

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

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NOV 02 2015

SPECIAL EDUCATION
SERVICES

[REDACTED]
Student,

Case No: 2015-0261

v.

[REDACTED]
Jennifer A. Leisner,
Impartial Due Process Hearing Officer
School District.

FINAL DETERMINATION AND ORDER

PROCEDURAL BACKGROUND

The Student, [REDACTED], ("Student") is a sixteen (16) year-old girl, currently in her sophomore year, and attending a public high school within the School District. (Parents' Exhibit #1) The Student has a medical diagnosis of spastic quadriplegic cerebral palsy ("cerebral palsy" or "CP") and other associated impairments; and, is currently eligible for special education and related services under the primary eligibility designation of Intellectual Disability with a secondary eligibility designation of Multiple Disabilities. (Id.) The instant case primarily concerns the implementation of related services in the high-school environment, especially the provision of conductive education as a related service of the Student's current IEP. (Id.)

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The Parents filed a due process complaint notice dated January 16, 2015 that was received by the School District on that same day.¹ The School District submitted its Response on January 26, 2015. On May 18, 2015, counsel for the Parents amended the DPCN. Counsel for the School District filed a Response to the Amended Complaint on May 28, 2015. The parties concluded the Resolution Meeting by waiving resolution and conducting State-sponsored mediation on February 24, 2015 for the original DPCN. The parties engaged in informal settlement conferences in lieu of a resolution meeting on the Amended DPCN. On June 22, 2015, a telephonic prehearing conference was held in the above matter, and the Hearing Officer produced a Pretrial Report and Order that was subsequently revised and amended on July 17, 2015.²

¹ The Parents seek a hearing pursuant to the *Individuals with Disabilities Education Act* ("IDEA") 20 U.S.C. §1415(f)(1) and (3), the *School Code of Illinois* ("School Code") 105 ILCS 5/14-8.02a, and their respective implementing regulations. *See*, 34 C.F.R. §300.502 and 23 Ill. Admin. Code 226.600-226.690.

² Throughout the litigation, counsel for the parties made appropriate written requests for extensions of the 45-day hearing deadlines in order to attempt resolution and schedule a hearing (including the submission of briefs) around attorney, hearing officer and witness schedules. The Hearing Officer approved the continuances, including setting the last day of hearing on the submission of closing briefs.

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The parties engaged in six (6) days of hearing and submitted written briefs at the close of hearing (October 21, 2015) in lieu of closing arguments.³

ISSUES

The following issues were addressed at hearing:

Issue #1: Whether the School District appropriately implemented the January 14, 2014 IEP by providing the amounts of physical therapy, occupational therapy, adapted physical education and assistive technology set forth in the January 14, 2014 IEP; and if not, whether a lack of any of these special education or related services denied the Student a free appropriate public education (FAPE)?

Issue #2: Whether the Student's IEP dated January 8, 2015 provides on its face a FAPE to the Student by providing appropriate special education and related services in physical therapy, occupational therapy, transition planning and dropping conductive education altogether?

Issue #3: Whether the School District predetermined the content of the January 8, 2015 IEP with regards to the decision to eliminate conductive education as a related service; and, if so, whether this impeded the Student's right to a FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or denied the Student an educational benefit?

Issue #4: Whether during the 2014-2015 school year, the School District complied with the Parents' request for the Student's educational records without unnecessary delay and before this due process hearing, and no more than 45 days after the request was made; and, if not, whether the failure to so comply impeded the Student's right to a FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or denied the Student an educational benefit?

In addition, counsel for the Parents requested extensive and specific relief, specifically:

- That the Hearing Officer order compensatory education for all allegedly lost special education and related services caused by the School District's alleged failure to implement the January 2014 IEP appropriately.

³ The Parents requested a closed hearing. A list of witnesses is attached to this ruling as Appendix A. Both parties submitted binders with exhibits, all of which were admitted into the record. In this opinion, references to the Parents' Exhibits will be P-#; for the School District's Exhibits it will be SD -#. In this opinion, testimony of a witness will be identified generally. A court reporter was present at the hearing.

- That the Hearing Officer re-insert the related service of Conductive Education (and transportation to and from a third-party provider) into the Student's IEP for the 2015-2016 school year (and for Extended School Year for the summer of 2016) at a rate of 540 minutes/week every other month.
- That the Hearing Officer order the School District to schedule the Student's academic courses for the 2015-2016 school year to take place in the morning, in order to allow the Student to participate in Conductive Education at an off-site location.
- That the Hearing Officer order the School District to conduct an appropriate transition evaluation for the Student; or, in the event the Hearing Officer concludes an appropriate transition evaluation has been completed, that the Hearing Officer create appropriate post-secondary goals that relate to the Student's training, education, employment and independent living skills.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows.

1. The Student

At her most recent triennial educational evaluation conducted in late 2013, the Student was assessed in the following areas: academic achievement, functional performance, cognitive functioning, communicative status, health, vision, hearing, motor abilities, and social/emotional status (social functioning). (P #2.) This triennial evaluation was performed by the IEP Team at the Student's middle school. (Id.) The validity of the assessments and the conclusions of her IEP Team at that time as to her eligibility are not in dispute.

The Student has an over-arching diagnosis of spastic quadriplegic cerebral palsy ("cerebral palsy" or "CP"), which was made when the Student was an infant.

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

(Mother's Testimony.) The Student's CP is severe, and impairs not only her mobility; but also, her cognitive functioning, her vision, her social skills, her communication skills, her academic functioning and her overall health. (P ##2 and 5) The Student's academic skills are at a functional level (her cognitive impairment qualifies her for a primary eligibility designation of intellectual disability), her expressive and receptive communication skills are not at age or grade level, and she needs assistance in identifying and regulating her emotional state, despite being described overall as a very social and happy young woman. (Id.)

Most notably, her CP causes mobility impairment and seizures, as well as low vision fields. (Id.) She is not independently ambulatory, and cannot stand or walk without adult assistance and the use of orthopedic equipment such as a stander; although she has emerging skills in independently accessing the school environment in her wheelchair. (Id.) Physically, "she needs help to go to the bathroom, but once there can go on her own." (Id.) She receives adult assistance and supervision with independent care tasks such as brushing her hair and teeth, and dressing herself. (Id.) She has learned some basic self-help tasks, but cannot be left alone for an appreciable amount of time, as she is not yet able to dial a phone for help without assistance or feed herself independently. (Id.) Visually, she has a diagnosis of bilateral optic nerve atrophy, esotropia, latent nystagmus, myopia and astigmatism and she wears glasses. (Id; see also, P #14.)

In February and March 2014, the Student had extensive back surgery for Spinal Fusion with Pelvic screw placement to correct a severe scoliosis of the spine. (P ## 132 and 201) Due to her recovery and rehabilitation from this surgery, the Student missed school; and was unable to participate fully in her Extended School Year Program. The surgery was considered medically successful; however, the Student still has pronounced issues with vitality and endurance; and, she fatigues easily both physically and intellectually. (Id., Dr. K Testimony.)

2. Conductive Education as a Related Service

For the last decade, the Student has participated in Conductive Education (CE) at the [REDACTED] (Center). (Father's Testimony, Mother's Testimony, Dr. K Testimony.) Many CE professionals testified at the hearing and explained the history of this particular methodology. (Ms. B Testimony, Ms. M Testimony, Dr. O Testimony, Dr. K Testimony and Ms. R Testimony) Although the term "education" appears in the name of this methodology, CE is not an educational program, per se. (Dr. O Testimony) Rather, CE appears to be a hybrid of multisensory mobility exercises and strength-building exercises provided in a clinical setting in a manner that encourages patients like the Student to use multiple skills at one time. (Dr. O Testimony, Dr. K Testimony, Ms. M Testimony). For example, patients of CE like the Student are taught certain specialized vocal exercises to be used during movement therapy in order to provide focus and motivation. (Id.) The Center does not provide any educational programming; and the Student does not receive any specialized instruction there, although there is evidence that she

enjoys her time at the Center and has made noticeable medical progress during her decade of time there. (Ms. B Testimony, Ms. M Testimony) Perhaps most importantly, the Student receives CE in the exclusive company of peers who, like herself, either have CP or some similar diagnosis. (Id.) Both the Student's mother and her CE providers testified that the Student enjoys being in the company of other peers who are similarly disabled, and interacts with them in socially appropriate ways. (Mother's Testimony, Ms. B Testimony, Ms. M Testimony.)

