

**ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION
IMPARTIAL DUE PROCESS HEARING**

JANE STUDENT,)	
)	
Student,)	
)	ISBE CASE NO. 004284
vs.)	
)	
CHICAGO PUBLIC SCHOOLS)	
DISTRICT NO. 299,)	
)	
Local School District.)	

Venita Hervey, Impartial Hearing Officer

DECISION AND ORDER

Jurisdiction

This matter is before the undersigned Hearing Officer for a special education due process hearing on the Parent's objections to the Student's Individualized Educational Plan (IEP) developed on September 14, 2004 and revised on October 15, 2004. The Hearing Officer has jurisdiction to hear and decide this matter pursuant to 105 ILCS 5/14-8.02a *et seq.*, 34 C.F.R. 300.507 *et seq.*, 23 Ill. Admin. Code 226.600 *et seq.*, and the Individuals with Disabilities Education Act, as amended, 20 U.S.C. 1415 *et seq.* ("IDEA").

Procedural History

The Parent initiated a request for a due process hearing on November 3, 2004.¹ PD4-6, SD1-3. The Illinois State Board of Education (ISBE) received the District's request for appointment of a due process hearing officer on November 17, 2004. IHOA. The Hearing Officer received notice of appointment and case documents on February 4, 2005 and contacted the parties on February 8, 2005 to schedule the pre-hearing conference. This Decision is not issued within 45 days of the Parent's request for a hearing as the case previously was assigned to several Hearing Officers who declined appointment or requested recusal resulting in delayed proceedings.

The parties received notice of their rights and exchanged document and witness disclosures before Independent Hearing Officer Sheana Hermann who requested recusal prior to issuing a pre-hearing conference report. The District subsequently moved to exclude certain issues, witnesses and

¹ Citation to Parent exhibits is PD____, to District exhibits SD____, to Hearing Officer Exhibits IHO____, to Gorny and Rosen transcript TR____.

documents disclosed by the Parent who filed a Memorandum in Opposition. This Hearing Officer issued a Preliminary Order on the District's motion on March 9, 2005 and the pre-hearing conference was held on March 18, 2005. SD4-11. The pre-hearing conference report was issued on April 6, 2005 and amended on April 9, 2005 to correct a clerical error in a case citation. SD12-17. The hearing commenced on May 2, 2005 and concluded on May 6, 2005. The record was closed on June 17, 2005 upon the Hearing Officer's receipt of the transcript and the parties' post-hearing briefs submitted electronically. This decision is issued beyond the statutory time line due to the number of witnesses and complexity of the exhibits and testimony. The District was represented by Tracy J. Hamm, Chicago Public Schools Office of Specialized Services, Due Process and Mediation division, and the Parent by Attorney Michael A. O'Connor.

Issues Presented and Remedies Sought

The Parent presented the following issues for decision:

- (1) Whether the Student received a free and appropriate public education (FAPE) in the least restrictive environment (LRE) for SY2004-05?
- (2) Whether the August 27, 2004 psychological evaluation was flawed due to errors and omissions in administration, scoring, and interpretation, and reliance on a prior inappropriate evaluation?
- (3) Whether the October 15, 2004 IEP is appropriate based on the Parent's contention that the IEP team:
 - a) failed to find the Student learning disabled and develop goals, objectives and support services for that disability;
 - b) limited social work services to 30 minutes per week and excluded group social work services;
 - c) denied extended school year services, and failed to offer compensatory services necessary to remedy the denial of FAPE from the start of SY2004-05 and the first two years of high school.
- (4) Whether the September 14, 2004 interim behavior intervention plan was implemented.
- (5) Whether the October 15, 2005 behavior intervention plan (BIP) was developed based on an appropriate functional behavioral analysis and appropriately implemented?
- (6) Whether the October 15, 2004 IEP statements of present performance levels and goals and objectives are sufficient and stated in objective and measurable terms related to the Student's disabilities?

- (7) Whether the District provided the Parent access to the Student's complete school records?
- (8) Whether the District is obligated to pay for the Independent Educational Evaluation obtained by the Parent?²

As remedy, the Parent seeks an Order directing the District to:

- (a) provide a complete copy of the Student's school records, including e-mail, BIP-related logs, and disciplinary records, and other communications among CPS staff regarding the Student;
- (b) convene an IEP meeting to implement a determination that the student is learning disabled and has an emotional/behavior disorder and provide special education and related services appropriate to those eligibilities;
- (c) conduct a comprehensive functional behavior analysis and develop an appropriate BIP;
- (d) offer compensatory education services to include ESY, a mentor/tutor for ten (10) hours per week for 44 weeks per year over the next two years, and;
- (e) at student and parent option, placement in a private therapeutic day school for the balance of the student's secondary education or placement in a District high school with class size limited to 12 students.

The District contends that the educational evaluation and functional behavior assessment used to develop the Student's September IEP and October IEP, respectively, were conducted in accordance with applicable administration standards and that the IEP determinations regarding the Student's emotional disturbance eligibility and special education program and related services are appropriate. The District also contends that its IEP determinations regarding group social work services, compensatory education, and extended year services were appropriate.

FINDINGS OF FACT

Background Facts³

The Student is a sixteen year old girl who has completed her chronological junior year at South Shore High School in the School of Entrepreneurship (South Shore). The Student attended

²In his Post-Hearing Memorandum, Parent's attorney withdrew the Parent's request that the District pay for the Parent's independent evaluation.

³The background facts are adopted from Hearing Officer Carolyn Smaron's August 12, 2004 Decision and Order in the Student's first due process hearing. PD45-63, SD166-184. The decision provides an excellent summary of the Student's experience at CMA-B.

the District's Chicago Military Academy-Bronzeville (CMA-B) in her freshman year and part of her sophomore year, school years 2002-03 and 2003-04. The Student was frequently absent and/or tardy, suspended for 58 days, recommended for expulsion, and failed all of her academic classes. She was physically attacked at a transportation stop on the first day of school and disliked the school's military theme, including mandatory ROTC uniforms. She desired to attend South Shore High School. The school social worker referred the Student to Hartgrove Hospital, a psychiatric facility, where she was admitted to the day treatment program for approximately two weeks in December 2003. The Student was expelled in January 2004 after threatening another student with a knife and completed her sophomore year at Vivian E. Summers Alternative school. PD45-63, SD166-184.

Following the Student's expulsion, the Parent requested a due process hearing. While the matter was pending, the District evaluated the Student, found her eligible for special education and related services based on an emotional disturbance disability, and on April 7, 2004 developed an IEP which included a Behavior Intervention Plan (April IEP). PD96-117, SD24-40. The Parent objected to several of the IEP team's determinations, particularly the exclusion of compensatory, group social work, and extended school year services, and the matter proceeded to hearing. PD16, SD45.

On August 12, 2004, Independent Hearing Officer Carolyn Smaron issued a Decision and Order concluding that the Student did not receive a free and appropriate public education (FAPE) while attending CMA-B. The District's failure to timely evaluate the Student for special education eligibility was cited as the primary cause. PD58-59, SD179-80. Hearing Officer Smaron also found that the April IEP was based on a seriously flawed evaluation and a "hopelessly defective" BIP, and did not provide the Student with a FAPE. *Id.* Further, the District did not forward the Student's IEP to her alternative school until June 1, 2004, further depriving the Student of the special education services to which she was entitled. PD16, SD181.

The District was ordered to: (1) expunge the two expulsion proceedings from the Student's record; (2) conduct an expedited educational evaluation of the Student; (3) place the Student at her home school and complete a functional behavioral assessment; (4) convene an IEP meeting to consider the new evaluation and revise the IEP if necessary; and, (5) develop a behavior intervention plan based on the new functional behavioral assessment. PD17, SD182. Determinations regarding compensatory and extended school year services and group social work services were deferred to the IEP team but with strong language suggesting that such services should be offered. Specifically, the Decision states that April IEP team should have concluded that the Student was entitled to compensatory educational services. PD15, SD180.

Jeannine M. Gorny, one of the District's school psychologists, completed an evaluation of the Student on August 27, 2004. The Student was assigned to South Shore, her home school, at the start of the 2004-05 school year. On September 14, 2004 the District convened an IEP meeting, attended by the Parent and Attorney O'Connor, considered the new evaluation, and found the Student eligible for special education and related services based on an emotional disturbance disability only. (September IEP). PD73-95, SD24-40.

