' joint request for continuance of the Pre-Hearing Conference. It is being issued within 10 days of the conclusion of the due process hearing.

Issues

The issues presented for resolution in this due process hearing were as follows:

Whether, since his re-enrollment in District on or about August 24, 2011, Student has had a right to a free appropriate public education (*FAPE*) in the least restrictive environment pursuant to the *IDEA*, of which he has been deprived by District as follows:

1. Violation of Parent's procedural rights under the *IDEA* and the *Illinois School Code* and their attendant regulations, which procedural inadequacies impeded Student's right to *FAPE*, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of *FAPE* to Student, or caused a deprivation of educational benefit to Student, and specifically:
 - A. failure to make and sufficiently document a timely written offer of an initial evaluation of the Student;
 - B. failure to provide sufficient information to Parent to enable her to give informed consent for evaluation of Student;
 - C. failure to provide prior written notice to Parent on the following occasions:
 - i. after District received Parent's consents or refusals;
 - ii. after District became aware of Student's suspected disabilities but refused to evaluate him;
 - iii. after District refused Student access to sports;
 - iv. after District decided to expel Student;
 - v. after District conducted IEP meetings for Student; and/or
 - vi. after District conducted manifestation determination review of Student
2. Failure to conduct a timely initial evaluation of Student;
3. Failure to evaluate the full nature and extent of Student's disabilities prior to and sufficient for use in any needed manifestation determination or other IEP; and
4. Failure to provide a timely, appropriate IEP for Student?

Findings of Fact

The material facts relevant to the issues in this matter, based upon the evidence presented at hearing, are as follows: Student is a 17 year old male, who was enrolled by Parent in the District's high school on August 24, 2011 as a sophomore general education student for the 2011-2012 school year. (Parent; D1) He was expelled from the high school on April 19, 2012. (T.A.; D68) He currently has a proposed IEP, developed following an evaluation conducted at Parent's request and an eligibility determination of May 29, 2012. (K.A.; D122, 128-210) The IEP team recommended Student's eligibility

¹² Referenced herein by page number preceded by the letter D.

¹³ See email from District counsel dated 9/28/12 listing the statutes and case law argued in his closing. The 38 page transcript of the closing argument attached to District counsel's email was not printed out and included in the record separately by the I.H.O. due to its length, since the parties indicated at the time of the hearing that the entire transcript was going to be transcribed with a copy for each party.

for special education and related services due to a specific learning disability. It has proposed placement in a public therapeutic day school as the least restrictive environment for Student due to his expulsion from the high school. However, Parent did not participate in either the eligibility conference or the IEP meetings, and she has not consented to the proposed eligibility, IEP, or placement. (██████████; D147-210)

Parent is single. Her permanent address is not within the District. (Parent) Parent provided District with an address located within District when enrolling Student in high school, and her proof of residency was accepted. (Parent; D1) She accepted mail from the District only at her permanent address outside of the District, and she instructed District personnel not to send her mail to the address within the District as she considered it an invasion of her privacy. Mail sent to her at that address was returned to District, while mail sent to the out-of-District address was accepted. (██████████; Parent; D418-437)

Student was previously enrolled in District's schools and was evaluated and provided with special education services during the course of that enrollment, including an evaluation conducted in 2009. (██████████; ██████████; D276-281) Parent disagreed with classification of Student as having an emotional disturbance at that time.¹⁴ (D281) She revoked consent for special education services from District in writing on August 19, 2009, at which time District provided Parent with a written explanation of the consequences of her revocation, including the fact that, as a general education student, Student would be subject to the district's discipline policies. Parent withdrew Student from the District, and he left the District without an IEP. (██████████; D282, 326-328)

Parent transferred student to another school district, in which her permanent address lies, and that district developed an IEP for Student dated May 26, 2010. (D245-275) However, Parent revoked her consent for special education services in writing from that district on September 7, 2010, and that district provided her with a written acknowledgement of the revocation and an explanation of the consequences of her revocation, including the fact that Student would be subject to district's discipline policies, on October 8, 2010. (D243-244) Parent has requested due process hearings regularly in past years. (Parent)