For the statutorily relevant period of time in this litigation (i.e. from January 16, 2013 to the present), CE has been listed as a *related service* on the Student's operative IEPs. (P ## 1 and 2.)⁴ Historically, the Student has received CE at the Center for intensive multi-hour sessions every other month. (Id.) When the Student attended middle school, her time at the Center did not significantly conflict with her academic schedule. (Mother's Testimony, P#2.) Since her enrollment in the School District's High School, however, the Student's time at the Center has conflicted with her academic schedule; raising a concern among the school-based members of the Student's IEP team that participation in CE as a related service was interfering with the School District's ability to provide

⁴ The Hearing Officer notes that several of the cases cited by Parents' counsel in their closing brief concerned the appropriateness of CE as a related service pursuant to an IEP. See, e.g., *Student v Elmhurst Public Schools Community Unit District 205* (ISBE Case No. 0001788, 2001). Given that CE has been listed as a related service on all of the operative IEPs for the Student, the Hearing Officer will accept that CE was treated as a related service for the Student. The issue in this hearing is whether the Student continues to require CE as a related service under her current IEP now that she is in the high school environment; or, if the Student's needs may be met through other types of related services such as Occupational Therapy (OT) and Physical Therapy (PT) that can be delivered in a high school setting.

appropriate special education services to the Student as called for in the 2015 IEP.

(Ms. J Testimony.)⁵

The related service providers who deliver CE to the Student are not School District employees. (Dr. O Testimony, Ms. M Testimony) These related service providers are hired by the Center, and receive specific training in order to deliver CE as Conductors. (Id.) There is no evidence that the State of Illinois regulates Conductors the same way other related service providers such as OTs and PTs are regulated. Nevertheless, in order for a Conductor to provide CE, he/she must have specific training and professional development. (Id.) There was no evidence presented at hearing to suggest that CE could be provided to the Student by anyone other than a Conductor; and, that all CE had to be provided off-site, at the Center (and not in the High School). Moreover, all CE related services could only be provided during the Student's school day and not on evenings or weekends. (Id.)

Witnesses from the Center testified that the Student's participation at the Center was as part of a self-contained program that was wholly designed and implemented by Center staff. (Ms. B Testimony, Ms. M Testimony.) Center staff did not obtain any input from the School District in designing the Student's CE regimen. (Id.) Significantly, the CE provided at the Center was not aligned at any time with any of the Student's operative IEPs or proposed IEPs. (Parents' ##

⁵ As a response to this concern, the Parents have requested that the Hearing Officer order the School District to alter its main class calendar to ensure that the Student does not miss any more of her academic instruction than is absolutely necessary in order to continue to receive CE as a related service.

1 and 2.) If anything, the witnesses for the Center viewed the Student's IEP goals (especially in the areas of mobility and motor planning) as an augmentation to the CE program; not, that the CE program should be complementing the operative IEP. (Ms. B Testimony, Ms. M Testimony.)

The evidence and testimony clearly show that although CE was listed as a related service on the Students IEPs, it was not a related service that was designed to integrate with the Student's IEPs. The services provided at the Center are specifically designed to minimize the Student's absence from school (by being provided intensely every other month); but there is no evidence that the actual CE methodology provided to the Student was designed with the stated goals and objectives of her IEPs in mind other than for scheduling. (Ms. B Testimony, Ms. M Testimony.)

The evidence and testimony also clearly show that even if CE was not linked in any discernable fashion to the stated goals and objectives of the Student's relevant IEPs, it did provide a tremendous clinical benefit to the Student's physical vitality. (Mother's Testimony, Dr. K Testimony.) Especially after the Students extensive back surgery, CE was credited by the Student's treating physician as making a dramatic difference in the Student's recovery, and thus, her ability to return to school. (Dr. K Testimony.) Nevertheless, when taken as a whole, the evidence demonstrates that the CE program delivered to the Student at the Center provided a mostly clinical/medical benefit to the Student with some overlap to the stated goals and objectives of her IEP.

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

3. The School District Individualized Education Plans (IEPs)

Prior to attending high school within the School District, the Student's middle-school IEP Team created a "transition" IEP for her eighth grade year on January 15, 2014 ("2014 IEP")⁶. (P #2.) The IEP was written in the middle of the Student's eighth-grade year and was designed to be implemented for the latter half of her eighth-grade year and the first semester of her freshman year. (Id.) The 2014 IEP appears to reference the Student's most recent triennial evaluations conducted in 2013 and reported at the 2014 IEP meeting. (Id.) In addition to the Student's middle-school IEP Team, the School District sent representatives to this IEP meeting. (Id.)

The Student's high school IEP team met on January 14, 2015 to conduct her annual review ("2015 IEP"), after the conclusion of the Student's first semester as a freshman. (P #1.) The Parents initiated this due process hearing within ten days of the 2015 IEP, which has not been implemented. Therefore, the 2014 IEP is the last agreed-upon IEP for the Student and has been the operative IEP for the duration of this litigation.

A. *2014 IEP Provisions.* The 2014 IEP has goals in the areas of reading comprehension, writing, math, functional skills (following a visual schedule), mobility (in her wheelchair, only), speech, and directing care (guiding a third person through the necessary steps of a familiar task). (P #2.) The 2014 IEP does

⁶ The Student did not attend middle school in the School District, but in a separate school district. (P #2.) There is no allegation that the 2014 IEP is inappropriate or otherwise violates the *IDEA*; and the Parents have not joined the Student's elementary school district to this action. In 2014 the Parents were given their procedural safeguards. (Id.) Therefore, for purposes of this litigation, the Hearing Officer concludes that the Parents are not challenging the appropriateness of the 2014 IEP.

not contain any specific transition program or goals, and it does not appear as though any specific transition assessments or evaluations were requested or obtained for the 2014 IEP meeting. (Id.)

The 2014 IEP contains updated progress reports on the CE provided at the Center. (P #2.) The progress reports reflect progress on goals that were independently drafted solely by the Center and not in coordination with the Student's other goals contained in the IEP. (Id.; Ms. M Testimony, Ms. B Testimony.) For example, the Student's mobility goal in her 2014 IEP is limited to her ability to independently navigate her wheelchair around the school setting. (P #2.) None of the CE goals or progress reports are designed to be delivered while the Student is in a wheelchair; in fact, witnesses for the Center were explicit that the delivery of CE to the Student was designed to be provided almost exclusively while the Student was out of her wheelchair. (Ms. M Testimony.) A cursory review of progress reports provided to the 2014 IEP Team shows that her CE goals only overlapped her IEP goals in the areas of self-care and the identification of some sight words. (P #2.)

The 2014 IEP provided an educational placement in an instructional, self-contained setting for the majority of her school day (1510 minutes out of a possible 1950 minutes), with related services in social work (37 minutes per week), adapted physical education (185 minutes per week), speech and language services (70 minutes/week), occupational therapy (40 minutes per week), physical therapy (60 minutes per week) and conductive education (540

minutes/week every other month). (Id.)⁷ The 2014 IEP also provided the Student with Assistive Technology and Vision Itinerant services. (Id.) Finally, the 2014 IEP provided Extended School Year (ESY) Services and a 1:1 aide. (Id.)

B. *2015 IEP Provisions.* The 2015 IEP has goals in the areas of writing, transition (work skills), math, function (mobility ~ also only pertaining to her ability to navigate with a wheelchair), functional (social thinking), and functional (self-care). (P #1) Unlike the 2014 (which the Parents did not challenge), the 2015 IEP does contain some transition-related goals; although there is no evidence that the School District actually completed any of the transition assessments listed within the IEP. (Id.) Moreover, the 2015 IEP (unlike the 2014 IEP) contains a transition plan; although it appears that the only transition services contemplated were to prepare the Student to attend the School District's CITE transition program after her fourth year of high school. (Id.)