The functional behavioral assessment was conducted over several weeks by Deloris Tanksley, a District behavior intervention specialist. PD337-350, SD301-314. On October 15, 2004, the IEP team revised the September IEP to include a functional analysis and behavior intervention plan (hereinafter “the October IEP”).⁴ PD67-70, SD316-322. On October 25, 2004, Parent's attorney notified the District of the Parent's dissent to the IEP. PD7-8, SD323-324. The IEP team's determination that the Student does not have a learning disability, the limited compensatory services, and the exclusion of extended school year services were of particular concern. Id.

The September IEP

The IEP team determined that general education classes with the support of a special education inclusion teacher were the least restrictive environment for the Student. PD86, SD288. The inclusion teacher assists the classroom teacher in implementing the modifications and accommodations identified in the IEP. The IEP designates 225 minutes per week (mpw) of specialized instruction for mathematics, 30 mpw for individual social work services, and 25 mpw in consultative services for independent functioning. PD85, SD287. Accommodations and modifications to assist the Student in the general education curriculum are indicated for these areas and for language arts/English/reading, biological sciences, physical education, art, and vocational subjects. PD80, SD282. The accommodations and modifications included having a counselor assist the Student in scheduling second semester classes and implementing the behavior intervention plan. Id. Additionally, the IEP requires that the Student's interim behavior plan be implemented for “all periods of transition, in the lunchroom, and on field trips.” PD79, SD281.

For those areas requiring specialized instruction and/or related services, the IEP team defined the Student's present performance levels and developed annual performance goals and benchmarks. PD81-84, SD283-86. In independent functioning, the team noted the Student is having “difficulty completing assignments and homework” and devised an annual goal for the Student to attend class prepared each day and complete classroom work and homework with 80% accuracy 90% of the time. PD81, SD83. In mathematics, specifically advanced algebra and trigonometry, the team defined the Student's present performance as “[Student] possesses emotional delays”, although the annual goal and quarterly benchmarks relate to mathematics mastery. PD82, SD284.

The IEP team found that the Student's special education services were delayed or not provided, and afforded compensatory services in the form of “collaborative team teaching model for all academic core subject areas, opportunity of summer school free of charge as needed to make up credits, extra class period (9th period) to make up credits.” PD89, SD291. The IEP team determined that extended school year services were not warranted. PD79, SD281.

⁴A student has only one “active” IEP and the IEP at issue in this matter is officially dated as October 15, 2004. References to the September IEP and October IEP are used to facilitate citation to the parties' exhibits.

The October IEP

The primary purpose of the October 15, 2004 IEP meeting was to complete the functional analysis and develop the behavior intervention plan (BIP). Barely six weeks into the school year, the functional analysis evidenced inconsistent attendance, cutting class during first, sixth, eighth, and ninth periods, noncompliance with teachers' rules, failure to complete classroom and homework assignments, and a lunchroom confrontation. PD337-349, SD301-315. The team determined that frustration and avoidance due to fear of failure were the antecedents to the Student's attendance problems and failure to complete her assignments, the consequence being failing grades. PD65-67, SD317-319.

The team added modifications related to the Student's attendance problems and failure to complete her course work. PD65, SD317. The modifications included having teachers record the Student's daily assignments in a notebook, daily assignment checks, attendance sign-in and an 8th period attendance check, having the Student take tests with a special education teacher, and consulting with the Behavior Intervention Team on noncompliance. Id. Teachers are required to complete a daily Behavior Tracking Form to monitor the Student's progress in meeting targeted behavior changes, specifically improved attendance, completion of classroom work and homework, and reduced aggressive behaviors. PD 69-70, SD 320-21.

Hearing Testimony

Parent

Mother described Student as a charismatic child who generally follows directions but can be a challenge. Mother is very concerned about the Student's education, particularly her poor grades, and tries to make herself available to school staff. Each day that Mother attended the hearing, she missed a half day of the college course she had recently enrolled in. Mother related that the Student had an extreme fear of school after experiencing physical assaults during her attendance at CMA-B. Mother had to talk to the Student over the summer to ease her anxiety about transferring to South Shore.

Mother acknowledged the Student's failure to attend her first period class but found it objectionable that staff required the Student to sit in the auditorium instead of attending class until Mother visited the school to discuss the matter. Mother was not aware of the problems with class tardiness and absenteeism until she picked up the Student's first report card. She recalled several conversations with Carol Holland, South Shore case manager, and brief conversations with some of the Student's teachers and classroom support staff. Mother did not see the Student's IEP progress reports, PD542-44, SD462-464, or the January 4, 2004 [sic] misconduct notice requesting a parent conference until the hearing. PD478, SD498. Neither District nor South Shore staff requested a parent conference with Mother other than noted above and social work staff did not conduct a home visit.

Mother confirmed that the Student attended the 2003-04 summer school session. The Student desires to attend college to support her goal of operating her own shoe store. Mother appeared very supportive of school staffs' efforts but somewhat hesitant and unsure of how to work with the school and the Student to alleviate some of the problems. Mother is willing and ready to meet with school staff to assist in the Student's academic development.

Teachers and Support Staff

The Student's teachers consistently cited absenteeism, tardiness, and failure to complete in-class and homework assignments as the primary cause of her poor academic performance. PD427-444, 524-525, 551-670, SD325, 329-343, 354-474. Without fail they expressed the opinion that the Student would perform in the average to upper level if she attended class, on time, and completed her assignments. Comprehension was a strength. Classroom and school support staff concurred. Most teachers cited occasional behavioral problems or an altercation between Student and a peer but not the severe misconduct the Student displayed at CMA-B. All were able to re-direct the Student's behavior and found her generally cooperative and sometimes apologetic in the aftermath.

Several teachers described their use of "bell ringer" exercises to illustrate the educational impact of the Student's tardiness. Bell ringer exercises are the first event to open class, the purpose being to focus attention and review material from recent lessons or introduce concepts for the days' lesson. The Student's chemistry teacher, Matthew Olson, estimated that the Student missed about one-half of the bell ringer exercises in his second period class due to being 15-20 minutes late "almost every day." Mr. Olson described the Student's attendance as "sporadic." She was at times absent about every other day and at other times attended 3-4 days in succession.

Despite attendance and school work compliance issues, Mr. Olson described the Student as "sharp" and "very participatory" when she attended class, often volunteering to read in order to earn extra credit. Mr. Olson cited reading and numerical problem solving as the Student strengths and noted that she would ask for help when needed. He further stated that missing assignments are the "only reason" the Student received a 'D' grade in his class. SD 517. He did not perceive any learning disabilities on the Student's part, having observed no difficulties with comprehension. He observed that the Student "hasn't gotten anything wrong when she does it, she just doesn't do it." He recalled speaking with Carol Holland, South Shore's Case Manager, on one or two occasions regarding the Student's attendance and grades.

Similar testimony was given by teachers Nicole Matti (British Literature), Simon Kakumanu (advanced algebra and trigonometry), Seth Patner (contemporary American history), Scott Steward (advanced small business planning), Lisa Michalak (biology), and Turtel Onli (art). Most permitted the Student to make up late or missing schoolwork, but typically required the Student to obtain the assignments from them after school. The teachers generally reported having reviewed the Student's IEP, and completing the behavior tracking forms that are part of the Student's behavior intervention plan. PD552-670, SD354-461. They submitted progress reports when requested. PD542-44, SD462-65.

None of the teachers mentioned recording the Student's assignments in the assignment notebook referenced in the Student's IEP. PD65, SD317. Scott Steward, advanced small business planning instructor, described the Student as having "pessimism" towards her assignments. On one occasion the Student became upset and cursed when Mr. Steward did not give her individual assistance on a task. Mr. Steward has a classroom policy which prohibits making up missed assignments unless the student has an excused absence. However, if a student attempts to complete the assignment but struggles he will allow additional time. Mr. Steward does not have a special education inclusion teacher in his class.

Despite recognizing the Student's academic strengths and potential, most of her teachers cited only minimal efforts to communicate with the Parent or school support staff regarding the Student's attendance and failure to complete assignments. Mr. Steward testified that the Student missed approximately 50% of his class sessions but also that her attendance had improved in the week prior to the hearing. He believed block scheduling helped with attendance but made the Student more reluctant to sit in class for the longer period of time.⁵ Mr. Steward did not speak with the case manager regarding the Student's attendance but spoke "briefly" with Ms. Murray, one of the Student's inclusion teachers. When his attempts to counsel the Student regarding her attendance failed, he did "nothing."

