Arkansas Department of Education
Special Education Unit

IN RE:

[redacted]
as Parents in behalf of
[redacted] Student

PETITIONER

VS. NO. H-12-08

Clarksville School District (CSD)
and
Arkansas School for the Deaf (ASD)

RESPONDENTS

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

The Petitioner alleges that Respondent Clarksville School District denied the Student with a free and appropriate public education (FAPE) during school years 2009-2010; 2010-2011; and 2011-2012 by:

1. Changing the Student's educational placement without due process;
2. Failing to identify and to evaluate for all of the Student's disabilities;
3. Failing to provide the Student with appropriate programming and supports to allow the Student to remain in the least restrictive environment (LRE);
4. Failing to educate the Student in the LRE;
5. Failing to provide the Student with an appropriate individualized education plan (IEP) taking into consideration all of the Student's disabilities, and related behaviors, including, but not limited to failing to provide appropriate goals and objectives, an appropriate behavior intervention plan, social skills training, and related services necessary to address the Student's disabilities and prevent exclusions;
6. Circumventing the IDEA and its procedures by removing the decisions regarding the Student's educational placement and programming from the IEP team and instead placing those decisions with the Juvenile Court Judge;
7. Failing to provide a continuum of placements for the Student;

8. Failing to provide educational supports and services for the Student to benefit educationally;

9. Failing to implement the Student's IEP or provide the Student any educational services from September 22, 2011 to October 10, 2011;

10. Failing to provide the Student with extended school year services (ESY):

11. Punishing the Student for behaviors related to his disability and associated with the District's circumvention of the IDEA, which resulted in residential placement for which the ASD is not certified and/or qualified to provide;

12. Punishing the Student and depriving him of special education and related services for behaviors he exhibited in a "dorm type" setting and not for behaviors connected to the Student's behavior at school; and

13. Failing to follow due process procedures by:

a. Not providing the Parents with adequate notice of IEP conferences;

b. Not conducting an evaluation and holding an evaluation conference in a timely manner;

c. Failing to consider the need for re-evaluation for behaviors inconsistent with hearing impairment;

d. Not providing accurate and proper notice of IEP attendees at IEP meetings;

e. Disclosing confidential special education documentation and programming to the Johnson County Juvenile Judge;

e. Failing to conduct a manifestation determination review conference at ASD which resulted in the Student's unilateral change of educational placement back to the CSD; and

f. Failing to provide the Parents with periodic progress of the Student's academic achievement and goals and objectives on his IEP.

The Petitioner alleges that Respondent Arkansas School for the Deaf denied the Student with a free and appropriate public education (FAPE) during school year 2009-2010; 2010-2011; and 2011-2012 by:

1. Changing the Student's educational placement without due process;

2. Failing to identify and/or evaluate and/or program for all of the Student's disabilities;

3. Failing to provide appropriate programming and support services in order for the Student to remain in the least restrictive environment (LRE);

4. Failing to provide the Student with a continuum of educational placements;

5. Failing to educate the Student in the LRE;

6. Failing to provide an appropriate IEP taking into consideration the Student's disabilities, and related behaviors, including but not limited to providing appropriate goals and objectives, an appropriate behavior intervention plan, social skills training, and related services necessary to address all of the Student's disabilities and prevent exclusions;

7. Failing to evaluate the Student when he exhibited behaviors consistent with ADHD and learning disabilities;

8. Failing to provide any notice, due process, or other written information to the Parents concerning the ASD's unilateral change of placement due to a constructive "expulsion" of the Student from ASD following an incident which occurred on or around September 20, 2011;

9. Failing to conduct a manifestation determination review following a disciplinary incident which resulted in a unilateral change of educational placement;

10. Disclosing confidential special education documentation and information about the Student's educational evaluation, placement, and programming to the Juvenile Court Judge;

11. Punishing the Student for behaviors related to his disability and associated with CSD's circumvention of the IDEA, which resulted in a residential placement for which ASD is not certified and/or qualified to provide;