Parent enrolled Student in a private military academy located in a neighboring state during the summers of 2009 and 2010. Student enjoyed the atmosphere of discipline and respect, which he likened to a boot camp, and felt able to complete the general education course work. (Parent; Student)

Parent enrolled Student in the District's high school for the 2011-2012 school year as a sophomore, and she advised District on the registration card completed by her at the time of enrollment on August 24, 2011 that Student did not have an IEP and that he had not received special education services. (Parent; D1) During Student's 2011-2012 school year in the District, Parent advised school staff that Student was not to be enrolled in special education classes, that he was not a special education student, and that she did not want him on an IEP. (██████████, ██████████; D8, 16)

District requested Student's records from his previous district, but it did not receive an IEP. Student's transcript, as provided by the previous District, did not reflect an IEP or special education services. Rather, it reflected Student's enrollment as a general education student at the last high school he attended in that district. When Student's counselor contacted the previous high school, she was advised that Student did not have an IEP. (██████████; D2-4, 119)

Student received F's in all of his classes in the 2011-2012 school year. He was frequently tardy and absent. (D118-120) Staff offered and initiated various academic and behavioral interventions for Student as Response to Intervention (*RTI*) and Positive Behavioral Intervention Strategies (*PBIS*) prior to his expulsion, including changing his enrollment in English II to a Core English class, the *Making Connections* program, which was successful when Student participated. District also offered a social academic intervention group (*SAIG*), individual consultation with the school social worker, an afterschool tutoring program Monday through Thursday with transportation home provided, and a behavior contract with his Dean, all of which Student declined. (██████████, ██████████, ██████████, ██████████; Student)

During the school year, Parent was contacted by staff regarding their concerns over Student's behavior and his academic struggles and their efforts to assist him. Parent also had access to information

¹⁴ Prior to the 2009 evaluation, Parent had notified District on October 17, 2008 that Student was cured of *RAD*. In that same correspondence she had also revoked consent to Student's IEP and all past IEPs. (D337)

regarding Student's academics and behaviors through District's online *PowerSchool* log system. Parent advised staff that she did not want them calling her about Student, and she considered their constant contacts harassment. Parent desired and agreed to, but Student declined, MAP testing offered by District to determine his current academic levels. (Parent; [REDACTED]; D5-10, 21; P75)

After flashing gang signs in the hallway on March 22, 2012, a Level IV violation of District's Code of Conduct, Student was suspended from school on March 23, 2012 and recommended for expulsion by the administrative team. [REDACTED]; P76) Parent requested a manifestation determination review on April 3, 2012, although Student was not a special education student at that time. (P77) An expulsion hearing was held on April 4, 2012, after which the school's hearing officer recommended to the school board that Student be expelled for the remainder of the 2011-2012 school year and for the 2012-2013 school year. However, the expulsion was to be held in abeyance to allow the Student to attend an alternative program, obtain his credits toward graduation, and then be allowed to return to the high school in the Fall of 2012 and have the discipline, including the expulsion, expunged from his record. The school board voted to permit the expulsion on April 19, 2012. [REDACTED]; P80) District offered to provide and made available to Student educational services through an alternative program, tutoring, and computer based programming during and after the disciplinary process. [REDACTED]; [REDACTED]; [REDACTED]; D211-212, 229-232, 234-236, 238-240, 242)

On April 7, 2012, Parent submitted her written request for an evaluation of Student, which was received by District on April 10, 2012. (D122) On April 30, 2012, District issued its notice of agreement to conduct the evaluation and scheduled and noticed a domain conference for May 4, 2012. That meeting was rescheduled to May 15, 2012 at Parent's request, and written notice of the meeting was issued on April 30, 2012. Parent participated in the domain conference held on May 15, 2012 to discuss existing information about Student and to establish the assessments to be included in the evaluation. ([REDACTED]; P81-95) Parent declined to be interviewed as part of the social developmental study. She reviewed all of the assessment information in writing at the time of the domain conference, after which she signed consent for evaluation on May 15, 2012. [REDACTED]; P94) She subsequently declined consent to allow the [REDACTED] to be administered to Student's teachers. [REDACTED]; [REDACTED]; D145-146)