Mr. Patner, Contemporary American History instructor, found the Student to have better comprehension skills than 80% of her peers. However, her attendance and failure to complete assignments resulted in a low grade. Mr. Patner requires students to request missed assignments after school but could not recall the Student doing so. He generally does not permit students to make up assignments after five weeks. Mr. Patner reported that Ms. Denton, the inclusion teacher assigned to his class, "didn't do anything" and had little interaction with students. Several teachers reported that special education inclusion teachers were available in their classrooms on a shared or sporadic basis, and other testimony indicated that teacher assistants sometimes were assigned rather than certified special education or subject area teachers (Olson, Redmond, Murray, Kakumanu)

Mr. Kakumanu testified that although the Student was absent from his advanced math class about 50% of the time, he only discussed her attendance with Ms. Murray. On one occasion he encountered the Student in the hallway on a day when she had failed to attend his algebra class. Although he asked the Student why she did not attend class, he was "too busy" to wait for an answer. Mr. Kakumanu had not seen the Student's IEP and was not aware that she was a special education student for "several months" after he arrived at South Shore in November, partly because he found her to be very bright.

Ms. Matti testified that the Student was one of six students out of approximately 100 who achieved the highest score on the PSAE preparatory test, a state sponsored test which incorporates portions of the ACT college entrance exam. However, she also related that the Student "almost

⁵Block scheduling combines a class period into two to two and one-half hour blocks and students attend class every other day rather than every day.

always” takes quizzes and tests late and, consequently, is given as much time as she needs. Ms. Matti did not contact the Parent about the Student's attendance until April 2005 after which she noticed a small improvement. Keeyena Riley, a teacher's assistant, normally handled parent contact.

Ms. Bermeo, the Student's putative Spanish teacher, reported that the Student has never attended her class. In the 25 week progress report, she commented that the Student needed a “more serious” approach. PD524, SD466. The Student once approached Ms. Bermeo in the hallway and stated, “Hi, I'm in your ninth period.” Lynette Redmond is a teacher's assistant in Ms. Bermeo's class who is completing work on her Bachelor's degree and teacher certification in Spanish. Ms. Redmond reported that the Student once denied being enrolled in Ms. Bermeo's class but alternately stated that she “needed help” with Spanish. Ms. Redmond has had some conversations with support staff regarding whether the Student is actually enrolled in Spanish. However, neither she nor any other witness testified to any concrete efforts to resolve the issue.

Several teachers and support staff provided examples of the Student's frustration and avoidance behaviors when she encountered difficult assignments. Mr. Onli observed that the Student has good comprehension skills but experienced “discomfort” using a four step process for art criticism. Toya Murray, an inclusion teacher in Mr. Kakumanu's class, noticed a correlation between the Student's absence and class quizzes. SD463. On one occasion, the Student attended class but flatly refused to take the quiz. None of the teachers mentioned that the Student took tests in a small setting. The Student once told Ms. Murray that she skipped class because it was too loud and she “couldn't learn.” The next day, the Student became angry and belligerent when Ms. Murray asked her a math question in front of the class and chided her on grounds that the classroom was not too loud to interfere with her learning. PD526.

Jacqueline Jones is South Shore's attendance coordinator in her first year at the school. In addition to tracking student attendance, Ms. Jones sponsors the attendance club, “Just Go” which the Student joined. SD-475- 489, 490. The Just Go program operates on a peer support concept to promote good attendance. Ms. Jones did not recall any South Shore staff contacting her regarding the Student's attendance. Staff communications usually focused on behavior incidents. Ms. Jones, who had not reviewed the Student's IEP, approached the Student upon noticing her pattern of absences and tardiness.

Ms. Jones explained the attendance tracking key for the Student's attendance records. SD-470-474. Not listed in the key is “R” which, with “T”, indicates tardiness, “V” which stands for very late, and a blank space which indicates the Student was present. Id. A cursory review reveals that the Student's unexcused absences, tardies, and 'very' late notations demonstrate a severe and ongoing problem. Ms. Jones believes the “Just Go” program had a positive impact on the Student's attendance and behavior. She acknowledges the Student's occasional behavior problems but finds that she is less angry than at the beginning of the school year. Ms. Jones volunteered to be the Student's mentor after she heard the principal discuss whether having one might help the Student.

District's Educational Evaluation

District school psychologist Jeannine M. Gorny performed the Student's evaluation. TR10, PD125-130, SD190-195. Ms. Gorny has been employed with the District for 22 years, 14 as a school psychologist. Ms. Gorny has a Master of Science degree in Education, a Master of Arts degree in Educational Administration and Supervision, and a Master of Arts in School Psychology, as well as certifications in teaching, administration, and school psychology. TR5-6. Ms. Gorny received training in assessment and evaluation through her education and attendance at workshops and staff development sessions. TR7.

Ms. Gorny's primary role in the evaluation process is to determine the students' cognitive ability and academic achievement potential. TR9. She uses a variety of methods to assess a student's special education eligibility, including a review of the student's school records, interviews with the student, parents, teachers and school staff, and administration of standardized intelligence and achievement assessments. TR9. She also observes and reviews the student's behavioral history to determine if behavioral factors are significant to a student's performance. TR9-10. In the instant matter, Ms. Gorny reviewed the Student's cumulative folder which included her academic history and behavioral reports, the Hartgrove Hospital records and other relevant information. TR11-22. Ms. Gorny also reviewed the psychological report prepared by Cary Goldstein in relation to the Student's April IEP for the same purpose. TR12, 14-15. Ms. Gorny denied using Mr. Goldstein's evaluation for any substantive purposes related to her conclusions in the August 27, 2004 evaluation and there was no evidence to the contrary.

Due to the expedited time frame for the evaluation, the District did not convene a domain meeting. Instead, the Parent submitted recommendations regarding the specific assessments that should be used in the Student's evaluation. PD11-14, SD186-189. Of particular note, the Parent specifically recommended assessments of auditory processing (related to the Student's low spelling score) and highlighted the fact that the Student's vocabulary score declined from the 55th percentile in 6th grade to the 29th percentile in 8th grade. Id.

In general, Ms. Gorny's assessments indicated that the Student performed in the low average range on most of the achievement assessments, and placed her cognitive ability in the low average range at the 19th percentile for students her age. PD-130, SD195. Ms. Gorny's evaluation indicated relative strength in the area of comprehension at the high average range, but also noted that the Student performed "significantly better" on verbal versus nonverbal reasoning tasks. Id.

Ms. Gorny's evaluation also revealed the Student's "relative as well as normative weakness" in auditory short-term memory in addition to weak word reading and decoding skills. PD128, SD130. Other concerns were in subtraction of fractions, working with exponents, and working with negative integers. PD-129, SD194. Ms. Gorny concluded that the Student did not need special education instruction, modifications, or accommodations within the general education curriculum.

Dr. Michelle Rosen is a licensed clinical psychologist and pediatric neuropsychologist in private practice since 1998. She received her Ph.D. from the Illinois Institute of Technology and did her internship at the University of Chicago. TR105, PD307-312. Neuropsychologists study how

brain functions impact performance, behavior and skills and generally conduct diagnostic assessments rather than long-term therapy. TR105, 107.

Dr. Rosen has never met the Student and did not review the Student's current IEP. TR109, 110. She critiqued Dr. Cary's April IEP evaluation at the hearing before IHO Smaron. TR109. In the instant case, she reviewed Dr. Gorny's evaluation as well as those conducted by ENH and Arnell Brady. TR110. Dr. Rosen challenged the procedural integrity and validity of Ms. Gorny's evaluation on several fronts after reviewing the Student's test protocols. TR111-112. She highlighted a number of computation errors, some of which would have changed the Student's results. TR84-98. Additionally, she found significant omissions, including the failure to query the Student on certain responses which may have required the Student to answer additional questions. TR110-130. Dr. Rosen also criticized Ms. Gorny for failing to record the Student's response to many questions, and completing the assessment in pencil. TR116.