As with the 2014 IEP, the 2015 IEP contains progress reports from the Center on the Student's CE services. Again, there is no evidence that the CE goals are deliberately tied into the goals of the IEP. (Id.) A review of the CE progress reports considered at the January 8, 2015 IEP meeting shows a small overlap of goals between the CE progress reports and the IEP goals: namely, in

⁷ At hearing, the Parents argued that there was a material difference in measuring and ultimately providing the special education services in the exact manner in which they were written (e.g., that delivering direct physical therapy for an aggregate of 60 minutes per week was materially different than delivering it in 3 sessions of 20 minutes each, as was specifically stated on the IEP). The Hearing Officer did not see any evidence that delivering the minutes in different chunks made any material difference to the delivery of services overall. Upon careful reading of the 2014 IEP it appears that the timing of services was related to the middle-schools class periods (P #2) and that delivering them in other measurements did not constitute a denial of FAPE in and of itself. See Issue #1 below.

the areas self-care, identifying site words, and vocational goals. (Id.) There is no evidence that the Center collaborated with the Student's IEP Team in identifying which IEP goals CE would address. (Ms. J Testimony, Ms. M Testimony, Ms. B Testimony.)

The 2015 IEP also called for an educational placement in a self-contained instructional setting for the majority of the Student's school day. (P #1.) Related services were to be provided as follows: Occupational Therapy (48 minutes per week); Adapted Physical Education (240 minutes per week); counseling services (40 minutes per week); speech/language services (60 minutes per week) and physical therapy (80 minutes/week). (Id.) The 2015 IEP also provided the Student with assistive technology, an assistive device, a 1:1 aide, and ESY services. (Id.) The most notable difference in the provision of related services is the removal of CE from the 2015 IEP altogether. (Id.)

Both IEPs describe the Student as a kinesthetic learner who benefits from regular movement to maintain vitality and to aide the Student in maintaining focus. (P ## 1 and 2.) There is no dispute that if the Student remains immobile for extended periods of time, she will fatigue and lose interest in educational tasks. (Ms. J Testimony, Mr. W Testimony.)

The School District admits that during the 2014-2015 school year, the Student was denied some physical therapy for over a month because the School District did not hire a physical therapist until October 2014. (Ms. D Testimony.) The School District also stipulates that there were issues in obtaining appropriate

assistive technology in a timely manner; and, that it did not have appropriate physical therapy assistive devices (such as a stander) for the better part of the Student's freshman year. (Ms. D Testimony.)

Prior to, and leading up to the January 8, 2015 IEP meeting School District staff made a deliberate effort to investigate whether or not CE was still an appropriate related service for the Student. (Ms. J Testimony, Ms. D Testimony, Dr. P Testimony)⁸ When the School District acquired a physical therapist in October 2014, she began researching CE as a methodology. (Cite PT.) Additionally, the Program Chair at the School District began self-educating herself about CE; and, she made a visit to the Center as part of that process. (Ms. J Testimony.)⁹ School-based members of the Student's IEP team also communicated with each other on this issue; and, the school-based members of the IEP team who testified at hearing all indicated that as a group they had concerns about the ability to deliver the Student's specialized instruction as called for in the IEP given the amount of time the Student spent at the Center. (Ms. J Testimony, Mr. W Testimony, Ms. D Testimony, Dr. Q Testimony.) Prior to the January 2015 IEP meeting, Center staff also made visits to observe the Student at her high school placement. (Ms. B Testimony, Ms. J Testimony.) As a result of this investigation, the school-based members of the IEP team made a recommendation at the January 8, 2015 IEP meeting to remove CE as a related

⁸ The Student's mother testified that at the Student's previous school district, there had also been a short-lived investigation to determine the continued efficacy of CE as a related service. The Student's mother testified that after a brief investigation by that school staff, the issue was dropped, and CE remained a related service in the Student's IEPs. (Mother's Testimony.)

⁹ The school physical therapist did not make a site visit to the Center, despite her desire to investigate the efficacy of CE as a related service to the Student. (Ms. D Testimony.)

service altogether; despite the vehement objection of the Parents and the Center staff who were in attendance. (Ms. J Testimony, Mr. W Testimony, Dr. P Testimony.) At this three-hour IEP meeting, the issue of CE was discussed, and the school-based members of the team made recommendations for additional related service minutes. (Ms. J Testimony, Ms. D Testimony) The LEA representative (who was not normally a part of the Student's IEP team) refused a request by the Student's father to adjourn the meeting and reconvene to discuss the issue regarding CE. (Father's Testimony, Ms. J Testimony.) The meeting was concluded, and CE was removed as a related service over the objection of the Parents and the Center staff in attendance. (P #1, Father's Testimony, Mother's Testimony, Ms. B Testimony.)¹⁰ The Parents filed their DPCN within ten days thereafter.

4. School District Response to Parents' Counsel's Requests for Records.

After the January 8, 2015 IEP meeting and the filing of the Parents' DPCN, counsel for the Parents made repeated requests for the Student's records. (P ##301, 305) The School District made responses over the course of several months. (P ## 83, 308, 312.) Prior to the hearing, counsel for the Parent made a motion to compel the production of the Student's records, which was ultimately

¹⁰ The January 8, 2015 IEP does not contain a written narrative description of the meeting, so there is no contemporaneous documentation of the conversations regarding the removal of CE as a related service at the IEP meeting. (P#1.) Accordingly, the Hearing Officer had to ascertain what transpired at the meeting based solely on the testimony of those witnesses who were in attendance. In areas where the two versions of the IEP differed, the Hearing Officer had to make a credibility assessment based on her impression of the witnesses. The overall conclusion is that the portion of the January 2015 IEP meeting discussing CE was highly contentious, especially between the LEA representative and the Parents. (Father's testimony, Ms. B Testimony.) It is also clear that the meeting was concluded that same day over the Parents' request to reconvene. (Father's Testimony, Mother's Testimony, Ms. J Testimony.)

granted with the additional order that the counsel for the School District account for the search for records pursuant to an affidavit by the School District records' custodian. (P # 311.) The issue regarding the timely production of documents was not resolved prior to hearing; and, the Hearing Officer gave the Parents leave to file an amended DPCN to add the issue of records production to the hearing issues, which the Parents did (P. ## 316, 321, 322, 323.)

As part of the five (5) day disclosures, the Parents have included documentation regarding their requests for Student records, which were entered into evidence with all of the other documents. (P## 305, 308, 310 - 324.) However, no substantive witness testimony, especially by the Parents, was elicited regarding this issue; nor what, if any, impact a delay in obtaining the Student's educational records may have had on the parties.

CONCLUSIONS OF LAW

Overview

The overriding issue in this case is whether the School District was justified in removing CE as a related service, or whether removal of CE constituted a denial of FAPE. Concurrent with this major issue, the Parents have also raised issues regarding the implementation of related service minutes pursuant to the 2014 IEP, the appropriateness of the transition goals, and the production of Student records pursuant to the *IDEA*.

Since 1975, when Congress enacted *The Education of All Handicapped Children's Act* (now known as the *Individuals with Disabilities Education Act*, 20

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

U.S.C. §1400, et seq.), it has been federal law that eligible children with disabilities are entitled to a free appropriate public education (“FAPE”) in the least restrictive environment (“LRE”) ~ that location where an eligible child with a disability may be appropriately educated “to the maximum extent appropriate, with non-disabled children.” *Beth B. v Van Clay*, 36 IDELR 121 (7th Cir. 2002), *citing*, 20 U.S.C. §1412(5). As the United States Court of Appeals for the Seventh Circuit has stated, “[t]he FAPE provision and the LRE provision are two sides of the same IEP coin.” *Id.* This fundamental joining of an appropriate education of eligible children in an environment that will most closely mirror a traditional educational setting meets the *IDEA*’s most fundamental purpose: “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C. §1400(d)(1)(A).¹¹

In the intervening decades since this statutory scheme was created, there have been regular updates to the *IDEA* and its implementing regulations,¹² designed at their core to recognize that “disability is a natural part of the human experience” and that it is sound public policy to improve “educational results for children with disabilities” in order to allow these children “equality of

¹¹ The *IDEA*’s other stated purposes (to ensure that the rights children with disabilities and their parents are protected, and to assist States, localities, educational service agencies, educators and parents to provide for the education of all children with disabilities) are no less important, and will be addressed further in this opinion. *See*, 20 U.S.C. §1400(d).