Student's evaluation, including assessment by District's psychologist, social worker, and nurse, was expedited and completed within two weeks of Parent's signed consent. An eligibility conference was scheduled and written notice sent to Parent on May 16, 2012. The meeting was convened as scheduled on May 29, 2012, but Student and Parent did not participate in spite of District's efforts to obtain their participation. ([REDACTED]; D149-169)

The school nurse reviewed Student's available health records and tested his hearing and vision and determined that he was healthy and had no vision or hearing deficits. ([REDACTED]; D155)

The school psychologist reviewed Student's past records, which included sufficient cognitive testing results indicating Student's average intellectual ability, and he assessed Student's academic achievement using the WIAT-III and the TOWL-IV over four one hour sessions at Student's church. His results are valid and exemplary of Student's current academic skills and indicate that Student's disability lies in his difficulty in associating letter sounds and blending them into words out of context. This impacts Student's ability to fluently read and write unfamiliar words. He did not show indications of an auditory disorder. Student did not show signs of a behavioral or emotional disorder. He was nice, polite, courteous, cooperative, and he attended well and gave his best effort. He had a good, logical approach to problem solving. He did not show affect. He had a good disposition and did not display signs of anxiety, depression, apprehension, or mood swings. He exhibited none of the signs commonly associated with fetal alcohol syndrome. The psychological assessment results were consistent with the social worker's assessment results. [REDACTED]; D153)

The social developmental study was completed by the school social worker. She interviewed Student and had Parent and Student complete the Behavior Assessment for Children, Second Edition to a (*BASC-2*) to assess his adaptive behavior. She assessed Student at his church. Her results were valid and reliable. She was unable to interview Parent or administer the *BASC-2* to a teacher due to Parent's refusal of consent for same. Parent requested that the social worker examine [REDACTED] only in regard to occurrences

in the 2011-2012 school year. Student displays no signs of fetal alcohol syndrome. He does not have an emotional or behavioral disability requiring development and implementation of an IEP. He is able to form and has formed attachments with adults and peers. The scores on the Parent *BASC* were completely average, age appropriate and not at-risk, even in regard to anxiety and depression. The scores on the Student *BASC* were also age appropriate and average and supportive of the Student interview. He had no clinically significant scores which would indicate a need for an IEP due to an emotional disturbance or behavioral disorder. He is extremely insightful, he knows the rules, but he makes poor choices. Understanding of rules and the need to comply with them but choosing not to comply due to other priorities is a social maladjustment but not a disorder or disability creating a gap that an IEP is required to close.¹⁵ (D.S.; D160-165)

District provided Parent with a copy of the eligibility determination documentation, recommending eligibility for Student due to a specific learning disability, offered to convene a manifestation determination meeting at Parent's earliest convenience, and provided her with a copy of her procedural safeguards on May 30, 2012. (█████, D147-148)¹⁶

On June 5, 2012, District scheduled and noticed an IEP conference for June 19, 2012, to include "a consideration of relatedness of disability to disciplinary code violations." (D191) The meeting was convened as scheduled. Parent and Student were invited, but in they did not participate. Their Pastor was invited at Parent's request, and he did attend. An IEP was drafted for Student, but it was not completed due to the need for Parent's and Student's input, particularly in relation to the placement decision and transition planning. Functional Behavior Assessment and development of an attendant Behavior Intervention Plan were deferred until Student was in a placement to be determined. (█████; D170-190)

An IEP meeting was scheduled with Parent and her attorney for July 26, 2012 in order to complete Student's IEP, and a notice was issued regarding same on July 16, 2012. (█████, D193) The meeting was convened, but neither Parent, Student, nor Parent's counsel attended or participated or responded to phone calls made in attempt to obtain their participation. (█████) The IEP team proceeded to make a placement determination for Student to attend a public therapeutic day school, during the period of his expulsion from the high school, which school could implement Student's IEP goals and provide a structured setting and social work services to address his behavior. (█████; D193-210) On August 3, 2012, prior written notice of the proposed placement was provided to Parent. (P184-185)