Dr. Rosen reserved her harshest criticism for Ms. Gorny's administration of the written expression sub-test in which she permitted the Student to respond orally rather than in writing as required by the test procedures. TR127-129. The test measures word fluency, i.e. the ability to generate *written* words quickly. TR125-126. When the Student refused to write her answers, Ms. Gorny allowed her to respond orally and credited two of four possible points. TR74-75. Equally significant, Ms. Gorny's evaluation report did not disclose the deviation. TR129, PD126, SD191. The validity disclosure states that the Student "did not require any adaptations or modifications of the standardized procedures." PD126, SD191. Dr. Rosen concluded that the August 27, 2004 evaluation should be interpreted with caution due to the scoring errors and omissions, and the written expression sub-test with "tremendous caution" due to the procedural violations. TR112, 130.

Dr. George Drelis is a school psychologist and has been with the District for 32 years. SD754. He has a Ph.D. in school psychology with minors in neuropsychology and learning theory from Loyola University of Chicago. SD 754. Dr. Drelis performs more than 100 evaluations each year and most of the students are found eligible for special education services. Dr. Drelis was not part of the Student's IEP meetings but reviewed the District and independent evaluations, the Student's academic records, and other documentation in preparation for the hearing.

Dr. Drelis discussed the process used to make learning disability determinations, a part of which involves reviewing "exclusionary factors" that marshal against a determination. Those factors include attendance, the age at which the student entered school, and mobility, i.e. the number of schools attended during the Student's academic career. Dr. Drelis believes that the Student's average performance on standardized tests through 8th grade and her cumulative grade report mitigate against a learning disability. PD447-451, SD300. He noted the absence of a significant discrepancy in the Student's performance on the District's WISC-IV and the WIAT-II assessments, and a positive and stable trend in the Student's standardized test scores from 3rd grade to 9th grade. PD447-448, SD300. In his opinion, the Student's attendance and other volitional conduct are the cause of her sub-par academic performance ("nobody can pass with that kind of attendance").

Dr. Drelis did not disagree with the majority of the assessment instruments used by the Parent's independent evaluators or with their results. Rather, he disagreed with the conclusions drawn from the results. Dr. Drelis stated that neuropsychologists look for the mere existence of a psychological deficit while school psychologists have to determine whether a particular deficit adversely affects student achievement. In his opinion, the Student's behavioral problems, particularly attendance, rule out a learning disability determination.

IEP Team Participants

Deborah Dusky has been with the District for 26 years, the last five as an area special education instructional specialist and teacher covering 22 schools. She has Bachelor's and Master's degrees in special education, and a Master's degree in administration with a special education director endorsement. Ms. Dusky was the District's representative at the September and October IEP meetings and moderated the proceedings. Ms. Dusky did not recall Mr. Goldstein's April IEP evaluation and did not use it in the September and October IEP deliberations.

Ms. Dusky concurred in the IEP team's determination that the Student's emotional difficulties were the primary cause of her poor achievement rather than her academic ability. She was concerned that the Student's desire to attend South Shore in regular education classes and improve her grades would be harmed if her placement was changed to a more restrictive setting. Ms. Dusky appeared genuinely appalled at the suggestion of placing the Student in a therapeutic day school or a residential facility. Ms. Dusky also indicated that staff capitulated to the Student's request to enroll in a 9th period class despite reservations and noted that the Student participated in the attendance club.

Ms. Dusky described extended school year (ESY) as special education services provided to eligible students over the summer term and not the equivalent of summer school. Based on the Student's desire to recoup lost credits and the assessment of her academic ability, the IEP team determined that regular education summer school would provide more benefit to the Student. PD79, SD281.

Carol Holland is the Case Manager at South Shore. Ms. Holland has been with the District for approximately 25 years and is in her second year at South Shore. Ms. Holland has a Master's degree in special education and holds certifications in Pre-K - 9 regular education and K - 12 special education. As Case Manager, Ms. Holland prepares and monitors special education students' records and prepares information for IEP meetings. Ms. Holland attends approximately one hundred IEP meetings each school year of which approximately 40 are eligibility determinations.

Ms. Holland described the factors involved in determining whether a student has a learning disability. Generally, evaluators look for a "significant discrepancy" between a student's academic performance and predicted ability level. In preparation for the Student's IEP meetings, Ms. Holland reviewed the Student's cumulative records, Ms. Gorny's report, and the social and behavioral assessments. Ms. Holland acknowledged that the Student's academic achievement is low despite average cognitive ability. Her determination that the Student is not learning disabled was derived

largely from Ms. Gorny's report and recommendations. Ms. Holland did not note any significant discrepancies in auditory, visual or perceptual performance.

Ms. Holland testified that the IEP team considered the Student's academic failures and need for compensatory services. The collaborative team teaching model is a compensatory service that supports special education students in the regular curriculum. A special education teacher is assigned to the students' classrooms to work with the regular education teacher. She did not feel that ESY services were appropriate because there was no evidence that the Student would experience any significant regression in her academic skills over the summer.

Ms. Holland recalled that the Student wanted a 9th period class despite staffs' reservations about her late-day attendance. She also knew that the Student was attending night school free of charge and offered the opportunity for tutoring free of charge. Tutoring is offered throughout the day and during 8th and 9th period. Student's access tutoring services through school counselors or the tutors. Ms. Holland found the Parent to be an ally in working with the Student on concerns related to attendance and completion of school work.

William Weeks has been with the District for 13 years, including positions as a special education teacher. He is currently the service learning coach at South Shore and chairs the special education department. He assists students in preparing for the ACT college entrance examination during 9th period. He related the IEP team's discussions regarding compensatory services, ESY, tutoring, and placement for the Student. The collaborative team teaching model and summer school were offered to the Student, along with building-based tutoring services. Mr. Weeks did not see any indication that the Student needed private tutoring services. He described ESY services as appropriate for students who would not retain information over the summer break. He believed the Student was served better through the regular summer school program. Mr. Weeks believed the Student overextended herself by enrolling in a 9th period class and attending night school.

Mr. Weeks was not involved in the IEP team's determination of the Student's eligibility and stated that he “didn't say anything” at the September IEP meeting. He relies on the psychologists evaluation of students' performance. Mr. Weeks did not feel that the Student was learning disabled but recalled hearing that she had certain anxieties related to math. Mr. Weeks saw nothing in the Student's current behavior or learning ability that would warrant a self-contained or therapeutic day school placement. He described the Student as “socializing perfectly” with her peers and “easily re-directed” when inappropriate behavior is addressed by staff.

Deloris Tanksley has been with the District for 19.5 years, 11 as a behavior specialist. She consults with schools to develop behavior intervention plans when students are not responsive in nonrestrictive classroom methods. She described the functional behavior analysis (FBA) as a review of the total school environment and the Student (student, family, medical history, social and academic background, etc.).

Ms. Tanksley conducted three observations of the Student for the October IEP functional behavior analysis (FBA) and behavior intervention plan (BIP). She completed “I-CARE” exit

reports and a behavior observation report as part of the functional analysis. PD337-349, SD301-314. The I-Care reports indicate that Ms. Tanksley had considerable difficulty obtaining the Student's records from CMA-B. Id. Ms. Tanksley stated that a key purpose of the FBA is to identify antecedents or triggers to inappropriate behavior. The IEP team then develops intervention strategies to manage the behaviors and incorporates them into the BIP.

Ms. Tanksley's report recommended that several interventions be incorporated into the Student's IEP: private censure, frequent verbal praise for appropriate behavior, a daily attendance sign-in, a processing strategy, consistent social work services and a consistent adult mentor, and a calm down area. PD347-49, SD309-314. The October BIP includes all of the interventions and the a weekly behavior checklist. PD67-40, SD316-322.

Social Work Services

Lawanda Dooley is a licensed clinical social worker and the District social work coordinator for a group of schools. Ms. Dooley supervises and provides technical assistance to school-based social workers and coordinates services between schools and social work staff. Ms. Dooley did not work with the Student directly or participate in the Student's IEP meetings. She spoke with the clinicians who provided services to the Student and reviewed the Student's records, including the Hartgrove Hospital records. PD352-415, SD60-66, 101-165. She noted that the Student's IEP incorporates a number of Hartgrove's behavior intervention recommendations and that Hartgrove did not recommend group social work services for the Student. SD129.

Ms. Dooley acknowledged that numerous social workers served South Shore in the 2004-05 school year and at least four provided services to the Student. Ms. Dooley stated that a consistent relationship between the student and service provider can increase communications, build trust, and improve service outcomes. She also stated that the statement of student goals is being improved with more precision in drafting measurable goals.

