

**Arkansas Department of Education**  
**SPECIAL EDUCATION UNIT**

**IN RE:**

\_\_\_\_\_,  
as Parents in behalf of  
\_\_\_\_\_, Student

**PETITIONER**

**VS. NO. H-09-14**

**Pocahontas School District**

**RESPONDENT**

**HEARING OFFICER'S FINAL DECISION AND ORDER**

**Issue and Statement of the Case**

**Issue:**

Did the Respondent deny the Student a free and appropriate public education (FAPE) according to the Individuals with Disabilities Education Act (IDEA) by failing to follow due process procedures in not identifying all of the student's disabilities that adversely affect his education and by not developing and implementing an appropriate Individualized Education Plan (IEP) for school years 2007-08 and 2008-09?

**Procedural History:**

On February 20, 2009 a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from \_\_\_\_\_ and \_\_\_\_\_ (hereinafter referred to as "Parents"), the parents of \_\_\_\_\_ (Petitioner) (hereinafter referred to as "Student"). The Parents requested the hearing because they believe that the Pocahontas School District (hereinafter referred to as "District") failed to comply with the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400 - 1485, as amended) (IDEA) (also

referred to as the "Act" and "Public Law 108-446") and the regulations set forth by the Department according to Arkansas Code Annotated 6-41-202 through 6-41-223 in providing the Student with appropriate special education services as noted above in the issue as stated.

The Department responded to the Parent's request by designating March 23, 2009, as the date on which the hearing would be held and by assigning the case to an impartial hearing officer. The Hearing Officer issued an order setting preliminary timelines on February 24, 2009, which afforded the District with the opportunity to challenge the sufficiency of the due process complaint notice. The District did so on March 6, 2009 and the Parents responded to the challenge on March 9, 2009. A pre-hearing order was issued by the Hearing officer on March 9, 2009, addressing the challenge and found in part for the District and in part for the Parent. Specifically, the Parents' alleged violations by the District of Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Fourteenth Amendment to the U.S. Constitution were not hearable issues under the Individuals with Disabilities Act (IDEA). However, the alleged complaint regarding the District's failure to identify, program, and implement an IEP for all of the Student's alleged disabilities was found to be hearable under the IDEA.

The order setting preliminary timelines also included an order for the District to convene a resolution session with the Parents on or before March 7, 2009. The District notified the hearing Officer on March 6, 2009, that a resolution conference was held; however, no agreement was reached.

Pre-hearing briefs were requested and received by the Hearing Officer from both parties on March 11, 2009. A telephonic pre-hearing conference was held by the Hearing Officer with council from both parties on March 16, 2009 where the issue to be addressed at the hearing was decided along with the procedures for introducing evidence and witnesses. The Petitioner was advised at

that time that they would bear the burden of proof in that they were the party challenging the current status of the Student.

The hearing began as scheduled on March 23, 2009; however, the Parents were not able to complete the requested testimony and requested a continuance which was granted without objection for the case to be heard for a second day on March 27, 2009. The hearing proceeded for an additional five days, with each day, except the last, having the Parents requesting a continuance in order to complete the presentation of their case. Consequently, the third, fourth, fifth, sixth and seventh day of the hearing was held on April 7, 2009; April 8, 2009; May 4, 2009; May 5, 2009; and May 19, 2009, respectively. Following the final day of the hearing both parties were offered the opportunity to provide the Hearing Officer with post-hearing briefs to be included with the record. They were instructed that their briefs must be received within five days of their receipt of the final transcript, with the understanding that the date would be June 3, 2009. The Respondent's post-hearing brief was received on June 3, 2009. The Petitioner requested and was granted seven additional days in which to provide the Hearing Officer with a post hearing brief. The Petitioner included two declarations by the Parents for inclusion in the record. Their inclusion was challenged by the District. The Hearing Officer concurred with the District and the declarations were not admitted as part of the record.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended and Arkansas Code Annotated 6-41-202 through 6-41-223, Robert B. Doyle, Ph.D., Hearing Officer of Sherwood, Arkansas, conducted a closed impartial hearing. The Parents were represented by Theresa Caldwell, Attorney of Little Rock, Arkansas and the District was represented by Donn Mixon, Attorney of Jonesboro, Arkansas.

At the time of the hearing the Student was a seven (7) year-old male who was a student

within the District for his Kindergarten school year (2007-08) and his current First Grade placement in school year 2008-09. Prior to entering the District as a Kindergarten student he was provided pre-school services at Kids First, a pediatric day health program, associated with the University of Arkansas for Medical Sciences, Department of Pediatrics. An Individualized Program Plan (IPP) was developed by the staff at Kids First on October 4, 2006 describing the services that they would provide to the Student through October 4, 2007 and prior to the Student entering the District's Kindergarten program.<sup>1</sup> A medical problem the Student presented with at Kids First as well as on entering the District was diagnosed as ----- . On entering the District in August 2007 the Student was provided a temporary IEP which indicated that he would be in a regular Kindergarten classroom for his general education and would be receiving speech therapy for an ----- three times weekly for thirty minutes each session.<sup>2</sup> The temporary IEP was extended with the provision of services being the same, with the addition of goals, on October 2, 2007. On entering the first grade the Student's IEP indicated that his educational placement was in a regular first grade classroom for his general education curriculum and that he would continue with speech therapy for an ----- two to three times per week with each session lasting sixty minutes.<sup>3</sup> During both his Kindergarten year and his first grade year the Student had an Individual Health Plan developed by the school nurse in coordination with the Student's physician.<sup>4</sup>

### **Findings of Fact:**

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<sup>1</sup> Exhibit Binder, Page 19a-19w.

<sup>2</sup> Ibid, Page 10-19.

<sup>3</sup> Ibid, Page 1-9.

<sup>4</sup> Ibid, Page 198-200 and 208-209.

1. Prior to entering the District the Student was diagnosed with -----, -----  
 ----- as defined in testimony by the Student’s mother is a clonal disorder of the  
 mast cell and its precursor cells. The clinical symptoms and signs of ----- are due  
 to the accumulation of these clonally derived mast cells in different tissues, including bone marrow,  
 skin, the gastrointestinal tract, the liver, and the spleen. When too many mast cells exist in a  
 person's body and undergo degranulation, the additional chemicals can cause a number of  
 symptoms which can vary over time and can range in intensity from mild to severe. According to  
 the Parent’s testimony those symptoms for the Student included -----  
 -----  
 ----- Also according to the Student’s mother there  
 is currently no cure for the disease; however, there are medications and treatments that keep the  
 disease in check. The Student receives -----  
 ----- well as medications for severe -----  
 -----  
 Additionally, both the Parents and the District have been provided and trained in the administration  
 of epinephrine via an Epi Pen Jr.<sup>5</sup> In addition to administering the Student’s scheduled medication  
 and being responsible for the implementation of the Student’s IHP, the school nurse provides the  
 Student with-----  
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2. Prior to the Student entering the District’s Kindergarten the Student was receiving pre-  
 school services at Kids First, a pre-school day program operated under the auspices of the  
 University of Arkansas for Medical Sciences. The staff at Kids First had developed an

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<sup>5</sup> Transcript Pages 1126-1127.