The proposed IEP, which has not been implemented due to lack of parental consent, identifies Student's need for specialized instruction due to his specific learning disability in the areas of reading and written expression. It includes, among other things, a review of his strengths and needs, his present levels of academic achievement, goals and objectives directed to improvement of his reading fluency, writing, and spelling as well as a goal to help him set and accomplish short and long-term academic and career goals. It provides for weekly social work services for Student and transportation to and from school. It notes the need for development of a behavior intervention plan and a transition plan. Along the continuum of placement options considered, a therapeutic day school was selected as the least restrictive environment since the District's mandated expulsion requires Student's attendance at a separate school. (D195-210)

Student prefers 1:1 attention to help him learn. (Student) Although Parent would like to have Student earn his high school credits by taking correspondence courses at District expense through the ██████████, District does not feel that correspondence courses are advisable for Student, as he has shown that he lacks the motivation to complete work independently. (Parent; ██████ Student; ██████)

¹⁵ Student's testimony at this hearing and his statements to staff in school records was commensurate with the social worker's findings. He likes to socialize with his peers rather than attend classes and do schoolwork.

¹⁶ As noted in the *Procedural Background* section above, Parent submitted her request for due process hearing in this matter on May 30, 2012, District responded on June 6, 2012, and the resolution session and mediations were subsequently held during the summer.

Conclusions of Law

At a special education due process hearing convened pursuant to the provisions of the *Illinois School Code*, it is incumbent upon the school district to present evidence that, if at issue, it has properly identified and evaluated the nature and severity of the student's suspected or identified disability and provided or offered to provide him with a free appropriate public education in the least restrictive environment. *105 ILCS 5/14 8.02a(g-55)(2012)* District has done so here. District presented persuasive evidence through its staff's credible testimony and documentation. The burden of persuasion in a special education due process hearing rests on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Kerry M. v. Manhattan School Dist. #114*, 46 IDELR 194 (N.D. Ill. 2006) In this case, Parent bore the burden of persuasion by a preponderance of evidence on all of the issues upon which she is seeking relief, and she has failed to meet her burden. Parent's testimony was less credible, in that she contradicted herself and the documentary evidence and also gave testimony more supportive of District's position. Student's testimony, insofar as relevant to the issues, was more supportive of District's position than that of Parent, and, in spite of his zealous advocacy on Parent's behalf, her counsel's argument was not supported by the preponderance of the evidence presented in relation to the identified issues in the case.

Based upon the above facts and the law applicable thereto, it is concluded that District has not violated Student's right to a free appropriate public education (FAPE) under the *IDEA* and Article 14 of the *Illinois School Code* and their attendant regulations since August 24, 2011, and specifically:

Issue No. 1: The preponderance of the evidence does not support Parent's contention that District denied Student a free appropriate education by violation of Parent's procedural rights under the *IDEA* and the *Illinois School Code* and their attendant regulations, which procedural inadequacies impeded Student's right to FAPE, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Student, or caused a deprivation of educational benefit to Student, and specifically by any:

- A. failure to make and sufficiently document a timely written offer of an initial evaluation of the Student;
- B. failure to provide sufficient information to Parent to enable her to give informed consent for evaluation of Student;
- C. failure to provide prior written notice to Parent on the following occasions:
 - i. after District received Parent's consents or refusals;
 - ii. after District became aware of Student's suspected disabilities but refused to evaluate
 - iii. after District refused Student access to sports;
 - iv. after District decided to expel Student;
 - v. after District conducted IEP meetings for Student; and/or
 - vi. after District conducted manifestation determination review of Student.