Ms. Dooley could locate only one of the Student's social work progress notes that should be completed by clinicians but admitted that she did not conduct a file search for additional records. PD702. She provided a computer printout that indicates the number of social work minutes provided to the Student per month but lacks any notes regarding the Student's progress. PD703. Ms. Dooley explained that the clinicians are supposed to "upload" the information from laptop computers each week to indicate service time.

The Student's IEP calls for 30 minutes of individual social work services per week. The sole progress report indicates the Student participated in a group session on February 5, 2005 which is confirmed in clinicians notes in the "required IEP minutes" section. PD702. The printout indicates the Student received 90 total minutes in September, 30 in October, none November through January, 75 in February and none in March and April. PD703. There is no explanation for the apparent break in service or any indication of how the IEP team receives information to gauge the Student's progress towards her annual goals and quarterly benchmarks.

Parent's Independent Evaluations

Drs. Dorit Raviv and Joanne Hoepfner each performed portions of the December 2, 2004 independent evaluation at the Evanston Northwestern Healthcare clinic (ENH) where both are employed. PD323-325. Dr. Raviv is a senior education specialist and works with an evaluation team that includes a psychologist and neuropsychologist. She specializes in learning disability assessments but is familiar with other assessments in order to differentiate among types of disabilities. She normally assesses achievement levels, learning processing measures, and evaluates school placements and IEP goals.

Dr. Hoepfner is the Director of the ENH Evaluation Center and appeared via telephone. She is a licensed clinical psychologist with a two year post-doctoral fellowship in neuropsychology. Dr. Hoepfner assessed the Student's memory and executive function. The ENH evaluation incorporated a number of the more in-depth cognitive and achievement assessments that the Parent recommended to the District. PD217, SD520.

The ENH evaluation indicated that the Student has a number of academic strengths, particularly in comprehension and problem solving, and the ability to compensate for certain psychological deficits. PD218-21, SD521-24. Conversely, the Student exhibited severe difficulties in phonological processing, awareness, and memory, and general difficulty with auditory discrimination. PD222-223, SD525-526. The Student's phonological deficits "interfered with all phonological tasks" including performance on sub-tests which required her to understand tasks that required analyzing and synthesizing sound in spoken words. *Id.* The evaluation also noted the Student's ability to compensate for her deficits when information is presented in a contextual and meaningful manner. For example, the Student's decoding skills are significantly deficient. She was "slow and highly inaccurate" in phonetically analyzing words and performed in the impaired range at the third grade level. PD220, SD587. However, she "compensated beautifully" when reading contextually. PD221, SD524.

The ENH evaluation concluded that the Student's significant processing deficits likely contribute to increased frustration and stress in academic endeavors. At one point, the evaluator observed that the Student struggled and became frustrated with words she could not spell. PD221, SD524. In essence, the Student must put more effort into reading and listening, even with her ability to compensate for the weaknesses in actual academic performance areas.

Arnell A. Brady has been a certified speech/language pathologist for 21 years and in private practice for 20 of those years. He earned Bachelor and Master of Science degrees in speech/language pathology from St. Xavier University and Northwestern University, respectively. Mr. Brady holds a special K-21 Illinois teacher certification in SLP and is licensed in Illinois, Indiana, Arkansas, Georgia and California.

Mr. Brady completed a speech/language evaluation of the Student on April 20, 2005 upon referral by Attorney O'Connor. PD695. Mr. Brady's evaluation is, arguably, the most clinical and unbiased of all the evaluations. He did not review the Student's cumulative history or behavior

records prior to his evaluation but did review Ms. Gorny's evaluation and the Student's current IEP. Based upon a thorough battery of speech/language assessments completed over a four to five hour period, Mr. Brady concluded that the Student is at “serious risk for a spoken language disorder as she progresses academically.” PD699.

Mr. Brady's assessment found that Student's difficulties are due to a significant deficit in short-term auditory working memory capacity, and poor attention/concentration. PD695-700. Regarding her academic difficulties, the Student told Mr. Brady, “I just can't seem to remember. I forget.” PD695. Mr. Brady estimates that the auditory processing deficits likely impact the Student's academic performance, “in whatever time it takes to utter five to seven words.” During one assessment requiring auditory processing ability, Mr. Brady observed the Student initiate a compensatory strategy by “writing” on the desk with her finger and her performance improved significantly. He also observed that the Student's reading accuracy and speed decreased significantly as words increased in complexity.

Dr. Valarie Owen is an associate professor of education at Nation Louis University and teaches courses on assessing and diagnosing disabilities and on exceptional children. She did not meet the Student but reviewed and critiqued for “best practices” both the functional analysis and behavior intervention plan developed in the October IEP. Dr. Owen's chief criticism of the Student's IEP was the failure to identify antecedents to the Student's behavior. In her opinion, the IEP's antecedents are better described as consequences, i.e. frustration and avoidance, rather than the precursors to the behavior. Dr. Owen stated that an antecedent is an environmental issue – the factor or event that triggers the behavior – rather than a student-centered issue although the IDEA and other statutes do not define the term.

Dr. Owen believes the Student has language problems that trigger the frustration, avoidance, and noncompliance in her academic endeavors. She was also critical of the lack of remedial focus in the Student's behavior intervention plan. She noted a great deal of tracking and monitoring but little in the way of corrective strategies.

Dr. Terry Smith is an associate professor of special education at National Louis University and has broad experience in social/emotional development and in curriculum development for students with social/emotional disorders. PD326-330. She is also the project director for the Literacy Project at the District's Nancy B. Jefferson alternative school Dr. Smith did not meet the Student or conduct any evaluations. At the Parent's attorney's request, she designed a compensatory education program for the Student and assessed the feasibility of a tutor/mentoring program as part of the compensatory services. PD693-94.

Based upon a review of the Student's records, Dr. Smith determined that an intensive program is required due to the short time remaining in the Student's high school career. Dr. Smith recommends a two year program that would engage a graduate student for ten hours per week to provide support and assistance to the Student. PD693-94. Dr. Smith stressed that the mentor would have to be flexible in meeting the Student's needs and a good fit. However, she did not discuss the mentoring program with the Student.

APPLICABLE LAW

An analysis of issues arising under the IDEA must begin with the two-prong test set forth in Board of Ed. v. Rowley, 458 U.S. 176 (1982): (1) whether the district complied with the IDEA's procedural requirements, and (2) whether the IEP is reasonably calculated to confer educational benefits to the student? Rowley, 458 U.S. at 206-07.

Once a school district develops an IEP based upon the student's individual needs, and reasonably calculated to provide the student with educational benefit, it must be implemented by providing the student with the special education instruction and related services set forth in the IEP. A school district is entitled to establish its own curriculum and instructional techniques to use with its students so long as they successfully meet students' needs, providing FAPE. The IEP must be "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 206-207. However, the benefits must be more than nominal. T.H. v. Bd. of Educ. of Palatine Comm. Cons. Sch. Dist., 55 F. Supp. 830, 842 (N.D. Ill. 1999). "[T]he floor surely cannot be so low as to allow the district to squander T.'s later potential for learning." Id.

Student Evaluations

The federal regulations governing evaluation procedures, 34 C.F.R. §§ 300.532-300.533, provide the minimum requirements for an evaluation. The tests and other evaluation materials must be non-discriminatory and conducted in the student's native language by trained and knowledgeable personnel. Id. at § 300.532(a)(1) and (c)(1). The evaluation must also include tests and other evaluation materials tailored to assess specific areas of educational need and not simply provide a single general intelligence quotient. Id. at § 300.532(d). The child must also be assessed in all areas related to the suspected disability. Id. at § 300.532(g). Finally, no single procedure should be used as the sole criterion for determining whether a child has a disability. Id. at § 300.532(f). In evaluating the data, the MDC team or its equivalent should review the existing evaluation data on the child, including evaluations and information provided by the parents, current classroom-based assessments and observations by teachers and related service providers. Id. at § 300.533(a)(1)

The Illinois Administrative Code, 23 Ill. Adm. Code 226.130, sets forth specific requirements for the conduct of student evaluations and provides, in relevant part:

a) Tests and other materials used to evaluate a child:

4) Shall be used in a manner consistent with the instructions provided by their publishers.

d) Any standardized test that is administered shall:

1) Have been validated for the specific purpose for which it is used; and

2) Be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the test.

i) If an assessment is conducted under nonstandard conditions, a description of the extent to which the assessment varied from standard conditions shall be included in the evaluation report. This information is needed so that the team of evaluators can assess the effects of these variances on the validity and reliability of the information reported and determine whether additional assessments are needed. For example, the use of a translator when a qualified bilingual professional is not available may create nonstandard conditions.