¹² In Illinois, Article 14 of the *Illinois School Code*, 105 ILCS 5/14, and its implementing regulations, provides the State’s counterpart to the federal requirements set forth in the *IDEA*.

opportunity, full participation, independent living, and economic self-sufficiency." 20 U.S.C. §1400(c)(1). In the most practical sense, the *IDEA*, the *School Code*, and their respective implementing regulations seek to make the ordinary benefits of public education available to students with disabilities between the ages of 3 -21. In this hearing, the objective is to resolve the issues presented below not only with the facts presented to the Hearing Officer, but also to resolve the issues below with the overall purpose of the *IDEA*.

Therefore, based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows for each of the issues presented by the parties.

Issue #1: *Whether the School District appropriately implemented the January 14, 2014 IEP by providing the amounts of physical therapy, occupational therapy, adapted physical education and assistive technology set forth in the January 14, 2014 IEP; and if not, whether a lack of any of these special education or related services denied the Student a free appropriate public education (FAPE)?*

The Parents submit that the School District failed to provide the required amounts of physical therapy, occupational therapy, adapted physical education and assistive technology set forth in the January 14, 2014 IEP. The Parents further submit that the School District's alleged failure to implement the January 14, 2014 IEP caused the Student to lose skills, fail to meet goals and objectives, miss instructional time in adaptive physical education, and be unable to access her assistive technology completely.

The School District submits that the January 14, 2014 IEP provided a FAPE with regard to the provision of the stated special education and related services except

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

for the related service of conductive education.¹³ The School District also submits that its staff implemented the occupational therapy, physical therapy, adapted physical education and assistive technology provided in the January 14, 2014 IEP in a manner that provided FAPE to the Student.

The Hearing Officer notes that the most significant difference between the 2014 IEP and the 2015 IEP is the provision of CE as a related service. That issue will be discussed more thoroughly below. For purposes of this issue, the Hearing Officer is focusing solely on whether the **other** related services provided for in the 2014 IEP were implemented appropriately by the School District for the first semester of the 2014-2015 school year, when the IEP was in full force and effect.

The Parents' argument regarding implementation failures identifies several alleged instances¹⁴, each of which will be handled separately:

- The provision of related services exactly as they were described regarding duration and frequency (as opposed to implementing minutes in an aggregate form);
- The delay in providing physical therapy ("PT") services and equipment to the Student for several weeks in the beginning of the 2014-2015 school year, even accounting for an aggregate computation of services;
- Failure to provide all of the occupational therapy (OT) services to the Student, even accounting for an aggregate computation of services;

¹³ The School District further submits that the related service of conductive education was and is not necessary for the provision of FAPE to the Student. This issue will be discussed more fully in Issue #2, below.

¹⁴ The Parents request "compensatory services" for these failures, specifically having the Hearing Officer order 37 (30 minute) sessions of PT and 24 (30 minute sessions) of OT, to be provided by private therapists chosen by the Parents along with travel costs. (Parents' Closing Brief, p. 23-24.)

- Failure to provide appropriate assistive technology (AT) to the Student in a timely manner.

A. *Exact vs. Aggregate Provision of Services.* The 2014 IEP lists OT and PT related services in an "A x B" format: specifically, PT was listed as "3x20" minutes per week and OT was listed as "2x20" minutes per week. (P #2.) The Parents argue that the format of breaking up total minutes in smaller installments was required to provide a FAPE. The School District argues that it is not a denial of FAPE to deliver one 60-minute session of PT per week instead of three 20-minute sessions. The Hearing Officer agrees with the School District, and finds that implementing the related services of PT and OT in the aggregate (i.e. one 60-minute session per week) as opposed to implementing these related services exactly as written (i.e., three 20-minute sessions per week) does not in and of itself constitute a denial of FAPE.

"Although the IDEA requires an appropriate education, it does not require a perfect education." *Sumter County School Dist. 17 v. T.H.*, 56 IDELR 186 (4th Cir. 2011), quoting, *M.S. v Simchick v Fairfax Cnty.*, 303 F.3d 523, 526 (4th Cir. 2002). As long as the IEP is implemented in a manner that provides its essential elements so as to confer some educational benefit on the child, it can provide a FAPE, even if it is not implemented exactly: "the failure to perfectly execute an IEP does not necessarily amount to the denial of a free appropriate public education." *Id.* The inquiry in this case, is whether the School District implemented the material

portions of the IEP, not whether it followed the exact schedule as set forth in the 2014 IEP.

The evidence and testimony clearly demonstrate that the 2014 IEP was drafted by the IEP team at the Student's middle school, with the intention that it would be the operative IEP for the remainder of the Student's time there. (Mother's testimony.) It is also clear that the minutes for special education and related services contained in the 2014 IEP were designed around the schedule of the Student's middle school as much as for any individual educational purpose. (Id.) If, as the Parents argue the exact duration and frequency was necessary for a FAPE (because of the Student's physical needs for these related services required them to be delivered more frequently in smaller amounts), then the provision of CE in large intensive sessions every other month would be similarly ineffective for the Student. Nevertheless, it is relevant to determine if, even in the aggregate, the related services of PT and OT were delivered in a manner to provide a FAPE. In other words did the School District's alleged failure to provide appropriate amounts of PT and OT amount to a substantial denial of these IEP provisions or a *de minimus* failure? See, *Houston Indep. School Dist. v Bobby R.*, 31 IDELR 185 (5th Cir. 200).

B. *Physical Therapy.* The School District stipulates that the Student did not receive any PT until October 2, 2014, but argues that all missing minutes were made up by the physical therapist during the 2014-2015 school year. (Ms. D Testimony; P# 77.) The Parents argue that the minutes were not sufficiently

made up by the end of the first semester. (P #77.) The evidence shows that by the end of the first semester, the missing PT minutes were not sufficiently provided, even with the addition of extra (and longer) sessions by the School District PT. (P #77, Ms. D Testimony.) Although the Hearing Officer found the School District PT to be a credible witness, her own testimony and logs showed that by early January 2015, the missing sessions of PT ~ even in the aggregate ~ were not made up. (Id.)

The School District seems to argue that if the Hearing Officer considers the total minutes made up during the entirety of the 2014-2015 school year, the amount of missing PT minutes becomes less material. (Ms. D Testimony.) The Hearing Officer disagrees for two reasons: (1) the 2014-2015 IEP identified the duration of these related services to be through January 14, 2015 (P. #2.); and, given the nature of the Student's severe orthopedic impairment and need for movement, denying her significant amounts of PT, and then making them up over the entirety of an entire school year constitutes a material violation of the *IDEA*. By the Hearing Officer's calculation, the Student missed 515 minutes of physical therapy from the beginning of the 2014 school year until early January 2015. (P # 77.)

Compounding this problem for the School District is the fact that even after it started providing PT services in October 2014, the School District did not have on hand the necessary PT equipment (most notably a stander) for several months after that. (Ms. D Testimony, P## 28, 40, 41 and 42.) Even if the missing PT

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

minutes had been appropriately provided during the course of the first semester, the inability of the School District to have the necessary equipment on hand at the beginning of the school year and after the initial provision of PT services constituted a material denial of FAPE to this Student, whose severe orthopedic needs were well documented. (See, P #2.)¹⁵ Again, although the Hearing Officer found the physical therapist to be a credible witness, it is clear that even after she began providing services to the Student, she was struggling to find the appropriate equipment with which to do so. She testified that she procured a stander (which was not even a good fit for the Student) on her own in order to better implement her PT sessions. (Ms. D Testimony.) While it is personally admirable for her to go to such great lengths for this Student, the School District had an obligation to ensure that all necessary equipment was available for the Student at the beginning of the school year. 34 C.F.R §300.232. It is clear that the School District delayed all aspects of the provision of PT services to the Student until after it hired a physical therapist; when it could have at least been attempting to acquire the necessary equipment for the Student sooner. Accordingly, the Hearing Officer finds that the delay in providing the necessary and correct PT equipment was also material violation of the IEP and accordingly, a denial of FAPE to the Student.