12. Failing to provide the Student with extended year services (ESY);

13. Punishing the Student and depriving him of special education and related services for behaviors he exhibited in a "dorm type" setting and not for behaviors connected to the Student's behavior at school; and

14. Failing to follow due process procedures by:

a. Not providing the Parents with adequate notice of IEP conferences;

b. Not conducting an evaluation and holding an evaluation conference in a timely manner;

c. Failing to consider the need for re-evaluation for behaviors inconsistent with hearing impairment;

d. Not providing accurate and proper notice of IEP attendees at IEP meetings;

e. Failing to conduct a manifestation determination review conference; and

f. Failing to provide the Parents with periodic progress of the Student's academic achievement on his goals and objectives.

Issues raised by the Petitioner in their initial request for a hearing that were ordered by the hearing officer as non-judicable under IDEA included allegations that the Respondents engaged in actions in violation of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Fourteenth Amendment of the U.S. Constitution. A decision to not bifurcate the hearing between the Petitioner and the District and then between the Petitioner and the ASD was made as a means of hopefully expediting the hearing process and being able to reach a decision within a reasonable time frame. Unfortunately this goal was not attained due to multiple unavoidable circumstances for members of the legal teams of all parties and the need for testimony from twenty-seven witnesses.

Procedural History:

On October 10, 2011, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from [redacted] hereinafter referred to as "Parents"), the parents and legal guardians of [redacted] (Petitioner) (hereinafter referred to as "Student"). The Parents requested the hearing because they believe that the Clarksville School District (hereinafter referred to as "District") and the Arkansas School for the Deaf (hereinafter referred to as "ASD") failed to comply with the Individuals with Disabilities Education Act of 2004 (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 by not providing the Student with appropriate special education services as noted above in the issues as stated.

The Department responded to the Petitioner's request by assigning the case to an impartial hearing officer and establishing the date of November 10, 2011, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting

preliminary timelines with instructions for compliance with the order, as well as the dismissal of the non-IDEA claims as noted above, was issued on October 11, 2011. On October 18, 2011, the Petitioner amended the due process complaint requesting an expedited hearing. An order setting timelines for the expedited hearing was issued on October 19, 2011, establishing the original date of the hearing of November 10, 2011, as the date on which the allegations of the expedited hearing would be addressed. However, on October 27, 2011, the Petitioner requested a dismissal of the expedited hearing, which was granted on the same date.

The District notified the hearing officer on November 3, 2011, that a resolution conference was conducted as ordered. The results of the conference according to the District's notification to the hearing officer on that date was that the remaining issues were the alleged denial of FAPE in the LRE for the two year period October 10, 2009 through October 10, 2011. The ASD also notified the hearing officer on November 3, 2011, stating that the unresolved issues were (1). Educational placement; (2). Placement in the LRE; (3) Occurrence of a manifestation determination review and separate programming conference following the Student's 3-day suspension from ASD on September 14, 2011; and (4). Provision of FAPE.

The hearing began as scheduled on November 10, 2011, and was continued on the record and by separate order from time to time for a total of twenty-three dates of hearing, with the final date being held on December 3, 2012. On the final day of the hearing the Petitioner presented a Motion in Limine requesting that the hearing officer refuse to allow the District to (1) introduce records that they had subpoenaed; (2) introduce testimony from an expert witness, and (3) to refuse extending the due process hearing past December 3, 2012, for the testimony (or a proffer) of an expert witness. The argument for the motion is contained in the hearing officer exhibits. The motion was denied on the record with an explanation that the responsibility of an IDEA hearing officer is to render a decision in the best interest of the Student based only on the evidence and testimony presented at the hearing and that as such, even though counsel for all parties are entitled to argument, it is the responsibility of the hearing officer to consider all available evidence and testimony.