Individualized Program Plan (IPP) for the Student.<sup>6</sup> The LEA Supervisor testified that eligibility for services are different for pre-school students when compared to school-aged children. She stated that in a pre-school program “there is an uncategorical label which does not exist in school-age [children].”<sup>7</sup>

3. Prior to August 2007 the Parents were not residents within the educational jurisdiction of the District, even though the Parents knew they would be moving into the District.<sup>8</sup> A transition conference was scheduled to meet on August 28, 2007; however, at the Parents’ request the meeting was moved up to August 16, 2007.<sup>9</sup> On that date the Student’s mother met with District personnel, including two speech-language therapists, the Student’s anticipated classroom teacher, the District’s due process coordinator, the District’s LEA supervisor, the school principal, and the Student’s case manager from Kids First, to review existing data and develop a temporary IEP. At that meeting it was decided that the IEP team needed speech evaluations and reports from Arkansas Children’s Hospital; a social history from the Parents; possibly a cognitive skills evaluation by the District’s psychological examiner; and if needed, for the school nurse to conduct a vision and hearing screening.<sup>10</sup> Also at that meeting the Parents acknowledged by signature that they had received a copy of their rights under the IDEA as well as consent for a temporary placement.<sup>11</sup> As noted previously, the temporary IEP of August 16, 2007 reflected no special education services other than

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<sup>6</sup> Ibid, Page 19a-19w

<sup>7</sup> Transcript, Page 123-124

<sup>8</sup> Ibid, Page 1479

<sup>9</sup> Exhibit Binder, Page 100

<sup>10</sup> Exhibit Binder, Page 95 and 96

<sup>11</sup> Ibid, Page 92-93.

----- for an ----- . Although the Student's mother testified that she brought up concerns, not only about the Student's medical needs and the consequent accommodations needed in order for him to attend school, but also his -----  
----- At the same time she testified in regard to the referral conference that she "didn't have an understanding of what was going to happen at [the] conference.....they talked about his -----....we talked about the concerns over his -----....there was a statement that we needed to do some testing...they would also start him in -----...we wanted him in a regular classroom....they needed to do more things, they needed to look over the things that I brought, and we would get back at our next meeting and go from there."<sup>12</sup> Her testimony revealed that she was an active participant in the conference and her signed informed consent with regard to the District's conducting an evaluation would also indicate her awareness of the District's need for additional information about her concerns in order to develop an appropriate permanent IEP.<sup>13</sup> Her testimony was replete with her concerns about the Student's medical problems, to which the District responded by developing his Individual Health Plan, signed by the Student's physician, the Student's mother, the classroom teacher, and the school's principal on September 27, 2007 and by the school's nurse and an aide on October 2, 2007.<sup>14</sup> The Parents did not testify that they requested nor did the Student's pre-school program records indicate a need for an ----- at the transition conference other than the Parents' undated document of concerns and a time line of contacts written by the Parents in preparation for the due process hearing.<sup>15</sup>

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<sup>12</sup> Transcript, Page 1730-1733.

<sup>13</sup> Exhibit Binder, Page 94

<sup>14</sup> Exhibit Binder, Page 208-209

<sup>15</sup> Exhibit Binder, Page 253-254 and 263

4. Introduced as evidence on the third day of the hearing during the testimony of the Student's school Principal was the District's policy on individual health care plans for students who are identified as having special health care needs.<sup>16</sup> The Principal testified that at the time the Student entered the District as a kindergarten student that he was familiar with the need for health care plans in general, but was not familiar with any of the specific requirements as stated in the District's policies.<sup>17</sup> In regard to special education students the District's policies state, in part, that the District will "provide specialized transportation for students whose IEP or 504 plan reflects the need to."<sup>18</sup> The District's policy on health care plans further stipulates that "health records should be kept in locked files in the school nurse's office."<sup>19</sup> The policy also states, in part, that when a student has an Individual Educational Plan (IEP) as well as an Individual Health Care Plan (IHP) a meeting "shall be scheduled in accordance with State regulations to develop special health care components" and that "such a meeting shall be held for all students with special health care needs, regardless of his/her need for special education" and that "if a student is to receive special education services, the IEP committee and the health care team will develop an IEP that includes an IHP."<sup>20</sup>

5. One of the decisions made at the August 16, 2007 referral conference under additional factors being relevant to the action proposed was that since the Student had "several medical concerns" those concerns were "referred to the 504 committee."<sup>21</sup> The IEP committee concluded

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<sup>16</sup> Ibid, Page 200a-200g.

<sup>17</sup> Transcript, Page 619.

<sup>18</sup> Exhibit Binder, Page 200b (emphasis added).

<sup>19</sup> Ibid, Page 200f.

<sup>20</sup> Ibid, Page 200g-200f.

<sup>21</sup> Ibid, Page 91



that the Student's medical issues were not a related service and therefore would be addressed through a 504 plan rather than an IEP.<sup>22</sup> There is no record or testimony that such an action by a 504 committee took place. The school Principal, who is the 504 designee for his building, testified that he was present at the discussions regarding the Student's health care needs. He further testified that it was his understanding that the difference between an Individual Health Care Plan (IHP) and a 504 Plan was that the "health care plan makes accommodations for students with health – special health needs" and "Section 504 makes accommodations for a student's learning needs."<sup>23</sup> The school Principal testified that it was his recollection that "there was discussion of IEP services for ----- [and] the question of academics came up [and] mother saying that he is fine academically, that he is very bright, prepared for kindergarten, wasn't a concern of his learning, so, therefore, that dropped the issue of special ed in academics, and it dropped the issue of 504."<sup>24</sup> At the same time, the Student's temporary IEP of August 16, 2007 and the final IEP of October 2, 2007 reflects that since the Student's "medical issues are not a related service and therefore are being addressed through 504."<sup>25</sup> The Student's mother testified that she asked for a copy of the 504 plan but never received one and the school's Principal testified that one was never developed, despite the IEP record because his health care needs did not "adversely affect [his] learning."<sup>26</sup>

6. A social history was received from the Parents dated August 16, 2007; however, the Student's mother testified that although she completed the report that she did not record the date as

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<sup>22</sup> Ibid, Page 12

<sup>23</sup> Transcript, Page 569

<sup>24</sup> Transcript, Page 591

<sup>25</sup> Exhibit Binder, Page 12

<sup>26</sup> Transcript, Page 604

noted on the report, stating that she had completed the inventory earlier at a school orientation meeting.<sup>27</sup> In that history the Student’s mother noted the medications that he was being prescribed as well as noting that he -----

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7. The ----- evaluations consented to by the Parents and received from Arkansas Children’s Hospital indicated an evaluation date of January 24, 2007. Under the assessment for articulation the report indicated ----- The report’s summary impressions included a recommendation for a ----- evaluation” and if needed to program therapy based on ----- techniques.<sup>28</sup> This was apparently based on the summary of impressions which included the statement that he had major ----- problems. As noted in testimony by the Student’s mother and the District’s speech/language pathologist ----- is a ----- disorder characterized by -----  
-----It is a disorder of ----- which may be acquired or developmental.<sup>29</sup>

The District’s speech/language pathologist also testified that “----- is not a disability, a recognized

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<sup>27</sup> Ibid, Page 1735-36

<sup>28</sup> Exhibit Binder, Page 176-177

<sup>29</sup> Transcript, Page 328; 1587-90; and 1519-22.

disability under itself (sic). . . the disability is -----.”<sup>30</sup> The District’s Due Process Coordinator who is also a speech/language pathologist testified that she added the diagnosis of ----- to the Student’s 2007-08 IEP at the Parents’ request, but that the disability remained a ----- disorder. She testified that the only difference between evaluating the Student for a ----- disorder and an ----- disorder would be “the tools that you would use to try to analyze that problem to break it down in segmentals, and just a different way of gaining information to treat. . . you still have an ----- disorder. . [and] the end result is -----.”<sup>31</sup> A previous ----- evaluation conducted on October 26, 2006 also concluded that the Student qualified for ----- therapy services with the recommendation that he receive 120 minutes of therapy targeting -----.<sup>32</sup> An addendum to that evaluation was provided to the District which indicated the Student exhibited a “-----disorder.”<sup>33</sup> The District’s speech/language pathologist testified that a -----disorder “is a disorder where it has a -----.....there are different processes that the student may exhibit, and because, typically it can be – it’s severe, and it just has a -----to it”and that it is a type of -----  
-----.”<sup>34</sup> In October 2005 when the Student was three years and seven months old a function ----- evaluation was completed where the results suggested a severe ----- disorder and severe -----.”<sup>35</sup> A ----- evaluation conducted

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<sup>30</sup> Ibid, Page 832.