Specific Learning Disabilities

The term "child with a disability" means a child - (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A)

The term "specific learning disability" means:

- (A) A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.
- (B) Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.
- (C) Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 20 U.S.C 1401(26)(A)-(C)

Criteria for determining the existence of a specific learning disability:

(a) A team may determine that a child has a specific learning disability if –

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) Oral expression. (ii) Listening comprehension. (iii) Written expression. (iv) Basic reading skill. (v) Reading comprehension. (vi) Mathematics calculation. (vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of – (1) A visual, hearing, or motor impairment; (2) Mental retardation; (3) Emotional disturbance; or (4) Environmental, cultural or economic disadvantage. 34 C.F.R. § 300.541

Social Work Services

34 CFR §300.24(b)(13)

Social work services in schools includes –

- (i) Preparing a social or developmental history on a child with a disability;
- (ii) Group and individual counseling with the child and family;
- (iii) Working in partnership with parents and others on those problems in a child’s living situation (home, school, and community) that affect the child’s adjustment in school;
- (iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and
- (v) Assisting in developing positive behavioral intervention strategies.

Extended School Year Services

The Illinois State Board of Education has issued a guidance memorandum on extended school year services for students with disabilities. (www.isbe.net/sped-ed/html/resources.htm) It provides, in relevant part:

The regulations implementing the IDEA require school districts to ensure that extended school year services (ESY) "are available as necessary to provide FAPE." 34 C.R.F. § 300.309(a)(1). Illinois regulations address the requirements of ESY in a manner consistent with 34 CFR 300.309. 23 IAC 226.75 defines extended school year services as “special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child’s IEP and at no cost to the parents of the child and meet the requirements of Section 226.750(c) of this part.”

23 Illinois Administrative Code at 226.750 states that “a school district shall not limit its provision of services during an extended school year to particular categories of disability, nor shall a district unilaterally limit the type, amount, or duration of such services.” The regulations further require the ESY be provided when an IEP team determines it to be necessary for the individual student to receive a free appropriate public education (FAPE) (23 IAC 226.230(a)(9)).

Depending on the special education student and his or her IEP, it may be appropriate for a special education student to receive ESY services in a regular education summer school

program. School districts via the IEP process must determine what is appropriate to meet a special education student's needs.

Student Records

The IDEA implementation regulations at 34 C.F.R. § 300.562 address parents' rights to access student educational records and provide, in relevant part:

Access rights.

- (a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to §§ 300.507 and 300.521- 300.528, and in no case more than 45 days after the request has been made.

- (b)(3) The right to have a representative of the parent inspect and review the records.

Least Restrictive Environment

The regulations that implement the IDEA suggest that disabled students should be placed in the least restrictive environment ("LRE") to the "maximum extent appropriate." Heather S. v. Niles Twp. High Sch. Dist. No. 219, (N.D. Ill. Dec. 2, 1999) (citing 34 C.F.R. § 300.550(b)(1)). The LRE requirement shows Congress's strong preference in favor of mainstreaming, Bd. of Educ. of LaGrange Sch. Dist. v. Illinois State Bd. of Educ., 184 F.3d 912, 914 (7th Cir. 1999) but does not require, or even suggest, doing so when the regular classroom setting provides an unsatisfactory education. 34 C.F.R. § 300.550(b)(2) ("Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

ANALYSIS OF THE ISSUES

A. Was the Student's August 27, 2004 psychological evaluation flawed due to errors and omissions in administration, scoring, and interpretation, and reliance on a prior inappropriate evaluation?

The Illinois Administrative Code does not equivocate in the requirements for conducting student evaluations. Tests and other materials *shall* be used in a manner consistent with the publishers' instructions, and *shall* be administered in accordance with any instructions provided by the producer of the test (emphasis added). 23 Ill. Adm. Code 226.130. Additionally, the statute requires that deviations from standard administration conditions *shall* be included in the evaluation report (emphasis added). Id. The disclosure is required so "the team of evaluators can assess the

effects of the variances on the validity and reliability of the information reported and determine whether additional assessments are needed.” Id.

Ms. Gorny acknowledged that she violated the publisher's standardized test administration procedures by allowing the Student to give an oral response to an assessment of written expression. The Student refused to write her response to the question and should have received no points. Instead, Ms. Gorny asked the Student to respond to the question orally, awarded the Student two of four possible points, and at hearing declared that the Student “completed the written expression portion of the test.” TR52,74. Although Ms. Gorny may have deviated from the mandatory administration procedures with good intentions “so as not to compromise the test” or penalize the Student, that is exactly the result that ensued.

The assessment is designed to provide an actual measure of the Student's achievement in written expression in comparison to other areas and in relation to her cognitive abilities. Ms. Gorny herself noted that the Student performed “significantly” better on verbal as opposed to nonverbal measures. PD130, SD192. Allowing the Student to give an oral rather than written response simply inflated the Student's actual achievement in an area of acknowledged lower performance. As Dr. Rosen stated, “Conceptually, it makes no sense at all.” TR127-128. Even more troubling is the fact that Ms. Gorny failed to disclose the transgression in the “Validity Statement” of the evaluation report. TR75, PD126, SD191. Instead, the disclosure states the opposite, “[Student] did not require any adaptations or modifications to the standardized procedures.” PD126, SD191.

The Validity Statement also states that the Student's performance “did not appear to be adversely affected by failure or frustration. PD126, SD191. However, Dr. Gorny's testimony revealed that, in addition to written expression, the Student responded negatively to the pseudoword decoding assessment, calling it dumb and moving through it very quickly. TR51-52. Decoding skills are the very area in which the Student displays marked deficits in both the District and independent evaluations. Additionally, Ms. Gorny acknowledged computational errors that in some instances alter the Student's score and omissions in recording the Student's responses that prevent any possibility of rehabilitating the evaluation, even if testing procedure would permit the practice.

There is also concern that the IEP team used a restrictive definition of a “severe discrepancy” between a student's ability and academic achievement. The team appears to have adopted an analysis that looked only at a discrepancy in the Student's total ability and total achievement. If so, the determination process impermissibly excluded an analysis of discrepancies in the specific areas enumerated in 34 C.F.R. § 300.541 (*e.g.* oral expression, listening comprehension, written expression, basic reading skill). Although the federal statute does not define the term “severe discrepancy” and the Illinois Administrative Code defers to the federal Code, 23 (*see*, Ill. Admin. Code § 226.170), Ms. Gorny and Dr. Rosen gave similar testimony regarding generally accepted measures that are set forth in test administration manuals.

All of these factors lead to the conclusion that the August 27, 2004 evaluation is invalid and should not have been used by the IEP team to determine if the Student has a learning disability. This

is the District's second attempt at evaluating this Student who, in the rapidly approaching school term, will begin her senior year. As explained more fully below, the Student was denied a free and appropriate public education in the first 75% of her high school career. She should not have to risk another flawed evaluation to receive an IEP that is appropriate and confers meaningful educational benefits to her.

As such, the District shall use the December 2, 2004 evaluation conducted by the ENH team, in conjunction with Mr. Brady's speech/language evaluation, to determine if the Student is eligible to receive special education and related services on the basis of a specific learning disability. The Parent requested that the Hearing Officer order the IEP team to adopt the findings of the ENH and Brady evaluations and there is a strong temptation to do so. There are numerous indications that the Student has mutually acknowledged deficits in short-term working memory, auditory processing, and decoding. However, the ultimate determination is more appropriately left to the IEP team working with the Parent and her attorney and/or experts.

B. Was the September 14, 2004 interim behavior intervention plan implemented and the October 15, 2004 behavior intervention plan based on an appropriate functional behavioral analysis and appropriately implemented?