C. Adapted Physical Education. The 2014 IEP called for the Student to receive adaptive physical education ("APE") for a rate of 185 minutes per week. (P #2.)

¹⁵ The Parents submitted many documents regarding the Student's medical condition over several years, and these documents were entered into evidence. It was unclear at hearing whether the school physical therapist had reviewed them all. (Ms. D Testimony.)

The School District actually provided APE at a rate of 240 minutes per week, a surplus of 55 minutes per week. (*See, P #1.*) There was no evidence at hearing to indicate that the Student missed a material amount of her APE. Accordingly, the School District provided adapted physical education in a manner that provided a FAPE to the Student.

At hearing, school physical therapist testified that some of the PT services provided to the Student were also done in the context of her adaptive physical education classes, so that the time spent in APE also doubled as her PT minutes on those occasions. (*Ms. D Testimony, P. #2.*) While this type of double dipping on direct services is suspect, given the significant overage of APE services provided to the Student, it is clear that the APE services were delivered in full, even accounting for those circumstances where the Student was receiving her PT minutes during APE.

The evidence also shows that during the Student's adaptive physical education classes she sometimes received 1:1 assistance from her general education peers, who were also receiving class credit for acting as volunteers. (*Ms. D Testimony*) While the interaction of the Student with her non-disabled peers certainly provides an enriching experience for all of the students involved, it is not a substitute for the direct PT or APE related services called for in the IEP, as these general education student volunteers are not School District employees properly certified to provide PT services to the Student, even if supervised by the physical therapist or physical education teacher.

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

D. Occupational Therapy. The 2014 IEP called for forty (40) minutes per week of OT (2x20). (P #2.) Testimony by the School District occupational therapist and her logs indicate that she provided OT in forty-five (45) minute sessions. (P #82, Ms. W Testimony) From the beginning of the school year until the expected expiration date for these related services in January 2015, the Student was entitled to receive 800 minutes of OT. (P. #2.) The OT logs show that for that period, the Student received 630 of those minutes. (P. #82.) The OT log shows that at least one of the missing sessions was due to the Student's absence, but that others were because of the therapist's absence. (Id.) Even crediting the occupational therapist with 40 minutes due to the Student's absence, by the Hearing Officer's calculation, the Student missed 90 minutes of OT. (Id.) Notwithstanding this shortfall, the Student only missed approximately two OT sessions for the first semester, an amount the Hearing Officer determines is *de minimus*, and not a denial of FAPE.

E. Assistive Technology. The 2014 IEP calls for the Student to receive assistive technology services. (P. #2.) The testimony of the School District's AT provider admits that not all of the Student's AT devices were available to her during the period of the beginning of the 2014 school year through early January 2015. (Ms. Testimony, P## 24, 44, 46, 49, 53, and 62.) Assisted technology services are defined as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assisted technology device." 34 C.F.R. §300.6. There is no apparent factual dispute that the School District was delayed in

obtaining all of the necessary AT services for the Student, including a delay in receiving a laptop computer and its software, delay in receiving an enlarged cursor, and delay in training the Student's 1:1 aide in the AT. (Ms. V Testimony.) Although most of these deficiencies were remedied in the first month of school (and thus would be a *de minimus* deprivation), the delay in training the Student's 1:1 aide until almost the end of the Student's first semester in the use of the AT is a material violation of the IEP, and a denial of FAPE. The 2014 IEP confirms her receptive and expressive communication deficits. (P #2.) Accordingly, the Student must rely heavily on the adults around her to help her access her education. The delay of over three months to train the 1:1 aide on the use of the Student's AT constitutes a denial of an assistive technology service. 34 C.F.R. §300.6(f). There was no evidence at hearing that the Student herself was already fluent enough in the use of her AT to mitigate the lack of training for her aide. Accordingly, the Hearing Officer finds that the delay in training the 1:1 aide in the full use of the AT constituted a denial of FAPE to the Student.

Ruling on Issue #1: In Favor of the School District regarding Occupational Therapy and Adaptive Physical Education; in favor of the Parents regarding Physical Therapy and Assistive Technology.

Issue #2: *Whether the Student's IEP dated January 8, 2015 provides on its face a FAPE to the Student by providing appropriate special education and related services in physical therapy, occupational therapy, transition planning and dropping conductive education altogether?*

The Parents submit that the January 8, 2015 IEP does not provide a FAPE to the Student because it provides only 60 minutes/week of physical therapy and 48

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

minutes/week of occupational therapy and a complete cessation of the Student's previous conductive education therapy at 540 minutes/week (every other month). The Parents further submit that the January 8, 2015 IEP does not have an appropriate transition plan, and that the proposed physical and occupational therapy contained in the January 8, 2015 IEP fails to address the Student's ongoing independent living skills, mobility skills (gross and fine motor), and transition programming needs.

The School District submits that the January 8, 2015 IEP provides appropriate special education and related services on its face; and, that ongoing conductive education as a related service is not necessary to provide the Student with a FAPE. The School District further submits that the January 8, 2015 IEP appropriately addresses the Student's ongoing independent living skills, mobility skills and transition programming needs.

A. Conductive Education as a Related Service.

Related Services, Generally. The Hearing Officer concludes that it is an educationally relevant inquiry by the Student's IEP team to reassess the necessity and validity of any related service contained in her IEP at each annual review. *See*, 34 C.F.R. §300.320. It would make no practical or educational sense for Congress to require annual IEP meetings and triennial evaluations of eligible children like the Student, if the mere fact that a type of specialized instruction or a related service is already in an IEP is proof that it is still needed to deliver a

FAPE. Therefore, the School District's inquiry into the efficacy of CE is appropriate, and mandated by the *IDEA*.¹⁶

Clearly, the Student's 2015 IEP is required to contain a statement of the special education and related services and supplementary aids and services (based on peer-reviewed research to the extent practicable) to be provided to the child. 34 C.F.R. §320(a)(4). Moreover, the special education, related services and supplementary aids and services **must** enable the Student: (1) to advance appropriately towards attaining the annual goals stated in her IEP; (2) to be involved in and make progress in her general education curriculum, and to participate in extracurricular and other non-academic activities; and (3) to be educated and participate with other children with disabilities and nondisabled children in school activities. *Id.* Also see, *Ross Valley School District*, 114 LRP 49845 (SEA Cal. 2014).

All related services as listed in an IEP must demonstrably "assist a child with a disability to benefit from special education." 34 C.F.R. §300.34(a). It is not enough simply to show that the purported related service is beneficial: it must connect back and "relate" to the provision of special education as outlined in the IEP. A related service can include "medical services for diagnostic or evaluation purposes" to be "provided by a licensed physician to determine a child's

¹⁶ Accordingly, the inquiry into the efficacy of CE is **not**, in and of itself, evidence that the School District premeditated to remove CE from the IEP in January 2015. See, Issue #3, below.

medically related disability that results in the child's need for special education and related services." 34 C.F.R. §300.34(a) and (c)(5).¹⁷

Conductive Education, specifically. As stated above, the Hearing Officer concludes that CE is a hybrid methodology that historically has provided both medical and educational benefits to the Student. (Dr. O Testimony, Dr. K Testimony.) While accepting that CE can be (and in this case has been) listed on an IEP as a related service (*see, e.g., Kirby School District #140 v ISBE*, 34 IDELR 82 (SEA Ill. 2000); and *Elmhurst Public Schools Community Unit District 205*, 35 IDELR 136 (SEA Ill. 2001)), CE is primarily a methodology for which decision-making authority resides primarily with the School District. *Case v Allegheny Intermediate Unit*, 49 IDELR 34 (D.C. Pa. 2007). In short, CE is not, in and of itself, necessary for a FAPE if another methodology can adequately address the Student's motor and attention needs under the IEP.¹⁸

Conductive education is not specifically identified under the *IDEA* as a related service, but could be considered one if CE is in fact required to assist a child to

¹⁷ By this definition, even though CE primarily addresses the Student's medical needs, it is not a "medical [related] service" pursuant to the *IDEA*.