A free appropriate public education, commonly referred to as *FAPE*, must be made available to disabled Illinois school children by their respective school districts in accordance with the *IDEA* and its attendant regulations. *20 USC 1400(2004)*; *23 ILAC 226.50(2007)*; *34 CFR 300.17, .101-.103(2006)* It is an education that is reasonably calculated to provide a disabled student with meaningful educational benefit, as based upon an individual education plan, or *IEP*, developed by an *IEP* team, including a 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. *34 CFR 300.513(2006)*

Parent contends that Student was entitled to *FAPE* and the protection afforded by its procedural safeguards during the 2011-2012 school year prior to his expulsion and prior to Parent's request for an evaluation either because he had an IEP in effect when he enrolled in the high school, or, alternatively, because the District should have identified and evaluated him as a child pursuant to its Child Find responsibility at some point during the course of the school year.¹⁷ Parent also contends that District did not follow proper procedures after it received Parent's request for evaluation on April 10, 2012, resulting in a denial of procedural *FAPE*.

District argues that Student was not entitled to *FAPE* prior to Parent's request for evaluation because Parent's permanent address was not within the District, as evidenced by her testimony at this hearing, and also that Parent had revoked consent for provision special education services by District during Student's prior enrollment in District before transferring out of the District in 2009, and that he did not have an IEP when he transferred back into the District, having revoked consent to services from the previous school district as well. Furthermore, District argues, Parent advised District upon enrollment on August 24, 2011 that Student did not have an IEP, which the previous high school confirmed, and that Parent consistently informed staff that Student was not a special education student and that she did not want him on an IEP. District contends that it followed required procedures to assure *FAPE* once Parent requested evaluation.

Regarding the question of Parent's residency during the period of time at issue in this case, the residence of an Illinois student's legal custodian, here Student's mother, with whom the student resides, is deemed the residence of the student. Only resident students may attend the district's schools tuition free. The statute governing residency establishes criminal penalties for a person who knowingly or willfully presents any school district with false information regarding the residency of a pupil for the purpose enabling that student to attend the district schools without the payment of nonresident tuition. *105 ILCS 5/10-20.12b(2012)* The registration card completed upon Student's enrollment in the District on August 24, 2011 indicates that District accepted Parent's proof of residency (POR) in the District, and there was no evidence presented at hearing that residency was challenged by the school board under the aforesaid statute during the 2011-2012 school year. Based upon Parent's sworn testimony at hearing that her permanent address is in another school district, District may challenge Student's residency in another forum in accordance with the residency statute and decline to enroll Student in the District going forward.¹⁸

Issues I.A-I.C. Pre-Expulsion

Student was not entitled to the procedural safeguards afforded by the IDEA prior to his expulsion from the District's high school.

When a student who has an IEP in effect in one district within the state of Illinois enrolls in another Illinois school district during the school year in which that IEP is in effect, and a copy of his IEP from the former district is provided to the receiving district at the time of or prior to his enrollment, the receiving district may adopt the IEP prepared for the child by the former district or develop a new IEP. When the receiving district does not receive a copy of a current IEP or confirmation of the requirements of a current IEP from the previous district at the time of enrollment, the district must enroll and serve the student as it believes appropriate until it does receive a copy of the current IEP or until a new IEP is developed for him. *23 ILAC 226.50 (2007); 20 USC 1414(d)(2)(C)(2005); 34 CFR 300.17, .101-103(2006)* In this case, Parent did not provide District with an IEP from the previous District when she enrolled Student or at any time during the 2011-2012 school year. Instead, she advised District that Student did not have an IEP and that he had not received special education services. Although Parent testified that she "probably did this accidentally", her testimony was not credible in light of the other evidence presented, including the Student Registration Form itself and the credible testimony of the

¹⁷ *23 ILAC 226.100 (2007)* implements *34 CFR 300.111 (2006)* requiring each school district to seek out and identify all children within the district who may be eligible for special education and related services and to refer them for evaluation where it is deemed warranted.

¹⁸ See *Mina ex rel. Anghel v. Bd. of Ed. for Homewood-Flossmoor*, 348 Ill. App.3d 264 (1st Dist. 2004), *Connelly v. Gibbs*, 112 Ill. App.3d 257(1st Dist. 1983)

counselor and the dean that Parent affirmatively advised them that Student was not a special education student, that she did not want him in special education classes, and that she did not want him on an IEP. Parent herself testified at hearing that she did not want Student on an IEP. Student was enrolled in high school in the previous district as a general education student prior to his transfer to District, and the transcript provided to District did not reflect special education programming for Student. Student did not have an IEP in effect for the 2011-2012 school year at the time of his transfer, and he had not had an IEP in effect in his previous district since the Fall of 2010 due to Parent's written revocation for consent to special education services. Therefore, it is clear that District did not owe Student *FAPE* under an existing IEP at the time Parent enrolled him in the District's high school on August 24, 2011. The District provided and offered to provide Student, as a general education student, with appropriate interventions directed to his academic performance and behavior, some of which were successful, and some of which he refused, prior to his expulsion.