<sup>31</sup> Ibid, Page 327-29.

<sup>32</sup> Exhibit Binder, Page 1790180

<sup>33</sup> Ibid, Page 181

<sup>34</sup> Ibid, Page 791

<sup>35</sup> Ibid, Page 184-187.

when he was two years, eight months, old resulted in impressions that included him having mild delays in ----- and moderate delays in ----- skills; with ----- skills being delayed, but no formal testing of those skills was completed.<sup>36</sup>

8. With the additional information gathered, the Student’s IEP team met again on October 2, 2007 and decided to extend the Student’s temporary IEP for the remainder of the 2007-08 school year.<sup>37</sup> The Parents consented to the initial placement.<sup>38</sup> The IEP committee determined that the evaluation data substantiated the existence of a disability consistent with state and federal regulations implementing IDEA and determined that his disability was -----  
----- The committee decided that the Student needed -----, 90 minutes weekly, with some direct instruction.

9. The Student’s Kindergarten school record reveals that he received grades of “S” (satisfactory) in all subject areas at the end of school year 2007-08 and was promoted to the first grade. The record also reflected twelve days absent and 166 days present for the school year.<sup>39</sup> His Kindergarten teacher, who is also his first grade teacher, testified that he had no problems in kindergarten with regard to educational progress. The school nurse testified that no problems were encountered with regard to implementation of the Student’s Individual Health Care Plan. She testified that she observed some unusual behaviors during the kindergarten year such as “-----  
-----,” but otherwise “in the last school year, we did not have any

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<sup>36</sup> Ibid, Page 188-191

<sup>37</sup> Ibid, Page 10

<sup>38</sup> Ibid, Page 80

<sup>39</sup> Exhibit Binder, Page 95

incidents with anything like” the ones he experienced this year.<sup>40</sup> She further testified that she mentioned the ----- to the Student’s teacher who indicated to her that she had not observed the same behavior in the classroom.<sup>41</sup> The Parents on the other hand made a record and testified, without collaborative evidence, that the Student experienced multiple episodes of difficulty in his kindergarten year, including “-----  
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The Parents also claimed an incident occurred in the Student’s physical education class involving the -----; however, the Student’s physical education teacher testified that she had no recall of the incident.<sup>42</sup>

10. The Student’s IEP team consisting of the Student’s classroom teacher, his mother, and the speech therapist, (who also served as the special education representative to the committee because the Student was receiving no other special education services except -----) met on April 23, 2008 for the Student’s annual review conference to discuss the student’s progress and to develop a plan for extended school year services if needed, and to decide on the Student’s programming for the next school year (2008-09).<sup>43</sup> Although the Parent testified that she was told by the speech therapist that the student showed regression over the holidays, the record reflects that no problem with recoupment was indicated on the record signed by the Parents.<sup>44</sup> The classroom based assessment for ----- students reflected that the Student was working on grade

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<sup>40</sup> Transcript, Page 1114-1115.

<sup>41</sup> Ibid, Page 1119.

<sup>42</sup> Transcript, Page 1347

<sup>43</sup> Exhibit Binder, Page 76-79

<sup>44</sup> Ibid, Page 74

level academically.<sup>45</sup> The record also reflected that the Student exhibited age appropriate social skills in the classroom. The annual review recommendation was for the Student to continue in -----  
----- for ----- sixty minutes weekly with the therapy focusing on -----  
----- The Student's mother recorded a note that she expressed concern over other items at the annual review conference; "however, neither the principal or anyone in special ed was present."<sup>46</sup> Her testimony was that she was concerned about the Student's Health Care Plan, its implementation, his unusual behaviors as noted above, and his need for physical therapy. There was no indication in her return of the Notice of Conference form that she had requested their presence or the nature of her concerns.

11. The Parents' issues were brought to a requested IEP committee meeting at the beginning of the Student's first grade. The meeting was scheduled for September 4, 2008, but at the Parents' request was moved up to August 28, 2008.<sup>47</sup> The record reflects that the Parents had requested the meeting to discuss changing the Student's "primary handicapping condition of----- to other health impaired (OHI).<sup>48</sup> The record reflects that those in attendance at the meeting included the Student's mother, her friend, the Principal, the School Nurse, the LEA supervisor, the Student's Speech Therapist, and the Student's classroom teacher. The Student's mother brought a five page document with thirty-two items related to her concerns for the Student's health needs at the school.<sup>49</sup>

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<sup>45</sup> Ibid, Page 73

<sup>46</sup> Ibid, Page 364.

<sup>47</sup> Ibid, Page 63.

<sup>48</sup> Ibid, Page 61 and 64.

<sup>49</sup> Ibid, Page 64-68.

According to the record and testimony of the LEA Supervisor she was asked to seek answers to two questions raised by the Parents. One, was it possible to include the Student's health care plan as a part of his ----- IEP, and two, can health accommodations be put on an IEP that aren't related to his ----- disability?<sup>50</sup> Although not stated as one of the reasons for requesting the meeting, another concern that the Parents presented was whether or not the Student also needed an evaluation for ----- and how it might impact his education. Although the LEA Supervisor testified that this was a new area for the District to discuss about the Student in that "up until the August 28<sup>th</sup> meeting, the only different behavior was a little bit of ----- in the nurse's room, all through kindergarten last year, there was nothing -----like that was observed at school that was reported to me."<sup>51</sup> The committee decided however, to conduct an -----evaluation.<sup>52</sup>

12. On September 2, 2008 the District received advice regarding the inclusion of the Student's health care plan in his IEP from the District's attorney stating that "unless the plan is a 'related service' under special education, it does not need to be included." The LEA Supervisor testified that she notified the Parents of this information on September 4, 2008.<sup>53</sup>

13. Although the document submitted as evidence which was presented to the IEP committee that met on August 28, 2008, prior to the Student entering the first grade, is difficult to read in that it contains markings by several different individuals, the record itself and the testimony by the school's Principal indicate that the discussion by the committee resulted in all of the Parents' concerns being contained in either a possible Section 504 Plan or the Student's Individual Health

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<sup>50</sup> Ibid, Page 56 and Transcript, Page 182

<sup>51</sup> Transcript, Page 203.

<sup>52</sup> Exhibit Binder, Page 59.