¹⁸ The Hearing Officer was very moved by the testimony of the Student's Parents who, while no longer married, continue to work cooperatively to support the Student's education (including participating together in this due process hearing). The Student's mother, herself a public school educator, demonstrated a thorough knowledge of her daughter's educational and medical needs and was able to articulate through her testimony the educational and medical benefits CE delivers to the Student. Most movingly, the Student's mother described several *non-educational* benefits of CE to the Student: namely, the medically-rehabilitative benefit that allowed the Student to recover from painful and serious back surgery, the delivery of CE into the early evening to allow the Parents to observe sessions while not missing work; and most of all, the sense of camaraderie the Student gains from spending therapeutic time with other similarly disabled young people. (Mother's Testimony.) The Hearing Officer was also impressed that the Student's father demonstrated open-mindedness to other methodologies other than CE, in the event they could address the Student's educational needs in a similar manner. (Father's Testimony.)

benefit from his/her special education. *See, e.g., Kirby School District #140 v ISBE*, 34 IDELR 82 (SEA Ill. 2000); and *Elmhurst Public Schools Community Unit District 205*, 35 IDELR 136 (SEA Ill. 2001). As with the provision of specialized instruction, related services are only necessary to allow the Student to receive “the basic floor of opportunity” and not the best possible outcome. *Petit v U.S. Department of Education*, 58 IDELR 241 (D.C. Cir 2012).

B. *The Student’s Motor and Attention Needs and Their Relation to Conductive Education, OT, PT and APE:* The record is clear that the Student requires PT and OT, plus APE in order to address her motor and attention deficits in order to receive a FAPE (P ## 1 and 2, Mother’s Testimony, Ms. J Testimony, Ms. D Testimony). All of these are properly identified as related services on both the 2014 and 2015 IEPs, as they clearly exist in order to allow the Student to access her special education. The germane question is whether or not the Student’s 2015 IEP provides for these related services (including the equipment necessary to deliver them in a high-school setting) in appropriate amounts. (P # 1.)

The 2015 IEP eliminates all CE as a related service. (P #1.) In order to determine whether the 2015 IEP delivers a FAPE with regard to the amounts of OT, PT, and APE as related services it is necessary to determine what (if any) educational benefit comes directly from CE; and, then to determine if the PT, OT, and APE as listed in the 2015 IEP address the Student’s deficits appropriately without any additional CE related services. In other words, the Hearing Officer must attempt

to determine, how if at all, CE allowed the Student to access her special education as it was set forth in her IEP.

All evidence and testimony at hearing demonstrates that the Student has an on-going need for movement as part of her IEP in order to address her motor needs (operating her wheelchair and participating in her educational services across all school settings) and her deficits in maintaining attention. (E.g., Ms. J Testimony, Ms. D Testimony) Her teacher at the high school report testified that there are times that the Student is so fatigued at the end of a school day that she can't focus or otherwise participate in her education. (Mr. W Testimony.)

The challenge in this case is to determine how, if at all, the Student's participation in CE at an off-site location for intensive therapy every other month, connects to the Student's ongoing performance *in her high school environment*. There was no evidence whatsoever that either the 2014 and 2015 IEP teams (including the Parents ~ who participated fully) felt the need to attempt to quantify how much the Student's participation in CE provided a clinical therapy versus providing the type of educational progress usually associated with a related service under the *IDEA*. (P ## 1 and 2.) Further complicating this analysis is the fact that the Student has been participating in CE regularly for a decade, so there is no recent base-line data to support any difference in her ability to access the general education environment or curriculum without it. (P ## 1 - 4, 104, 207, 208, Ms. J Testimony, Ms. D Testimony.) Additionally the school psychologist did not make a site visit to the

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

Center to ascertain the nature of the CE actually being provided to the Student.

(Ms. D Testimony.)

In the absence of any evidence showing a factual correlation between the provision of CE as a related service and the Student's ability to access her special education at a high-school level, the Hearing Officer turns to the 2014 and 2015 IEPs for guidance. As stated above, the Hearing Officer has concluded that the CE "goals" developed by the staff at the Center were not as a result of any collaboration with the Student's IEP teams. The CE "goals" do not reference state learning standards, or otherwise reference the applicable IEP specifically in any manner. (P ## 1 and 2, Ms. M Testimony) Conversely, 2014 and 2015 IEPs have PT goals, which directly related to the provision of special education to the Student. (P ## 1, 2) Moreover, the APE and OT related services also clearly relate to the provision of special education in the 2014 and 2015 IEPs even if there are no specific goals attributed to these related services. (Id.) At best, the CE "goals" that address self-care and site word reading can be seen as directly connected to the special education contained in the 2014 and 2015 IEPs.¹⁹ All of the other CE "goals" address gross motor skills in an attempt to improve overall strength and vitality to the Student. (Id.) The testimony of the Center's witnesses also reinforced that those attributes of CE which make it a unique methodology (the emphasis on being out of a wheelchair, the emphasis on exercises to build

¹⁹ The CE progress reports discussed at the January 2015 IEP meeting also reference one "vocational" goal. (P #1.) Given that the transition plan contained in that IEP is found to be inappropriate, the Hearing Officer cannot connect the CE vocational goal to the IEP transition goals.

strength, the communal nature of having similarly disabled students encouraging each other, and the specific vocalizations that accompany the gross motor exercises) are an integral part of the CE methodology and are not created or individualized for the Student or her IEP needs. (Ms. B Testimony, Ms. M Testimony, Dr. O Testimony, Dr. R Testimony.)

In short, there is no compelling evidence that the amounts of CE as listed in the 2014 IEP are necessary to provide the Student with a FAPE in the high-school setting. If it were possible to cull out only that IEP-relevant portion of the CE program being provided to the Student at the Center²⁰, and simply reduce the allotted time of CE accordingly, that result would still prove problematic for this Student. The amount of time away from her high school setting to obtain CE at the Center directly interferes with the ability of the School District to deliver her special education, as her CE sessions (unilaterally scheduled by the Center) conflict with the Student's academic schedule at the School District. (Ms. J Testimony.)²¹ Continuing to receive CE off-site also removes the Student from the least restrictive environment at that time in her life when she needs more exposure to her non-disabled peers, not less. *See*, paragraph C, below.

²⁰ This result is impracticable as all of the Center's witnesses described the Student's CE program as holistic and beneficial to her when given in the amounts already set forth in her 2014 IEP. (Dr. O Testimony, Dr. R Testimony, Ms. B Testimony, Ms. M Testimony.)

²¹ The Parents' suggestion that the Hearing Officer order the School District to alter its entire main schedule for the high school in order to accommodate the CE related service is an example of having the tail (the related service) wag the dog (the provision of special education). Even if such a drastic remedy were feasible, it would not address the important time away from the high-school setting and the Student's non-disabled peers that both the *IDEA* mandates and the Student needs. *See*, Paragraph C, below.

Nevertheless, the Hearing Officer cannot agree with the School District that either (a) the Student gets no educational benefit from CE; or (b) any loss of educational benefit caused by the removal of CE from the 2015 IEP is appropriately addressed by the amount of PT, OT and APE contained therein. As the Student is addressing at least some of her IEP goals indirectly through CE, that methodology is having some unmeasured impact on her access to her specialized instruction. Also, a review of the 2014 and 2015 IEPs shows that the amounts of PT and OT are nearly identical. (P ## 1 and 2.) The only significant increase is in the amount of APE between the two IEPs. (Id.) As a result, the Hearing Officer cannot find that the 2015 IEP in its face, solely provides a FAPE given the amount of PT, OT and APE related services it contains.

The Hearing Officer therefore finds that (a) the amounts of PT and OT contained in the 2015 are **not** sufficient in order to provide the Student a FAPE; **and** the amounts of CE contained in the 2014 IEP are **not** necessary in order to provide a FAPE. The Hearing Officer concludes that, in order to determine how much more OT and PT are necessary to deliver a FAPE to the Student it will be necessary for the School District to re-evaluate the Student as to her movement and attention needs in a high-school setting; and then, to adjust the amount of direct OT and PT services accordingly (but in an amount to at least fifty percent (50%) greater than the current amounts already set forth in the 2015 IEP). Until this process is completed, the Student will need to continue to receive CE at the Center (including transportation).