Since Student was not entitled to the procedural safeguards afforded to special education students under an existing IEP when he enrolled in the District high school, the question becomes whether Student was nevertheless entitled to assert protection of those safeguards prior to his expulsion, in spite of Parent's insistence that Student was not a special education student and that he should not be given an IEP. A student who has not been determined eligible for special education and related services and who violates a code of conduct is allowed to assert the procedural protections of the *IDEA* if the district "had knowledge" that he was a child with a disability before he committed the violation. However, regardless of whether an evaluation had been requested or parents or teachers had expressed concerns about the student's behaviors prior to the offending violation, the law specifically exempts a district from having the requisite "knowledge" by allowing that a district "...shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child...has refused (special education) services...." And the student may therefore be subjected to the same discipline as children without disabilities. 20 *USC 1415(k)(5)(C) and (D)(2006)*; 34 *CFR 300.534(2006)* Parent revoked her consent to special education services from District in writing¹⁹ on August 19, 2009, and she was advised in writing by the District at that time of the consequences of her revocation, including the fact that Student would be subject to discipline for any misconduct as a general education student without the protection of *IDEA* procedural safeguards. She withdrew Student and transferred him to another district, where she revoked consent to special education and related services, specifically citing 34 *CFR 300.300(b)(4)* in her written revocation, on September 7, 2010. Again, she received written notice of the consequences of her revocation from that district on October 8, 2010.²⁰

The argument made by Parent's counsel that District was somehow obligated to offer a full and individual evaluation of Student under 23 *ILAC 226.100(2007)* prior to his expulsion and Parent's request for evaluation is not compelling under the circumstances of this case, and the cases law he cites in support of this argument contains facts that are clearly distinguishable from those here. Clearly District has made efforts in the past to evaluate Student and program for him, only to have Parent revoke consent for special education services, while knowing the consequences of her revocation. The previous revocation of services exempted District from any responsibilities under the *IDEA* which might otherwise have been triggered by a knowledge of Student as a student with a disability. Nevertheless, District made reasonable efforts to address Student's academic and behavioral issues with appropriate interventions without seeking to label him as a special education student in conformance with Parent's stated desire that Student not be given an IEP.

The argument that Parent has somehow been confused about the consequences of her actions is not persuasive. It is apparent from the credible testimony and documentary evidence presented here that Parent intentionally and specifically opposed and desired to prevent the qualification of Student for the

¹⁹ See 34 *CFR 300.9(2006)* and 34 *CFR 300.300(b)(3)(2006)* regarding consent for services and revocation of consent. Pursuant to changes in the regulations in 2008, revocation of parental consent to services must be made in writing pursuant to 34 *CFR 300.300(b)(4)*, and district is required to provide parent with prior written notice in accordance with 34 *CFR 300.503*.

²⁰ Both parties have cited 73 *Fed. Reg. 73,012-73,013*. The commentary included therein favors District's argument that District cannot be deemed to have had knowledge that Student was a student with a disability under the circumstances presented in this case.

receipt of special education protections, consistent with her previous revocations of consent for special education services both in and outside of District. Additionally, it is clear from the evidence presented that even had District sought consent from Parent to conduct an evaluation of Student for purposes of qualifying him for special education services during the 2011-2012 school year, Parent would more likely than not have refused consent for the evaluation, or, in the event that he were to have been determined eligible and provided with an IEP prior to his expulsion, Parent would have refused consent for implementation of the IEP. The fact that even after the evaluation was done at her request and within the parameters she herself specified in May 2012, in her desire only to reverse the expulsion, Parent declined to attend and participate in the eligibility conference and the subsequent IEP conferences for Student resulting from the evaluation.