<sup>53</sup> Ibid, Page 57 and Transcript, Page 190

Care Plan. As was his opinion concerning the Student's need for a 504 Plan for his kindergarten year, the school Principal testified that in his personal opinion a 504 Plan was not needed for his first grade either because "he is doing well in his academics....performs well, at grade level, if not above."<sup>54</sup> He also testified that a 504 Plan was never developed as discussed at the August 28, 2008 meeting because the Student's mother told the committee "no 504 would be allowed" even though the Student's IEP continued to state that his medical needs were being met through a 504 plan.<sup>55</sup>

14. The Parents sought for the designation of Other Health Impaired (OHI) to be the designated disability for which the Student would receive special education services, with his medical problems and ----- to be included along with his ----- disorder.<sup>56</sup>

15. At the August 28, 2008 IEP meeting the committee decided, with parental consent, to conduct a complete -----  
----- evaluations.<sup>57</sup> This too was insisted on by the Parents according to not only the testimony of the Student's mother, but a friend that accompanied her to the meeting.<sup>58</sup>

16. Documents from the Student's primary care physician were received in October 2008 providing the diagnosis of -----with recommendations for treatment in the school environment. Unfortunately, it was an exact duplicate of a letter submitted to the District in August 2007 as a means of developing the Student's Individual Health Care Plan. From all appearances only

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<sup>54</sup> Transcript, Page 611

<sup>55</sup> Ibid, Page 643

<sup>56</sup> Exhibit Binder, Page 64 and Transcript, Page 79 and 175,

<sup>57</sup> Exhibit Binder, Page 58-59

<sup>58</sup> Transcript, Page 1416



the date of the letter was altered, given that it has a different font from the rest of the document.<sup>59</sup>

17. On October 10, 2008, thirteen calendar days following the August 28, 2008 IEP meeting the District's Psychological Examiner completed a----- evaluation which included the results of the Student's ----- screening conducted on October 8, 2008; a curriculum/classroom based assessment conducted by the classroom teacher; as well as the ----- -----tests administered by the psychological examiner.<sup>60</sup>

18. On October 31, 2008, the Parents had the Student evaluated by an independent psychological examiner, employed at the Child & Youth Development Center. The report included an addendum completed on November 21, 2008.<sup>61</sup>

19. Prior to the completion of the Parents independent evaluation the District sent a notice of an IEP meeting scheduled for October 27, 2008; however, at the Parents' request it was postponed and held on November 11, 2008.<sup>62</sup> The District notified the Parents that the comprehensive evaluation had been completed and the results were ready to be reviewed.

20. Between the two meetings the Student had exhibited behaviors within the school environment not previously noted by District personnel. The LEA Supervisor testified that "the behaviors that had occurred during that time....there was more concern [at the IEP meeting] with the bizarre behavior than the actual health impairment....because the behaviors that occurred during that time were so different than what we had seen before...we were trying to figure out exactly what was causing the problem, because there were behaviors observed on – not many occasions during that

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<sup>59</sup> Exhibit Binder, Page 205-206 and 213-214

<sup>60</sup> Exhibit Binder, Page 132-141

<sup>61</sup> Exhibit Binder, Page 119-131

<sup>62</sup> Exhibit Binder, Page 50-55

time, but a few occasions during that time that were different than anything that we had ever seen at school.<sup>63</sup> The IEP Coordinator for the District testified that the unusual behaviors observed during this time frame were not observed as unusual events during his kindergarten year.<sup>64</sup> The School Nurse who is in charge of developing and implementing the Student's IHP testified that in his kindergarten year the only unusual behaviors she observed, as noted above, was described as "-----  
-----".<sup>65</sup> In his current year she noted that she has not observed the same behavior as much as last year. However, in the current year she noted that the Student had an incident where he believed that-----.  
Another event of unusual behavior occurred following an outdoor activity during the school's fall festival where the Student was observed----- The Student believed that the -----and he began to-----, with the Nurse reporting that he stated he could feel----- . She also reported that there are days when he----- . When asked if she had observed or heard of these types of behaviors occurring with----- children she replied that she had not; however, such was discussed with her by the Student's mother.<sup>66</sup> When asked about her observing other behaviors often associated with----- such as a need for rigid compliance with scheduled events or activities, she testified that she had not observed those in the school environment. She did testify that the Student is consistently aware of time for activities such as his -----that

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<sup>63</sup> Transcript, Page 61, 79, 200-202, and 258.

<sup>64</sup> Ibid, Page 465-466 and 553-554

<sup>65</sup> Ibid, Page 1108

<sup>66</sup> Ibid, Page 1108-1120.

she provides.<sup>67</sup> When asked if he worried about getting through his -----she replied “yes..at 1:20, if we are not done, he wants to go to activity.”<sup>68</sup> The school’s Counselor saw him on two separate occasions in September/October 2008 at the request of his classroom teacher; however, she testified that she was not able to get a lot out of him to understand why he was not displaying the -----that he had in kindergarten. On her planned third session she was told by his classroom teacher that he was having a really good day and a few days later was told the same thing, that he was having a good week. She followed up later with the classroom teacher and was informed that he was doing great.<sup>69</sup>

21. His classroom teacher testified that she did not observe any -----behaviors since the beginning of the current school year as was described and discussed with the Student’s mother.<sup>70</sup> The classroom teacher described his behavior in kindergarten the previous school year as “just as normal as everyone else” and that “he went with the flow” except that occasionally “he-----  
----- The only unusual behavior she reported having seen in his current school year was ----- All other unusual behaviors such as being ---- and needing to ----- she related to his medical condition, and possibly the event noted above as well where he believed----- His physical education teacher testified that she did not notice any socially different behaviors usually found in

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<sup>67</sup> Ibid, Page 1124

<sup>68</sup> Ibid

<sup>69</sup> Ibid, Page 1214-1217.

<sup>70</sup> Ibid, Page 959

----- children.<sup>71</sup> The Student's art teacher testified that she was not aware the Student had a disability and stated that in her class he maintained eye contact with her when spoken to and interacted with other students.<sup>72</sup> The Student's music teacher testified that in her class "he is cooperative, and he participates, answers questions, he, you know, sings along, he is a good student."<sup>73</sup> The school's media specialist who reads to the students, testified that the Student "sits and listens, he participates...he sings if we sing a song, he checks out a book, he does stations, we do station work, like computer time or anything like that...he does everything everyone else does in the library" and that his interaction with other students was "normal as far as I can tell."<sup>74</sup>

22. Prior to the November 11, 2008 IEP meeting the Parents had obtained a -----  
- evaluation by an independent psychological examiner. His report, as noted above, was made available to the rest of the IEP team on the date of the meeting. The examiner who conducted the evaluation was not in attendance at the meeting, but testified in the hearing. His final conclusion was that the Student exhibited a moderate to severe ----- disorder.<sup>75</sup> His test environment observations were that the Student "was cooperative...affect was restricted....at times -----...eye contact was fairly good...engaged in spontaneous conversation...was reluctant to give a wrong answer and had to be encouraged to guess...[and] some -----was observed."<sup>76</sup> He reported that the Student's intellectual screening indicated average intelligence and that his academic

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<sup>71</sup> Ibid, Page 1316