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

C. Transition Planning. Interestingly, the 2015 IEP contains a transition plan; but no transition evaluation or assessment to support that plan, even though transition assessments were specifically identified, but not completed. (P #1.) It is all but impossible for this Hearing Officer to determine whether the transition plan contained in the 2015 IEP is appropriate absent any specific assessment regarding the Student's transition needs.²² The School District has cited *L.M. v Downingtown Area School District*, 65 IDELR 124 (E.D. Pa 2015), as supporting its position that the lack of a transition assessment as part of the 2015 IEP was not a fatal flaw. The instant case is distinguishable from *L.M.*, in that the 2015 IEP explicitly identifies specific transition assessments as needed, but were never in fact completed. (P #1, Ms. J Testimony). If the Student's IEP team felt the need to specifically include transition assessments as part of the transition plan, the Hearing Officer concludes that they are necessary in developing an appropriate transition plan, and that their absence is a procedural violation of the *IDEA*. The Hearing Officer also concludes that this procedural violation impaired the Student's right to a FAPE, significantly impaired the Parents' ability to participate in the decision-making process regarding the provision of a FAPE to the Student, and, denied the Student an educational benefit. *See*, 34 C.F.R §300.513.

Testimony regarding the Student's likely post-secondary needs was generally consistent; but, again, not based on any formal assessment. (Ms. J Testimony)

²² It would also be difficult, if not impossible, for this Hearing Officer to create a transition plan from scratch without such an assessment, as the Parents have requested as an alternative remedy.

There is no evidence that multiple post-secondary outcomes or transition plan options were considered at the January 2015 IEP meeting, except the School District's CITE program. (Mother's Testimony, Ms. J Testimony.)

All the witnesses who testified about the Student's ultimate post-secondary outcomes contemplated some sort of supported living and working arrangements for her once she aged-out of her transition program²³. (See, e.g., Ms. M Testimony, Ms. J. Testimony.) Even the Center's witnesses indicated that the Student's post-secondary employment and living needs would involve her remaining in her wheelchair for most of her day, and being largely dependent on others to assist her with daily life activities and employment. (Ms. M Testimony.)

None of the witnesses who testified about the Student's post-secondary needs indicated that they expected the Student to live independently or to secure competitive employment that was not highly supported. Yet there was no assessment that formalized these types of conclusions or otherwise indicated the Student's own preferences for her post-secondary life. (P #1.)

The one abiding and encouraging attribute all witnesses agreed upon about the Student's post-secondary life is that she will benefit from the extremely optimistic and appealing aspects of her highly social personality. (Id., Mother's Testimony, Father's Testimony, Ms. W Testimony, Mr. W Testimony, Ms. J Testimony, Dr. K Testimony, Ms. B Testimony, Ms. M Testimony) Every witness who testified about the Student uniformly and enthusiastically described her as a

²³ No witnesses who testified about transition planning, including the Student's Parents, gave any indication that they expected her to graduate high school with a general education diploma.

hard-working, sincere, loving and social young woman. (Id.) All of them agreed that her best skill was engaging with everyone she met in a positive and loving manner ~ whether that person has a disability like her own, or whether that person is non-disabled. (Id.) The Hearing Officer was moved by the fact that everyone who knows the Student likes her; something that can be said for very few people, whether they are disabled or not.

This is one important consideration when assessing her transition needs and planning her post-secondary life as part of the IEP process; but, it is not sufficient on its own to support an entire transition plan. The *IDEA* is explicit that its ultimate purpose is to “ensure that all children with disabilities have available to them a free appropriate public education designed to meet their unique needs **and prepare them for employment and independent living.**” 20 U.S.C. §1400(d). (Emphasis added) The purpose of the *IDEA* is to prepare children such as the Student to take their rightful place in society ~ to teach them how to make a meaningful life in a world full of people who are not like them. There is no “special education” library or grocery store. There is no “special education” shopping center or polling place. There is only one world, and the *IDEA* mandates that local education authorities (such as the School District) take explicit and overt steps to prepare eligible children (such as the Student) to live in that world with as much independence as possible. Maximizing the Student’s obvious social strengths is an important place to start, but the IEP Team correctly

determined that additional transition assessments were necessary to complete that process. (P #1.)

Transition planning is designed to be a “results oriented process that is focuses on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-secondary activities.” 34 C.F.R. 43(a). The *IDEA* provides for transition assessments to be an integral part of this planning process; and the Student’s IEP team agreed that assessments were integral to the Student’s transition plan as they explicitly identified them. (P. #1.) Accordingly, the Hearing Officer concludes that the transition plan contained in the 2015 IEP lacks an integral element, namely an appropriate transition assessment, and thus does not provide a FAPE on its face.

Ruling on Issue #2: In Favor of the School District regarding the removal of CE as a related service; in favor of the Parents on the general issue of denial of FAPE regarding OT, PT and Transition Services.

Issue #3: Whether the School District predetermined the content of the January 8, 2015 IEP with regards to the decision to eliminate conductive education as a related service; and, if so, whether this impeded the Student’s right to a FAPE, significantly impeded the Parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or denied the Student an educational benefit?

The Parents submit that the January 8, 2015 IEP did not reflect the decision of the entire IEP or appropriately note the opinions of the Parents and the Student’s conductive educators; and that the School District pre-determined that it would not provide conductive education as a related service to the Student. The Parents’ further submit that this alleged procedural violation denied the Student a FAPE.

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

The School District submits that the January 8, 2015 IEP was not predetermined by the School District staff or administrators. And further the School District submits that the Parents predetermined their position that conductive education was necessary to provide FAPE to the Student and that they would not accept other alternative services.

The IDEA requires that the School District must ensure that the Parents are members of all IEP teams regarding the Student. 34 C.F.R. §300.327, 34 C.F.R. §300.501(c)(1). There is no dispute here that the Parents were invited to and actively participated in all of the relevant IEPs, including the January 2015 IEP meeting. (P #1, Mother's Testimony, Father's Testimony, Ms. J Testimony, Dr. P Testimony.) The issue of predetermination rests solely on the fact that at the January 2015 IEP meeting the school-based members of the IEP Team removed the related service of CE over the active objections of both Parents and member of the Center in attendance. (Id.)

Usually, allegations of pre-determination as a procedural violation occur in the context of determining the child's educational placement. *See, e.g. Board of Education of Township High School District 211 v. Ross*, 486 F.3d 267 (7th Cir. 2007); *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir. 2004); and, *A.E. v Westport Board of Education*, 46 IDELR 277 (D. Conn. 2006). In this case, the Student's placement is not in dispute; and the issue regarding pre-determination centers solely around the removal of CE from the Student's IEP as a related service.

RECEIVED 11/2/2015 - SPECIAL EDUCATION SERVICES

As a rule, predetermination occurs when school-based members of the IEP team unilaterally make IEP decisions ahead of a meeting. *See, Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir. 2004). Evidence of predetermination must demonstrate that the school-based members of the IEP team entered the meeting with closed minds. *H.B. v Las Virgenes Unified School District*, 52 IDELR 163 (C.D. Cal. 2008), *aff'd*, 54 IDELR 73 (9th Cir. 2010, *unpublished*). Even though it is acceptable for IEP team members to meet ahead of the IEP meeting to discuss IEP issues and potential outcomes, in order to avoid a finding of predetermination there must be evidence that other alternatives were discussed and considered at the IEP meeting. *Board of Education of Township High School District 211 v. Ross*, 486 F.3d 267 (7th Cir. 2007); *See also, T.P. v. Mamaroneck Union Free School District*, 51 IDELR 176 (2nd Cir. 2009). A finding of pre-determination is a procedural issue; and, in order to prevail, the Parents would need to prove that any act of predetermination impeded the Student's right to a FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or denied the Student an educational benefit. 34 C.F.R. §300.513(a)(2).