It is therefore concluded that District did not owe Student *FAPE* and did not commit procedural violations, including those delineated as *Issues 1.A. through 1.C* herein, under state and federal special education laws which 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 at any time prior to receipt of Parent's request for evaluation. As a general education student, Student was subject to the disciplinary measures taken by the school board which resulted in his expulsion, as Parent had been advised in writing at the time of her written revocations of consent for special education services by District and the former school district.

Issues 1.A.-1.C. Post-Expulsion

Although it is concluded that District did not engage in procedural violations resulting in a denial of *FAPE* to a student with a disability prior to receipt of Parent's request for evaluation on April 10, 2012 in this matter, the question remains as to whether it committed the acts or omissions cited by Parent as procedural violations in her counsel's Amended Due Process Hearing Request once it received Parent's request for evaluation of Student, dated April 7, 2012, on April 10, 2012. The preponderance of the evidence supports District's contention that it A) appropriately informed the Parent of its agreement to perform the requested evaluation within 14 school days after receiving Parent's request, B) it did conduct a face to face domain conference with Parent, prepared a detailed report of the discussion, which Parent reviewed before signing the consent for the expedited evaluation of Student, and C) it gave Parent the necessary prior written notices for all actions taken for which it was legally required during the period between April 10, 2012 and the present time.²¹

It has been Parent's choice since participating in the May 15, 2012 domain conference to refuse to participate in IEP meetings for Student and to keep Student from special education programming in which he could be given instruction and support, earn credits toward graduation, and be able to return to the District's high school in 2013 with his disciplinary record expunged. There have been no procedural violations committed by District in this matter that have impeded Student's right to *FAPE*, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of *FAPE* to Student, or caused a deprivation of educational benefit to Student.

Issue No. 2: The preponderance of the evidence does not support Parent's contention that District denied Student a free appropriate education by failure to conduct a timely initial evaluation of Student.

As discussed above, Student was not entitled to *FAPE* from the District until Parent requested an evaluation of Student following his expulsion hearing. Normally, an Illinois school district is permitted 60 school days after securing a parent's consent to evaluation to complete an evaluation and convene an IEP meeting to develop an IEP for an eligible student. 23 ILAC 226.110(d)(2007) As expulsion proceedings were pending, the evaluation was expedited as legally required. Here, District received Parent's request for evaluation on April 10, 2012, scheduled a Domain conference in accordance with

²¹ See 105 5/14-8.02(g)(2012); 23 ILAC 226.110(c)(2007); 34 CFR 300.9 and .300(2006); 34 CFR 300.304(a), .305, .503 and .504(2006); 20 USC 1415(k)(5)(D)(ii)(2006); 34 CFR 300.534(d)(2)(2006)

Parent's availability, and obtained her consent to administer the assessments to which Parent was willing to agree at a Domain conference on May 15, 2012. The evaluation was completed by May 29, 2012, at which time the eligibility conference was convened. The District's evaluation of Student was therefore timely.

Issue No. 3: The preponderance of the evidence does not support Parent's contention that District denied Student a free appropriate education by failure to evaluate the full nature and extent of Student's disabilities prior to and sufficient for use in any needed manifestation determination or other IEP.

As has been discussed above in this Decision, District adhered to all statutory procedures in planning the evaluation of Student. Parent participated in the planning of the assessments to be used, limiting the evaluation by refusing to be interviewed by the social worker as part of the Social Developmental Study and by denying her consent for completion of the BASC by Student's teachers. The evaluation was also constrained by Parent's refusal to put Student in the alternative program offered to Student at the time of his disciplinary proceedings where observations of his performance might have been observed, and the inability of the evaluators to observe Student in any educational setting during the course of the expedited evaluation. Nevertheless, the preponderance of the evidence in this case supports District's contention that it did properly evaluate the nature and extent of Student's learning disability and his instructional and related services needs.²² The qualified personnel, including the nurse, psychologist, and social worker, who conducted the assessments of Student for the evaluation requested by Parent all testified credibly at hearing. The social worker was a particularly impressive and persuasive witness for District.