These issues can be answered together because the record demonstrates that neither behavior plan was implemented to any discernable degree, regardless of the underlying functional analysis or definition of antecedents. The IDEA mandates that a student's IEP be more than a paper process: "Once a school district develops an IEP based upon the student's individual needs....it must be implemented by providing the student with the special education instruction and related services set forth in the IEP." Board of Ed. v. Rowley, 458 U.S. 176, 206-07 (1982) Although the District accumulated reams of historical records, behavior tracking reports, and progress reports detailing the Student's absenteeism and failure to complete assignments, there is scant evidence of any responsive or concerted interventions to address the matter. Two examples are illustrative.

Mathematics is the only academic subject in which the Student receives specialized instruction. However, Mr. Kakumanu testified that she missed 50% of his advanced algebra and trigonometry classes without any significant intervention from building or District special education support staff. This is not surprising considering that Mr. Kakumanu was not aware the Student was receiving specialized services "for several months" after he joined the faculty in November 2004. As such, he had no knowledge that absenteeism was a "targeted behavior" in the Student's intervention plan with an annual goal for the Student to attend class prepared each day and complete classroom work and homework with 80% accuracy 90% of the time.

Even more striking was the school's lack of response to the Student's Spanish class attendance. Although the Student has a perfect record of having never attended the 9th period class, staff were uncertain if she was still enrolled even at the time of the hearing. The record contains several references to staff members reservations about allowing the Student to enroll in a 9th period class given her historical absenteeism. The ensuing result should have been anticipated and addressed early on. One of the modifications/accommodations in the Student's IEP is, "work with

counselor in late January to schedule 2nd semester classes.” However, even though the Student never attended the Spanish class in the first semester, and received an “F” grade and no credit, she remained enrolled for the second semester. The lapse is particularly acute because the 9th period class is a compensatory service to allow the Student to make up credits lost during the CMA-B years.

Ironically, the Student displayed some initiative to address her chronic absenteeism by joining the attendance club. However, Ms. Jones, the school's attendance coordinator and “Just Go” attendance club sponsor, had not seen the Student's IEP. Ms. Jones could not recall being contacted by any staff member regarding the Student's attendance. It is also troubling that most teachers required Student to come to them to ask for missed assignments, usually after the school day. None displayed any awareness of the assignment book referenced in the behavior plan or the requirement to record the Student's assignments in the book. Few staff members took any significant or sustained measures to contact the Parent regarding the Student's attendance and failure to complete assignments. Lastly, not one teacher testified that the Student was permitted to take tests in a small setting. Instead, she devised her own strategy in one class by skipping the regular period so she could take the test late and receive additional time.

In essence, the District failed to adhere to the IDEA's requirement to actually implement the Student's behavior intervention plan. For these reasons, the Hearing Officer finds that the District failed to implement the Student's September IEP interim behavior plan or the behavior intervention plan contained in the October IEP.

C. Was the October 15, 2004 IEP appropriate based on the IEP Team's:

- a) failure to find the Student learning disabled and develop goals, objectives and support services for that disability;**
- b) decision to limit social work services to 30 minutes per week and exclude group social work services;**
- c) denial of extended school year services, and failure to offer compensatory services necessary to remedy the denial of FAPE from the start of SY2004-05 and the first two years of high school.**

Learning Disability Determination

Despite the predictable dichotomy of opinion as to whether the Student has a learning disability, each of the qualified evaluators who assessed the Student found significant weaknesses, deficits, or discrepancies in the Student's auditory processing, short term working memory, decoding skills, and attention. Although the District's evaluation methods were not as thorough or as particularized as those used by the independent evaluators, both Ms. Gorny and Dr. Drelis noted concerns in decoding and short-term auditory memory.

The IEP team and several District witnesses noted the Student's frustration, avoidance, and fear of failure in connection with her absenteeism and failure to complete classroom and homework

assignments. There is probably no better example of “avoidance” than the fact the Student misses class as regularly as she attends but joined the attendance club of her own volition. Additionally, although the Student continues to have sporadic confrontations, her absences are no longer attributable to multiple suspensions due to explosive outbursts and extreme physical aggression – the basis for her emotional disturbance disability. Rather, she avoids class and receives low grades for no discernable reason yet continues to express the desire to succeed in school.

It is highly probable that the reason simply is not discernable to the Student. She cannot “see” or comprehend the psychological deficits that impede her ability to retain and process auditory information, hence the frustration, fear of failure, avoidance and test anxiety. It is unclear whether any teacher, school counselor or special education support staff ever sat down with the Student and seriously investigated the reasons for her absenteeism or failure to complete her assignments. The social work progress notes may have provided valuable information in this area but the District produced only one report and none for the entire first semester. A computer printout indicating the number of social work minutes provided to the Student is merely a record keeping device. It is not indicative of educational benefit to the Student.

There is also some evidence that the IEP team's perception of the Student was clouded by the emotional disturbance “label” of her disability to the exclusion of a learning disability. Mathematics is the only academic area in which the IEP team found that the Student required specialized instruction at 225 minutes per week. Yet, in defining the Student's present level of performance in algebra and trigonometry, the IEP team listed, “ [Student] possesses emotional delays.” It is also possible that the Student's strong compensatory skills overshadowed the impact of the auditory and decoding deficits on her ability to perform academically. No one on the IEP team delved into whether the Student's frustration and avoidance in completing her assignments is an underlying cause of her absenteeism. There were several examples that strongly lean in that direction.

For example, Ms. Matti lauded the Student's performance on the PSAE examination but also noted that the Student “almost always” takes quizzes and tests late where she is given additional time. Mr. Onli noted the Student's “discomfort” with a more complex method of art criticism, and Mr. Steward described the Student's “pessimism” towards her assignments. Ms. Murray, an inclusion teacher, noticed a correlation between the Student's absences and the days on which quizzes were given. She also recounted an incident in which the Student flatly refused to take a quiz even though she attended the class. Lastly, the ENH evaluation noted that the Student's auditory processing and discrimination deficits could be a barrier to learning a foreign language – the very class in which the Student has the worst record of absenteeism. The Student alternately denied being enrolled in the class and indicated that she “needed help.”

The District's witnesses placed a great deal of weight on the Student's strong compensatory skills. The evidence leaves no doubt that the Student has a remarkable ability to sidestep certain performance barriers by compensating with other skills. During the speech/language evaluation, Mr. Brady observed that the Student “wrote” on the desk with her finger when she was having difficulty in one assessment and improved immediately. However, the presence of compensatory skills does

not equate to the absence of a learning disability. Nor should the Student be left on her own to figure out ways to circumvent her learning difficulties. As Mr. Brady noted in his speech/language evaluation, the Student's processing and decoding difficulties will become more pronounced as she progresses through school where, as Dr. Rosen pointed out, she will become frustrated when trying to read words she has never encountered.

The Hearing Officer finds that the September 15, 2005 IEP was not appropriate as to the learning disability determination due to the flawed August 27, 2004 evaluation. As noted above, the IEP team will use the ENH and Brady evaluations to determine if the Student has a learning disability.

Social Work Services

Although the IEP provides that the Student is to receive 30mpw in individual social work services, the one social work progress note the District produced indicated that the Student participated in a group session. If group services are being provided, the IEP must be revised to reflect the fact. Of more concern is the unexplained gap in the record of services actually provided to the Student, regardless of the missing progress reports.

In the final analysis, however, the Parent simply did not put forth sufficient evidence to warrant additional social work services, including group services. The Hartgrove Hospital did not recommend group services and there is nothing to suggest that such services would provide educational benefit to the Student. Therefore, the Hearing Officer finds no error in the IEP team's decision regarding social work services.

Extended Year and Compensatory Services

The IEP team determined that extended year services (ESY) were not warranted as there was no indication that the student would suffer any regression in her skills over the summer break and require time to recoup those skills during the upcoming school year. The team also defined ESY as "special education summer classes", and believed the Student would receive the most educational benefit from regular summer school courses. However, neither federal nor state regulations prohibit the District from providing special education and related services to students enrolled in regular education summer classes. The ISBE guidance memorandum on ESY provides that, "Depending on the special education student and his or her IEP, it may be appropriate for a special education student to receive ESY services in a regular education summer school program. School districts via the IEP process must determine what is appropriate to meet a special education student's needs." ISBE ESY Memorandum, November 21, 2001 at www.isbe.net/sped-ed/html/resources.htm.

The IEP provisions related to the Student's mathematics instruction, attendance, and assignment completion, for example, are probably just as relevant during the summer school session as during the school year. In short, the IEP team's determination regarding ESY services was not appropriate as the analysis was too restrictive. This issue will also be revisited in the forthcoming

revision of the Student's IEP, particularly if ESY services are necessary to address a determination that the Student has a learning disability.