<sup>72</sup> Ibid, Page 1365-1367

<sup>73</sup> Ibid, Page 1377

<sup>74</sup> Ibid, Page 1397-1398

<sup>75</sup> Exhibit Binder, Page 126

<sup>76</sup> Ibid

screening indicated average basic reading and math skills. He noted that the Student's spelling skills were above average for a child his age and that the screening of his visual-motor integration skills were average. His report indicated and he testified that the Student's history and the adaptive behavior rating inventory was provided by the Student's mother and not from any other source. He did however, reported and testified, that he sent a behavior rating and questionnaire to his classroom teacher by way of the Student's mother. He received the completed rating scale on November 17, 2008, and prepared an addendum to his report on November 21, 2008.<sup>77</sup> His addendum to the evaluation is consistent with the testimony presented by school personnel in that he noted the classroom teacher reported that his attendance was good, that he does not present with any difficulty in the classroom, that his grades are A's and B's, that he is working above his capacity and that he has no difficulty with concentration. The behavior rating scale completed by the classroom teacher was noted in his report to indicate that his scores were within normal limits. These observations and ratings are inconsistent with those reported by the Student's mother on whom the evaluator depended for completing his evaluation. The examiner testified that he did not observe the Student in a setting outside the evaluation room. He testified that it was not unusual to have different symptoms at home versus school or a difference in observations of symptoms of -----<sup>78</sup> He also agreed on cross examination, as well as in his report, that in order to provide a program of educational services for the Student it would be necessary to have input from teachers about how he exhibits himself in the classroom as well as through observations by the District's behaviorist.<sup>79</sup> He also noted in his report that the problem behavior rating form completed by the Student's mother was significant for

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<sup>77</sup> Ibid, Page 130

<sup>78</sup> Transcript, Page 1520 and 1551

<sup>79</sup> Ibid and Exhibit Binder, Page 127

-----, but that these are not unusual behaviors for ----- children. At the same time he recommended a----- consultation to consider -----to address the Student's ----- He also found that the Student's language skills, which are often delayed for children with autism, to be one of the Student's strengths.<sup>80</sup> When asked by the Hearing Officer about his observations of the----- behaviors described to him by the Student's mother, and in direct examination he responded that he did not observe them during the evaluation session.<sup>81</sup>

23. The Student's IEP team met on November 11, 2008 with the Parents being present and participating. The District's psychological examiner was present to explain the evaluation results obtained by the District; however, no one was available to present the results of the Parents' independent evaluation other than the Parent and it was not complete without the addendum completed on November 21, 2008.<sup>82</sup>

24. The District's evaluation results concluded that up until October 3, 2008 the Student displayed satisfactory progress and behavior in the classroom, but after that date his performance and behavior took a drastic change. With regard to intelligence testing he fell into the average range. He achieved a standard score in listening comprehension of -----; a standard score in articulation of -----; and a phonological assessment standard score of 69. His score on an----- screener fell within the non----- range. His classroom performance until the week of October 5, 2008, was on grade level, but there was a dramatic difference that week; however, since that time he had "normalized"

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<sup>80</sup> Transcript, Page 1524

<sup>81</sup> Transcript, Page 1574

<sup>82</sup> Exhibit Binder, Page 47 and 48

somewhat. No significant deviations of target behaviors were noted between those of the Student and his peers. He obtained a word reading standard score of ---; a reading comprehension standard score of --; a pseudo-word decoding standard score of ---; a numerical operations standard score of ---; a math reasoning standard score of ---; a spelling standard score of ---; a written expression standard score of --; a listening comprehension standard score of -----; and an average to above average score on all achievement indices. These scores were considered consistent with the findings obtained by the independent evaluator.<sup>83</sup>

25. The November 11, 2008 committee recommended that a behavioral consultant provide additional data from classroom observations to address the behavioral concerns contained in the Parents' independent evaluation as well as those presented to the committee by the Student's mother. Although parental consent to seek the input of a behavior consultant was not necessary, the District asked the Parents to give such a consent; however, the Student's mother stated she needed to discuss it with her husband first. Their consent was subsequently provided. The committee further agreed to conduct another IEP meeting on December 4, 2008 to discuss the results of the independent autism evaluation.<sup>84</sup>

26. Permission was given by the Parents on November 13, 2008 for the District to have a behavior consultant to come to the school to assist in conducting observations and to possibly make programming recommendations for the Student.<sup>85</sup>

27. The Parents reported to the psychological examiner that from their experiences and observations in the home environment that the only form of play in the Student's first two years of

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<sup>83</sup> Exhibit Binder, Page 122

<sup>84</sup> Ibid

<sup>85</sup> Ibid, Page 42

life “was to-----” and when in day care “did not seem to notice other children” and that “he enjoyed -----  
-----on end [and] would ignore anyone speaking to him,” and that “-----  
-----” and that “various professionals felt that his -----  
-----” and that he was not-----” and that “he did not -----  
-----” and that “he had difficulty with-----.” They also reported to the psychological examiner that “he became -----  
-----which he would-----  
-----and that “he did not-----They also reported to the psychological examiner that the Student’s “-----[had] continued and he [had] added -----” and that he “had difficulty-----  
.” Even though the observation and testimony of the Student’s teachers was not the same, the Parents reported to the psychological examiner that “if his teacher was absent this resulted in several days of not talking followed by months-----  
-----” and that in the school “he had several episodes of -----and that he began “-----  
----- The psychological examiner’s report is quite similar in content to a seven page document the Student’s mother developed and testified that they prepared specifically for the due process hearing, where they outlined all of the problems that they believed the Student had experienced in the school environment.<sup>86</sup> Again, as noted above the majority of the problems they testified that they believed to be accurate were inconsistent with the testimony and documents produced by the District personnel.

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<sup>86</sup> Exhibit Binder, Page 356-362



28. The Student's IEP committee met again on December 4, 2008 following the District's opportunity to review the findings and recommendations of the psychological examiner's report. They determined to follow the suggestions of the report and conduct both an ----- and a ----- after the Parent's obtained prescriptions to do so from the Student's primary care physician. They further decided that in order to meet education eligibility for an autism diagnosis they needed a physician's statement to rule out other causes for the behavioral characteristics being attributed to ----- . The decision was also made to ask the Parents for permission to release the ----- evaluation to the behavior consultant who had been contacted to make the recommended school observations.<sup>87</sup>

29. District personnel testified that they did not receive the prescriptions to conduct the ----- evaluations until February 11, 2009, even though they are dated December 5, 2008 and the Parents testified that they were hand-delivered to the District on December 8, 2008.<sup>88</sup>

30. Also dated December 5, 2008 are documents entered as evidence from the office of the Student's physician relating to excused absences; a letter signed by the physician regarding his treatment and his concurrence with the psychological examiner's diagnosis of ----- and a letter from the psychological examiner discussing his recommendation for possible medication therapy for the Student.<sup>89</sup> These documents were also testified to by the Parents to have been delivered on December 8, 2008; however, the documents received into evidence reflect they were received by

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<sup>87</sup> Ibid, Page 33-34

<sup>88</sup> Exhibit Binder, Page 29 and 365; Transcript, Page 1593

<sup>89</sup> Ibid, Page 241-246; 28; and 27 respectively.

certified mail by the District on February 9, 2009.<sup>90</sup> A prescription pad note from the psychiatrist where the psychological examiner worked and with whom he consulted regarding the test results of the Student, along with a note from the psychological examiner regarding an appointment, is dated December 12, 2008.<sup>91</sup>

31. A ----- evaluation was conducted on February 18, 2009, that determined that the Student had “a lot of good gross motor skills...[and that he] does not demonstrate a gross motor delay.” The only thing she noted out of the ordinary was a question of the Student’s endurance issues and cough.<sup>92</sup>

32. An -----evaluation was conducted between February 13, 2009, and February 23, 2009, that determined that the Student’s “scores on the VMI, BOMP, and Peabody are all above the criteria to qualify for skilled -----at this time.”<sup>93</sup>

33. The District completed a consultation with an autism behavior consultant to provide observations and suggestions for the District on November 18, 2008.<sup>94</sup> The concerns expressed in the referral were:

“[The Student] is diagnosed with -----and----- . He has a health care plan and an IEP to address speech goals. He has been recently diagnosed with ----- from Child Youth and Development Center. [He] has difficulty when -----.