Upon questioning at hearing, both the psychologist and the social worker provided sound reasoning in support of their findings that Student qualified for services due to a learning disability that impacted his reading fluency and writing and spelling skills but that, although he requires support for his behavior, he does not qualify for special education eligibility due to an emotional or behavioral disability. Parent did not present testimony from any witnesses to discredit the testimony of the evaluators or to support her allegations regarding the inappropriateness of the evaluation. Nor has she availed herself of the right to request independent evaluation at public expense if she disagreed with the results of District's evaluation.²³

It cannot be concluded that District has deprived Student of *FAPE*, either procedurally or substantively, by a failure to evaluate Student's disabilities at any time relevant to the issues in this case.

Issue No. 4: The preponderance of the evidence does not support Parent's contention that District denied Student a free appropriate education by failure to provide a timely, appropriate IEP for Student.

Illinois law allows a school district 60 school days from date of parental consent for evaluation to convene an IEP meeting and develop an IEP for an eligible student, and the IEP is to be implemented no later than the beginning of the following semester.²⁴ The IEP team met beginning on May 29, 2012, and reconvened on June 19, 2012, and July 26, 2012, and staff attempted to secure the participation and input of Parent and Student in the IEP development process. The resulting IEP, absent the behavioral and transition components desired by the IEP team but deferred until it could obtain Student's participation and place him in a school setting, stood ready for implementation prior to the beginning of Student's Fall 2012 school term, had Parent chosen to consent to services and placement. The IEP was therefore timely.

²² See 105 ILCS 5/14-8.02(2012)(b); 23 ILAC 226.110, .130(2007); 34 CFR 300.304, .305, and .307(2006)

²³ 105 ILCS 5/14-8.02(g)(2012) and 23 ILAC 226.180(2007) allows a parent to request an independent educational evaluation at public expense upon disagreement with a district's evaluation, and the record indicates that District had paid for IEE of this Student in the past relating to possible *RAD*. As noted earlier in this Decision, Parent denied that Student was had an emotional disability and revoked consent to the IEP related to that determination and also advised District that Student was cured of any previously suggested diagnosis of *RAD*.

²⁴ 105 ILCS 5/14-8.02(2012)

As with her contentions regarding the impropriety of the evaluation, Parent did not present any witness testimony critical of the contents of the IEP. The IEP was based upon the evaluation of Student, and it includes the components that the team was able to develop without Parent's and Student's participation and without Student attending school.²⁵ As noted above, the transition plan was to be developed when Student was presented for interview by the District's transition coordinator and the FBA completed and BIP developed once Student was in an educational setting where they could logically be developed and implemented. Therefore, it cannot be concluded that Student was deprived of *FAPE* for lack of a timely and appropriate IEP, either procedurally or substantively.

From the evidence introduced at the hearing in this matter, it is clear that Student has not been able to receive a public education that might have put him in a better situation than he currently is, and there is sympathy for his plight, as he is an unemancipated minor at this time and there appears to be insufficient legal reason for anyone in authority to provide him with an educational surrogate under Illinois law. Nevertheless, his circumstances are not due to any illegal act or omission on the part of the District pursuant to applicable state and federal special education laws.

IT IS THEREFORE ORDERED:

That Parent's request for relief is denied.

DATED: October 8, 2012



Stacey L. Stutzman
Impartial Hearing Officer

²⁵ See 23 ILAC 226.230(2007) and 34 CFR 300.320(2006)

RIGHT TO REQUEST CLARIFICATION

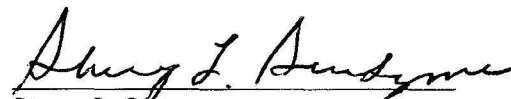
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, 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 uploaded this Decision and Order onto the ISBE SEDS on October 8, 2012, and served copies of the aforesaid Decision and Order upon Parent, her counsel, District, District's counsel, District's Special Education Cooperative, 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 October 8, 2012 before 5:30 p.m.



Stacey L. Stutzman
Impartial Hearing Officer