Compensatory Services

There is little evidence that the compensatory services offered in the Student's IEP were implemented with any degree of fidelity let alone that sufficient to restore the Student's two year denial of FAPE. The collaborative team teaching model was never fully implemented as several teachers in core subject areas testified that their co-teacher was shared with another classroom, assigned only sporadically, or, in the case of Ms. Denton, didn't do anything and had little interaction with students. Since the Student never attended her 9th period Spanish class and received a failing grade, the provision did nothing to restore the Student's foregone credits. Nonetheless, she remained enrolled in the course for the second semester, despite the IEP provision requiring a counselor to assist in scheduling her second semester classes.

Hearing Officer Smaron's August 12, 2004 Decision indicated that the Parent requested 100 hours of tutoring as compensatory services for the Student. Although IHO Smaron did not order the District to provide tutoring services, she declined to do so because, "...the IEP team should not be *limited* by the number of hours claimed by the parent as compensatory services" (emphasis added). PD61, SD182. Tutoring services are not provided as part of the Student's IEP. Ms. Holland and Mr. Weeks testified that tutoring is available to all students free of charge throughout the school day and during 8th and 9th period. However, no one took into account the fact that the Student already had a full class load of eight courses, not to mention her night school courses. There is no evidence that the IEP team considered alternative tutoring services through weekend scheduling or a private provider. There is no evidence that the District can or will provide sustained compensatory services sufficient to remedy the Student's loss of FAPE over a three year period.

In summary, the Hearing Officer finds that the Student's October 15, 2004 IEP is not appropriate in that it is not reasonably calculated to confer educational benefits to the student. The IEP team could not make an accurate determination regarding the Student's potential learning disability due to the invalid evaluation. The exclusion of ESY services was based on an improperly restricted reading of District's authority to offer the services if the Student enrolled in regular education classes. The compensatory services offered were either ill-advised, i.e. the 9th period class, contradictory, as with school-based tutoring, or inadequate to restore the degree of FAPE lost during two full years of high school. There is no indication that the IEP services related to social work are inappropriate. However, if group services are being provided, the provision must be reflected in the IEP.

D. Are the IEP's statements of present performance levels and goals and objectives sufficient and stated in objective and measurable terms related to the Student's disabilities?

Although Dr. Owen's testimony revealed several flaws in the IEP's statements of present performance levels and goals and objectives, the shortcomings may be attributable to the absence

of an accurate and thorough evaluation of the Student. The above findings regarding the IEP and behavior intervention plan will require a full revision of the Student's IEP. If the Student is determined to have a learning disability, that factor alone may remedy some of the confusion in the statement of goals and objectives in all areas. For example, mathematics is the only academic area in which the team found the need for specialized instruction at 225 minutes per week. However, the Student's present performance level is defined in terms of her emotional delays with no indication of how those delays contribute to the need for specialized algebra/trigonometry instruction. Additionally, the team's review of the ENH and Brady evaluations may help to more accurately state the antecedents to the Student's academic frustration, avoidance, fear of failure and test anxiety (i.e. in terms of deficiencies in auditory attention, working memory and decoding skills).

Neither the September nor October IEP state performance levels and goals and objectives in an appropriate manner. However, the above findings regarding the IEP and behavior intervention plan will require a full revision of the Student's IEP. As such, the IEP team should have more accurate information at its disposal through the ENH and Brady evaluations, regardless of the Student's learning disability determination.

E. Was the Parent given access to the Student's complete school records?

At the pre-hearing conference, the Parent sought to introduce testimony regarding the District's e-mail retention policy and recovery capabilities. The Hearing Officer excluded the witness on grounds that the matter was more appropriately addressed prior to the hearing, through voluntary compliance to the records request by the District or by subpoena. At hearing, however, most witnesses stated that they were not requested to review their e-mail folders or that they did not know how to conduct a search. South Shore's principal produced several e-mail communications regarding the Student. Additionally, Ms. Dooley stated that she did not review social work files to attempt to locate the Student's progress reports. The Parent did not request the Hearing Officer to issue subpoenas for the records and at this time there is no way to determine if such records exist.

Based upon the District's failure to attempt production of the social work records, and the fact that the Principal produced e-mails at the hearing, and after the five day disclosure deadline, the District did not provide the Parent with access to the Student's records as required under 34 C.F.R. § 300.562. The District will be ordered to request both the social work progress notes and all e-mails regarding the Student from those staff members and departments involved in the Student educational affairs.

F. Did the Student received a free and appropriate public education (FAPE) in the least restrictive environment (LRE) for SY2004-05?

Taken together, the above factual findings and analysis result in the conclusion that the Student did not receive a FAPE for the 2004-05 school year. Her IEP was not implemented to any meaningful extent and did not confer educational benefits. Although the Student's absenteeism is at least partially volitional, her acknowledged apprehension of school, and the attendance patterns established at CMA-B, were the remedial targets of the IEP and behavior intervention plan.

Parent's Requested Remedies

Most of the Parent's requested remedies are addressed above. The remaining requests focus on ensuring that the Student will receive compensatory services sufficient to restore the loss of a FAPE in the prior three academic years, 2002-03 through 2004-05, and a FAPE in the upcoming school year.

The Parent's request for an alternative placement, at Parent's option, is denied. Placing the Student in a therapeutic day school or residential facility would not only violate the IDEA's mandate regarding placement in the least restrictive environment, but has the potential to turn into another CMA-B debacle. South Shore teachers and staff all expressed the belief that the Student can be successful in the regular education curriculum with the provision of certain special education and related services. The Student desired to transfer to South Shore and, despite some anxieties, seems to have overcome the extreme anger and explosive temper so prevalent at CMA-B.

The Parent's request for an external tutor/mentor program as outlined in Dr. Smith's April 25, 2005 letter to Parent and Attorney O'Connor is both reasonable and necessary to ensure that the Student's educational loss is restored. The District will offer the program at its expense as part of the Student's revised IEP.

DECISION

IT IS HEREBY ORDERED that the school district shall convene an IEP meeting using the summer assessment team no later than July 25, 2005 and, utilizing the Parent's independent evaluations conducted by the Evanston Northwestern Hospital Clinic on December 2, 2004 and Mr. Arnell Brady on April 20, 2005, determine if the Student has a specific learning disability. If necessary, the Student's October 15, 2005 IEP shall be revised to provide special education and related services appropriate to that disability.

IT IS FURTHER ORDERED that the Student's IEP shall be revised to include a behavior intervention plan that contains appropriately stated and measurable interventions and is reasonably calculated to address behaviors related to the Student's emotional disturbance disability and learning disability, if determined and deemed necessary. As the record contains significant data regarding the Student's school and classroom activities in the 2004-05 school year, the decision of whether to conduct a new functional analysis is left to the IEP team, in consultation with appropriate staff and the Parent.

IT IS FURTHER ORDERED that the District is to undertake all reasonable efforts to locate and provide to Parent or her attorney the social work progress notes from the 2004-05 school year and any e-mail communications regarding the Student by July 25, 2005. If necessary, the District shall have its information technology staff develop e-mail search instructions and disseminate the same to applicable District and school-based staff.

IT IS FURTHER ORDERED that the District shall offer the Student compensatory services in the form of the tutoring/mentoring program recommended by Dr. Terry Smith and set forth in the hearing testimony and exhibits. The tutor/mentoring program shall be provided to the Student for a period of two years beginning no later than August 1, 2005 unless a later date is mutually agreed upon by the parties, and at a total cost not to exceed \$24,000 (twenty four thousand and 00/100 dollars), the full cost to be borne by the District. The tutoring/mentoring, program shall be in addition to any other compensatory services the IEP team deems necessary and appropriate, including but not limited to a collaborative team teaching model for all academic core subjects and extended year services.

Right to Request Clarification

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

Right to File 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 this decision is mailed to the parties.

Issued: July 5, 2005

VENITA HERVEY
Impartial Due Process Hearing Officer

CERTIFICATE AND AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of the foregoing Decision and Order was served on the parties via electronic mail and also by U.S. Postal Service Priority Mail with Delivery Confirmation, postage and fees prepaid, and directed to their record business address, by depositing the same with the Postal Service at Rockford, Illinois before 5:00 p.m.

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