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<sup>90</sup> Ibid, Page 27-30

<sup>91</sup> Ibid, Page 239-240

<sup>92</sup> Ibid, Page 117

<sup>93</sup> Ibid, Page 115

<sup>94</sup> Ibid, Page 40

He becomes -----

-----

----- Recently he had a----- episode involving-----.

He was taken to the nurse’s office where he-----, [the

nurse] confirmed the -----

-----.

“His mother reports frequent -----

are observed by the school nurse on a regular basis if his-----

Some ----- are observed in the classroom. His behavior has

become more normalized in the classroom.

“[His] mother has difficulty getting him to school on time. He has a concept of time;

however, he does not see the need to be on time. Pushing him tends to lead to -----

----- He will-----.

Recently at school he refused to -----

----- Staff reported a look of -----

-----.

“Long story short: [He] is in need of some recommendations to help with transitions

and prepare him for-----

34. The consultant testified that she was prepared to address the Student’s issues and provide an observation along with recommendations after the first of the new year. She also suggested that in her opinion it would be good for the Student to be screened for his ----- and -----,

“because mental health supercedes behavior, that needs to be done first.”<sup>95</sup>

35. According to emails between the consultant and the District’s IEP coordinator the scheduled visit to observe the Student was set for February 16, 2009, with all requested assessments having been completed and ready for her assessment.<sup>96</sup>

36. On February 9, 2009 the Parents submitted a letter to the IEP coordinator requesting that an IEP meeting be scheduled for the “purpose of developing an IEP for [the Student] which would address both his medical condition and his -----in addition to his needs already outlined on his current IEP.” Further requesting that she “please inform [them] of meeting dates and times at least 14 days in advance in writing.” The letter additionally stated that they were withdrawing their permission for all further testing of the Student including the scheduled behavior consultant’s observation, with the exception of the -----evaluations.<sup>97</sup>

37. On February 18, 2009 the IEP coordinator testified and noted for the record a phone contact was made with the Parents to confirm an IEP meeting set for February 20, 2009.<sup>98</sup>

38. On February 19, 2009 the Parents submitted another letter to the District notifying them that they were withdrawing their request for an IEP meeting and that they were filing a request for a due process hearing.<sup>99</sup>

## **Conclusions of Law and Discussion**

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide

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<sup>95</sup> Ibid, Page 39

<sup>96</sup> Ibid, Page 39F

<sup>97</sup> Ibid, Page 26

<sup>98</sup> Ibid, Page 31 and 23.

<sup>99</sup> Ibid, Page 21

a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21.<sup>100</sup> The IDEA establishes that the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services.<sup>101</sup>

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities in its regulations at Section 5.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008.

In 1982, the Supreme Court was asked and in so doing provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education." The Supreme Court noted that the following twofold analysis must be made by a court or hearing officer:

- (1). Whether the State (or local educational agency) has complied with the procedures set forth in the Act (IDEA)? and
- (2). Whether the individualized educational program developed through the Act's procedures is reasonably calculated to enable the student to receive educational benefits?<sup>102</sup>

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<sup>100</sup> 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

<sup>101</sup> 20 U.S.C. § 1401(3)(A)

<sup>102</sup> *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

The courts consistently agree that FAPE must be based on the child's unique needs and not on the child's disability.<sup>103</sup> Thus the charge to education professionals is to concentrate on the unique needs of the child rather than a specific disability. It is necessary, therefore to look at the facts in this case as to whether or not the District concentrated on the unique needs of the Student and not specifically at his disabilities as identified by his Parents, his physicians, or other healthcare professionals. The testimony elicited in the course of the hearing in general would indicate that the District personnel, including the teaching staff and others, contrary to the belief of the Parents, had a good handle on the specific and unique educational needs of the Student in addition to being aware of his medical issues. The differences in the beliefs of these two parties may be attributed to by the fact that the District's personnel did not have the same developmental history as the Parents and that the Parents have only a limited exposure to the Student's behavior in the school environment. The Parents had experienced a different history of some of the maladaptive behaviors exhibited by the Student which makes it difficult to reconcile their perceived educational and social needs for the Student from those of the District.

In more specifically defining what is meant by FAPE the Supreme Court, in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, held that an educational agency has provided FAPE when it has provided personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. The Court noted that instruction and services are considered "adequate" if:

- (1). They are provided at public expense and under public supervision and without charge;
- (2). They meet the State's educational standards;

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<sup>103</sup> 34 C.F.R. § 300.300(a)(3)

- (3). They approximate the grade levels used in the State's regular education; and
- (4). They comport with the student's IEP.<sup>104</sup>

The definition of children covered under IDEA is doubly circular. A child with disabilities must be so disabled as to require special education and related services. Special education and related service as noted above are those that meet **the unique needs of a child** with disabilities. Moreover, related services are those that **assist a child to benefit from special education**, which can only be received by a child with disabilities.<sup>105</sup>

The issue addressed in the instant case has been presented by the Parents as being such an egregious violation of the Act by the District that they have denied the Student with FAPE. As noted above FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, **which meet the standards set forth by the Department**. Consequently, a hearing officer must look at the issue to determine whether or not a district has been compliant with that definition and whether or not any single violation or the accumulation of violations are severe enough to constitute a denial of FAPE. The educational document that must contain how a district will be in compliance with those standards and the document that defines what specifically designed instructions are to be implemented to meet the unique needs of a student is the Individual Education Plan (IEP). The Supreme Court as noted in the Rowley case opined that an IEP must be considered appropriate if it is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>106</sup> In an administrative due process

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<sup>104</sup> *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

<sup>105</sup> 20 U.S.C. § 1400©

<sup>106</sup> *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

hearing, the petitioner has the burden of proving the essential elements of its claim.<sup>107</sup> The Parents in the instant case bore such burden.

**School Year 2007-2008:**

The first issue of compliance for the District was whether or not they met the Department's standards with regard to providing FAPE for the Student's kindergarten year? He did not enter the District under an IEP, but rather he was receiving pre-school services under an Individualized Program Plan (IPP) developed by Kids First, a day program under the direction of the University of Arkansas for Medical Science and not a program administered by the District. The Department has provided districts with transition guidelines to allow for comprehensive and uninterrupted services.<sup>108</sup> Those guidelines stipulate that the time frame for beginning the transition process is between January and February of the same year a student is to begin a district's kindergarten program. However, as noted in the facts above the Student was not officially a resident for educational purposes of the District until August 2007. Since the District's personnel were acquainted with the Parents prior to this time, could they have made plans for the transition, the answer is of course "yes." At the same time, did their waiting until the Student was officially a responsibility of the District to have a transition conference deny the Student FAPE, the answer is "no."

Consistent with the Department's guidelines for a new special education student entering the District, a temporary IEP was implemented and contained a continuation of ----- services that had been previously provided at the Student's pre-school program under his IPP. The IEP committee met again within the stipulated time frame established by the Department and rendered the Student a

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<sup>107</sup> *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed 2d 387]

<sup>108</sup> Section 9, Special Education Eligibility Criteria and Program Guidelines for Children with Disabilities, Ages 3-21, Arkansas Department of Education, 2000.



permanent IEP with essentially the same services. According to the evidence the Student was able to advance into the first grade with satisfactory academic achievement. Even though the IEP may not have been the gold standard desired by the Parents it can not be concluded that it was not reasonably calculated to enable the Student to achieve passing marks and advance to the next grade.