In this case, there is evidence that the School District decided to explore the efficacy of CE as a continued related service. The Parents were aware of this exploration (Mother's Testimony, Ms. J Testimony). The school physical therapist and the School District administrator testified that they each researched CE and visited the Center. (Ms. J Testimony, Ms. D Testimony.) Also, one of the

Student's Conductors also visited the high school to observe the Student. (Ms. M Testimony.) The school-based members of the IEP team testified that prior to the January IEP meeting they met informally and discussed their concerns that CE was affecting the ability of the Student to access her special education; and, whether the educational benefits of CE could be delivered within the high school setting. (Ms. J Testimony, Mr. W Testimony, Ms. D Testimony, Ms. V Testimony.) There is no evidence that the school-based members came to the IEP with a closed mind; it is clear that they considered the alternatives, including continuing with CE as a related service, prior to the IEP meeting. (Id.)

The testimony of the witnesses also indicates that Student's father was open other suggestions than the CE methodology, perhaps more so than the Student's mother or the CE personnel from the Center. (Father's Testimony) The testimony regarding the meeting is that it was lengthy, and that the IEP team had a vigorous discussion of the impact of removing CE from the IEP as a related service. (Father's Testimony, Ms. J Testimony, Dr. P Testimony.) There is consistent testimony from both School District witnesses, CE Conductors and the Parents, that the LEA representative became visibly irritated with the length of the IEP meeting, refused to adjourn and reconvene the meeting at the father's request, and brought the meeting to an abrupt close after several hours. (Id.)

While the Parents and the CE Conductors were understandably disappointed that, after a three hour IEP that included intense discussion on the merits of CE as a related service, it was still removed from the IEP, the evidence

does not support that the school-based members of the IEP came into the meeting with closed minds or that the Parents weren't given a fair opportunity to participate in the process. Accordingly, the Hearing Officer concludes that the School District did not predetermine the decision to remove CE as a related service.

Ruling on Issues #3: In Favor of the School District.

Issue #4: *Whether during the 2014-2015 school year, the School District complied with the Parents' request for the Student's educational records without unnecessary delay and before this due process hearing, and no more than 45 days after the request was made; and, if not, whether the failure to so comply impeded the Student's right to a FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or denied the Student an educational benefit?*

The Parents' submit that during the 2014-2015 school year they requested, through counsel, access to "a complete copy of the education records relating to [the Student] that are maintained by the District, or within its possession, custody or control." The Parents further submit that the School District did not produce the Student's education records in a timely manner (i.e., no more than 45 days after they were requested); and, that this failure impeded the Student's right to a FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or denied the Student an educational benefit.

The School District submits that during the 2014-2015 school year it made a timely production of the Student's educational records to the Parents; and, in the alternative, that if some records were not produced in a timely manner, any delay in production did not impede the Student's right to a FAPE, significantly

impede the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, nor denied the Student an educational benefit.

As stated above, counsel for the Parents have consistently raised the concern that the School District has not been forthcoming with all of the Student's records when they have been requested. (See, Findings of Fact, ¶4.) The Hearing Officer even permitted the Parents to Amend their DPCN in order to allow a claim that the alleged delay in producing records constituted a procedural violation under the *IDEA*. (Cite order.) The Parents submitted the documentation already considered by the Hearing Officer during the pre-hearing process (Cite documents) but did not produce any additional evidence at hearing that the alleged delay in producing documents either impeded the Student's right to a FAPE, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student, or denied the Student an educational benefit. 34 C.F.R. §300.513(a)(2).²⁴ Without evidence from one of the Parents that the alleged procedural violation met the standards of 34 C.F.R. §300.513(a)(2), the Hearing Officer has no basis to determine that a substantive violation of the *IDEA* occurred.

Ruling on Issue #4: In Favor of the School District.

²⁴ The Hearing Officer notes that at least on one occasion, counsel for the School District noted for the record that there were documents testified about that weren't produced. However, no sworn witness ever gave testimony about the impact of the alleged delay.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. That, no later than sixty (60) school days after the date of this Order, the School District must obtain at public expense an updated physical therapy re-evaluation by a licensed outside physical therapist, preferably with professional knowledge of CE²⁵ ("private evaluator"), and hold an IEP meeting to determine the Student's gross motor needs in her current high-school setting.
 - a. That, as a part of this re-evaluation, and in addition to administering appropriate evaluation instruments and reviewing relevant Student educational and medical records, the private evaluator will observe the Student for at least two full days in her high-school setting and two full sessions of Conductive Education at the Center.
 - b. That the private evaluator, as part of the evaluation report, will make a written determination of the elements of the Student's current CE program that connect directly to the goals and objectives as stated in the January 2015 IEP, and identify methods for providing physical therapy to address these same goals in the high school setting.
 - c. That the private evaluator, as part of the evaluation report be prepared to make a written recommendation for the following:
 - i. additional physical therapy goals regarding increasing attention to task in addition to gross-motor needs;
 - ii. an increase of direct physical therapy minutes in an amount of at least 50% more than the amount currently listed in the 2015 IEP and to be implemented completely within the high school setting on a near-daily basis; and
 - iii. a firm recommendation for necessary physical therapy equipment (including, but no limited to a stander that is properly fitted for the Student) to be provided by the School District to enable the delivery of the

²⁵ Similar in training to Dr. O.

recommended physical therapy services solely within the high school setting.

- d. That the Parents are ordered to consent to the evaluation once the School District has identified a physical therapist that meets the qualifications set forth above. In the event the Parents refuse to provide informed written consent to the School District for this evaluation, the School District is hereby authorized to secure the re-evaluation over the lack of informed written parental consent.
 - e. That the Student is to continue receiving conductive education at the Center during the pendency of this re-evaluation process at the same rate set forth in the 2014 IEP. However once the recommendations for increased physical therapy services outlined above have been set forth in the Student's updated IEP, conductive education may be officially removed as a related service from the Student's updated IEP.
2. That the School District provide the Student with 515 minutes of conductive education (including transportation to and from the Center) as compensatory services for missed physical therapy minutes during the 2015-2016 school year. This compensatory education may be provided concurrently as part of the process outlined in Paragraph 1(e) above, if the amount of conductive education provided during the pendency of the physical therapy re-evaluation is at least 515 minutes.
 3. That, no later than sixty (60) school days after the date of this Order, the School District must obtain a transition assessment of the Student (and a written report thereof) by a qualified private transition specialist and hold an IEP meeting to update the Student's current transition plan, according to the recommendations made as part of the transition assessment. In addition, the Parents are ordered to consent to the transition assessment once the School District has identified a transition specialist that meets the qualifications set forth above. In the event the Parents refuse to provide informed written consent to the School District for this evaluation, the School District is hereby authorized to secure the re-evaluation over the lack of informed written parental consent.
 4. That, no later than thirty (30) school days from the date of this Order, the School District will provide documentation that all

School District staff currently providing special education and/or related services to the Student are trained in the use of the Student's current physical therapy equipment and all other assistive technology devices and software currently used by the Student. In the event, that the process outlined in Paragraphs 1 and 2 above changes the physical therapy equipment or assistive technology devices and software provided to the Student by an updated IEP, the School District must provide additional written documentation that all School District staff currently providing special education and/or related services to the Student are trained in any updated physical therapy equipment and assisted technology devices and software within thirty (30) school days of the date of the IEP making said changes.

In accordance with 105 ILCS 5/14-8.02a(h), within ninety (90) school days of receipt of this Order, the District shall submit proof of compliance to:

Illinois State Board of Education
Program Compliance Division
100 North First Street
Springfield, IL 62777-0001

NOTICE OF RIGHT TO REQUEST CLARIFICATION

Pursuant to 105 ILSC 5/14-8.02a(h) either party may request clarification of this decision by submitting a written request to the Hearing Officer within five (5) days of receipt of the decision. The request for clarification shall specify the portions of the decision for which clarification is sought. A copy of the request shall be mailed to all other parties and the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, IL 62777. The right to request 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.

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NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Pursuant to 105 ILCS 5/14-8.02a(i), any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within one hundred and twenty (120) days from the date the decision is mailed to the party.

IT IS SO ORDERED.

November 2, 2015

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/s/ Jennifer A. Leisner
Jennifer A. Leisner,
Impartial Due Process Hearing Officer

[REDACTED]