Was the District's decision to implement a separate Individual Health Care Plan and not include it as a part of the Student's IEP deny the Student FAPE? Even though such a decision not to do so was inconsistent with the District's own policy it was not necessarily in the instant case a violation of the IDEA. The Rowley case, as noted above, addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. In that case the Court determined that a student's IEP be reasonably calculated to provide him or her with **some** educational benefit; however, the Court also stated that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities.<sup>109</sup> The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and **related services** which are individually designed to provide educational benefit to the student.<sup>110</sup> The evidence presented in this case adequately demonstrated that the Student was provided with a basic floor of opportunity with the temporary and permanent IEP for his kindergarten year with------. The fact that he also was receiving services under an Individualized Health Care Plan did not in and of itself deny him with that basic floor of opportunity.

The Supreme Court in the Rowley case recognized the importance of adherence to the

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<sup>109</sup> *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.C. 3034 (1982), at 198 - 200.

<sup>110</sup> *Ibid* at 201.

procedural requirements of the IDEA.<sup>111</sup> The analysis of whether a student has been provided a FAPE, as noted above, is twofold. In the instant case it must be decided as to whether the procedural safeguards of the IDEA have been satisfied and whether the FAPE offered was substantively appropriate. According to the evidence presented and the testimony given the Student had need only for ----- services outside the educational services of the regular kindergarten classroom. Other than the Parents' expressed concerns about "-----" at the transition conference, of which there is no record, the District had no evidence available to them at the time to suspect that such behaviors, if they existed, would have an adverse impact on the Student's educational progress. The only additional information and evaluations provided party prior to the development of the Student's permanent IEP for his kindergarten year involved adding the diagnostic label of ----- . Although this finding is contrary to the Parents' beliefs and wishes, the evidence presented regarding his educational needs for his kindergarten year were consistent with the IEP as developed. Therefore, there was not a denial of FAPE by the District for failure to identify all of the student's disabilities that adversely affect his education or by not developing and implementing an appropriate Individualized Education Plan (IEP) for school year 2007-08.

**School Year 2008-2009:**

As required by regulation the District's annual review held in the spring of 2008 to consider his kindergarten progress and any special education needs for his first grade year was conducted with parental participation. As in the previous meeting to establish his permanent IEP the record does not reflect any evidence presented by documents or District personnel that the Student had any other

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<sup>111</sup> Ibid at 205

special education services needed other than----- . His medical needs were discussed and documented as being covered under a Section 504 plan which was never developed by the District. Contrary to the testimony by the Parents no evidence was provided to show that the Student exhibited ----- behavior within the classroom or school environment which had an adverse impact on his educational progress. Without parental objections being noted on the record the Student's IEP committee recommended a continuation of his -----services; for him to attend a regular first grade class; and given the Student's progress and lack of regression, decided that he was not in need of extended school year services.

It was at the IEP meeting at the beginning of his first grade where the District was faced with the challenge of responding to the extensive health care concerns of the Parents as well as to their request that the Student be further evaluated for ----- and that he be considered as other health impaired for special education services.

**Other Health Impaired:**

The regulations implementing the IDEA and the Department defines other health impaired (OHI) to mean having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia. The definition, however, also stipulates that the health problem must adversely affect a child's educational performance.<sup>112</sup> The regulations continue by stating that this list of medical problems is not exhaustive; however, whatever the medical issues may

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<sup>112</sup> 34 C.F.R. § 300.7(c)(9) and Part II, Section G, Special Education Eligibility Criteria and Program Guidelines for Children with Disabilities, Ages 3-21, Arkansas Department of Education, 2000.

be they have to have an adverse affect on the child's developmental/educational performance before the child can be identified as OHI. The Department has provided districts with both that which is required as well as that which is recommended for screening and evaluation purposes in order to correctly identify a child as OHI.<sup>113</sup> A physician's diagnosis serves only as the basis for such a classification and is not in and of itself permitted to be the determining factor for the classification. The only change in the Student's health concerns as noted by duplicate documents from the Student's primary care physician as well as the prescriptions for care was the date on which they were signed. Given that the Student's developmental/educational progress had not been negatively impacted by his medical problems in his kindergarten year, the District would have no reason to believe that they would be in his first grade.

Was the District's decision to continue to meet the challenges of the Student's health problems by developing and implementing an Individual Health Care Plan and not including it as a part of the Student's IEP a denial of FAPE, even when such a decision was inconsistent with the District's own policy? Again, as with his kindergarten year the evidence presented by the Parents and the testimony given by the school personnel did not show that as of August 2008 his health problems presented an adverse affect on his educational progress, thus it can not be considered a denial of FAPE as defined by the IDEA or the opinion handed down by the Supreme Court simply because the District failed to follow their own procedural policy.

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A school district must provide a full and individual evaluation before declaring a child as eligible for special education services and before developing an IEP to address the special education

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<sup>113</sup> Part II, Section G, Special Education Eligibility Criteria and Program Guidelines for Children with Disabilities, Ages 3-21, Arkansas Department of Education, 2000.

needs of that child.<sup>114</sup> A school district is required to assess a child in all areas of suspected disability, including language function, general intelligence, academic performance, communicative status, and social and emotional status.<sup>115</sup> A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services and the content of the IEP.<sup>116</sup>

Given the Parents' multiple health concerns as well as their concerns about the Student's possible -----, the records presented as evidence reflect that the District asked for parental consent to conduct an -----evaluation. The Department has provided districts with guidelines as to what must be completed when a child is suspected of having ----- . They include a social history along with an assessment of the child's cognitive/intellectual abilities; communicative abilities; social/emotional behavior; observation covering personal-social behaviors, toy play, conversational speech, emotional expression, amount of time spent in idiosyncratic repetitive behaviors and eating behaviors in a variety of settings including the child's home environment, classroom and play situations. Along with these assessments a medical examination; an assessment of the child's self-help skills; and an assessment of the child's educational programming with functional curriculum-based measures must be completed.<sup>117</sup> In the instant case and prior to scheduling the evaluation conference the District obtained the required----- evaluation and a social history which was provided by the Parents; however, no observational information was available at the time the conference was scheduled to be held. Nor was there a medical examination

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<sup>114</sup> 20 U.S.C. 1414(a)(1) and 34 C.F.R. 300.301(a)

<sup>115</sup> Ibid, at 1414(b)(3)(B) and 34 C.F.R. 300.304(c)(4)

<sup>116</sup> Ibid, at 1414(b)(2)(A) and 34 C.F.R. 300.304(b)(1)

<sup>117</sup> Ibid, Section A.

report available to rule in or out, the possibility that the Student's behavior was or was not medically related to another disorder. The Department's regulations establishing the time frame within which an evaluation must be completed is consistent with the IDEA regulations. Both regulations stipulate that the evaluation of a child must be conducted within sixty (60) calendar days of receiving parental consent for the evaluation. An exception to this required time frame would be only if the District was making sufficient progress to ensure a prompt completion of the evaluation, and the Parents and the District agreed to a specific time when the evaluation would be completed. Another exception to the time frame would be if the Parents repeatedly failed or refused to produce the Student for the evaluation.<sup>118</sup> Neither of the two later exemptions were in play at the time the District scheduled the evaluation conference to be held on October 27, 2008, the final day of the sixty day time frame. The Parents were notified only seven days prior to the scheduled meeting. They were not notified early enough in advance to make the scheduled meeting time and requested that it be rescheduled on November 4, 2008; however, the District had a conflict for that date and both parties agreed for the conference to be held on November 11, 2008, seventy-five (75) days after the parental consent was given for the evaluation. It would also appear that not only was the District not completely prepared for the evaluation conference to be held on October 27, 2008, but also, neither were the Parents ready in that they contracted for an independent ----- evaluation which was conducted on October 31, 2008. Unfortunately, neither the District's evaluation information nor the Parents' evaluation met all of the required assessment information required for the determination of ----- as a possible criteria for eligibility for special education services. Neither contained observations covering the Student's personal-social behaviors, toy play, conversational speech, emotional

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<sup>118</sup> Section 6.03, Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008 and 34 C.F.R. 300.8.

expression, amount of time he might have spent in idiosyncratic repetitive behaviors and eating behaviors in a variety of settings including the classroom and play situations. Only the home environment was considered by the examiner who prepared the independent evaluation for the Parents. Unfortunately he had only the Parents' report for what did or did not take place in the school and play environments. Neither the District's nor the Parents' evaluation data was shared with each other prior to the evaluation conference held on November 11, 2008.

The question for this Hearing Officer is whether or not the District denied the Student FAPE for having not complied with the requirements for completing a timely and complete evaluation, and whether or not a fifteen day delay in establishing an evaluation conference to consider the incomplete evaluation process is a proper ruling. The Supreme Court supported Congress' emphasis on the importance of procedural compliance; however the accusation that a student has been denied FAPE has not been supported by the courts when the alleged violation has been based solely on procedural violations.<sup>119</sup>

In the instant case, although neither of the exemptions for a justified delay as noted above were present, there existed the display of unusual behaviors in the school environment during this time on the part of the Student which necessitated a challenge to be addressed by both the District and Parents. Until these events took place none of the District's personnel believed that the Student had any ----- behaviors which might have an adverse affect on his developmental/educational progress.

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<sup>119</sup> *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982). See also *Evans v. District No. 17 of Douglas County*, 841 F.2d 824 (8th Cir.1988). (See also *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8<sup>th</sup> Cir. 1996). More recently see: *Hiller v. Board of Education*, (16 IDELR 1246) (N.D. N.Y. 1990); *Bangor School Department* (36 IDELR 192) (SEA ME 2002); *Jefferson Country Board of Education*, (28 IDELR 951) (SEA AL 1998); *Adam J. v. Keller Independent School District*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003); *School Board of Collier County v. K.C.*, 285 F. 3d 977 (11<sup>th</sup> Cir. 2002), 36 IDELR 122, *aff'g* 34 IDELR 89 (M.D. Fla. 2001); *Costello v. Mitchell Public School District 79*, 35 IDELR 159 (8th Cir. 2001); and *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1484 (9th Cir. 1992) .

Even the Parents' examiner questioned as to whether or not the unusual behaviors which occurred between the referral conference and the evaluation conference were related to -----, health problems, medication reactions, or ----- . Without seeking answers to the presenting problems and possibly coming up with an inappropriate educational criteria or an inappropriate education plan for the Student, the District made the correct decision to seek input from a specialist in the area of ----- and behavior. Unfortunately, the Parents' revoked their consent for the completion of the assessment due to their frustration and the fact that they believed enough time had passed and enough information was already available for the District to complete an IEP which would address the Student's health care needs as well as the ----- as diagnosed under the DSM-IV by their examiner.

The Office of Special Education has responded to numerous inquiries regarding the use of the DSM-IV as a means of addressing eligibility for services under IDEA. Their response has been consistent in that a diagnosis under DSM-IV, as provided in this case by the Parents' evaluator, does not guarantee eligibility under the IDEA.<sup>120</sup> Although procedural safeguards are central to the IDEA, "[a]n IEP should be set aside only if 'procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.'<sup>121</sup> In the instant case the Parents have not convincingly shown through testimony or evidence that the Student's IEP developed on his entry into the first grade (school year 2008-09) was inappropriate. Nor have they proven that even though it did not contain the Student's IHP, that such a violation of the District's own policy denied the Student of

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<sup>120</sup> *Letter to Coe*, Office of Special Education Programs, 32 IDELR 204, September 13, 1999

<sup>121</sup> *Independent Sch. Distr. No. 283 v. S.D.*, 88 F.3d 556, 562 (8<sup>th</sup> Cir. 1996) (citing *Roland M. V. Concord Sch. Comm.*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990))



FAPE. Further, given the delay and the circumstances under which the District was being asked to consider additional assessments for the purpose of the possible adverse affect of ----- on the Student's educational progress do not in an of themselves constitute a denial of FAPE. Granted the District extended the time frame under which the evaluation process should have been completed, but not without parental consent; and granted the Student did display some unusual behaviors within that same time frame; and granted the Parents' evaluator concluded that the Student did qualify for a DSM-IV diagnosis of ----- however, the District's ability and opportunity to consider additional information was hampered by the Parents in their revoking of their consent to conduct further assessments in their desire to have the Student's IEP completed in the manner in which they felt it already justified.

The burden of proof in order for the Hearing Officer to respond to the question as to whether or not the District failed to provide the Student with FAPE for school year 2008-2009 has been that of the Parents. Given all of the evidence and testimony it is without doubt that the Parents experienced extensive consternation in dealing with the inaccurate information provided them with regard to the existence of a Section 504 Plan for the Student; that they have a child with a rare and currently incurable health problem that they believe that school personnel demonstrated limited knowledge about; that they have been convinced and believe they have convincing evidence that the Student has and displays ----- type of behaviors not only in the home environment, but also the school environment; however, they have not presented sufficient testimony or evidence to show that these real and perceived problems have had or may have an adverse affect on the Student's educational progress. Therefore, the allegations they have brought to this due process hearing do not warrant a decision that the District has denied the Student with a free and appropriate education at public expense for school year 2008-09.

In both school year 2007-08 and 2008-09 the District has failed to include the Student's IHP in his IEP as required by their own District policies. Again, however, the Parents have not convincingly shown through either testimony or evidence that such a failure had or has resulted in an adverse affect on the Student's educational progress. Consequently, such a failure in and of itself cannot be considered egregious enough to warrant a denial of FAPE under the IDEA.

## **Order**

Even though no adverse affect on his educational progress has been proven by the Petitioner at this point in time, the evidence and testimony has indicated the possibility that the Student demonstrates the need for a consideration of -----as a possible eligibility criteria for special education. Therefore, by this order the District will complete the ----- assessment begun prior to the institution of the Petitioner's request for a due process hearing and will complete the assessment and conduct an evaluation conference to consider the results of that assessment on or before September 15, 2009.

The Parents' request for compensatory special education is hereby denied.

The Parents' request that the District be ordered to provide reimbursement for evaluations is hereby denied.

The Parents' request that the District provide special transportation services will be dependent upon the outcome of the evaluation conference as ordered above. Therefore, the Parents' request of this Hearing Officer to order the District to provide such services by way of this decision is denied.

## **Finality of Order and Right to Appeal**

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individuals with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

It is so ordered.

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Robert B. Doyle, Ph.D.  
Hearing Officer

June 23, 2009  
Date