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 for the Arkansas Department of Education, conducted a closed impartial hearing. The Parent was represented by Theresa L. Caldwell, attorney of Little Rock, Arkansas; the District was represented by Sharon Streett, Attorney of Little Rock, Arkansas; and the ASD was represented by Amanda Gibson, Assistant Attorney General for the State of Arkansas.

At the time the hearing was requested the Student was a twelve year-old, sixth grade, male, attending the ASD on order by Circuit Judge Ken D. Coker, Jr. in the Circuit Court of Johnson County, Arkansas, Third Division. Judge Coker ordered the Parents to enroll the Student in ASD on November 24, 2009, without consideration of the IDEA and due process procedures awarded a student who has been identified as a child with a disability as defined in 20 U.S.C. §1401(3). The Student's disabilities as noted in the record and acknowledged by all parties include hearing impairment with expressive and receptive language disorders and a mood disorder with disruptive behavior disorder.

Prior to the school years being challenged by the Petitioner, the Student was provided special education services in the District's Pyron Elementary School. He began his fourth grade school year 2009-2010 in the District, but as noted above was ordered by the Juvenile Court to attend the ASD. Enrollment there began in February 2010 and continued through his fifth grade school year 2010-2011, and his sixth grade school year 2011-2012 until the request for the due process hearing was submitted to the Department on October 10, 2011. He returned to complete his sixth grade school year in the District following the Petitioner's request for an expedited hearing and the results of a resolution conference held on October 21, 2011.

A pre-hearing document review was conducted with input from all three parties, at which time the specific unresolved issues that would be addressed in the hearing were decided, as well deciding on the witnesses and evidence which would be necessary to address the issues. At that time it was also decided that the burden of proof was to be born by the Petitioner. It was explained to all parties at the beginning and again at the conclusion of the hearing that the decision reached by the Hearing Officer would be based only on the testimony and evidence presented at the hearing. All parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements. Briefs were provided by all parties and are included as exhibits in

the Hearing Officer Binder of Orders and Pleadings.

Findings of Fact:

The District:

1. Did the District deny the Student FAPE by changing his educational placement without due process during the school years in question?

The Student's IEP to be followed for his fourth grade year (2009-10, the first school year in question) was developed on May 5, 2009.[1] The Student's mother attended the IEP meeting and received a copy of the IEP on May 6, 2009. He was scheduled to receive the majority of his education in a regular classroom with non-disabled peers and receive both speech and occupational therapies to address the educational problems he encountered as a result of a severe hearing impairment. The location of his classroom was discussed as being the alternative learning environment (ALE), which operated as a regular classroom, but with a smaller student to teacher ratio. The record does not indicate that the Parents objected to this location for services since his mother signed the parental consent for him to be assigned to the ALE.[2] The District contended that this location would not be a change in placement in that they consider the ALE a regular classroom.[3] Accommodations for him would include the presence of an American Sign Language (ASL) interpreter as well as hearing aids. Another special factor in terms of location of services included in the IEP was that he could not follow the District's regular discipline policies due to having had numerous discipline incidents. The Parent's binder of exhibits includes fifteen conduct referrals during the Student's third grade year prior to the development of the school year 2009-10 IEP and three more following that date.[4]

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[1] Parent Binder, Page 49-56

[2] District Binder, Page L31

[3] Transcript, Vol X, Page 88

[4] Parent Binder, Pages 709-726

A conduct referral prior to the development of the 2009-10 IEP on March 17,2009, led to a police report accusing the Student of having stolen a teacher's wedding band.[5] A conduct referral on April 10, 2009, indicated that the Student had brought a toy gun to school.[6] This event led to the conducting of a manifestation determination review in order to determine if the toy gun incident did or did not have a direct and substantial relationship between the Student's disability (hearing impairment) and the incident. The committee met on April 14, 2009, (again prior to the development of the 2009-10 IEP), and determined that there was no direct or substantial relationship to his hearing disability. At a separate programming conference conducted the same day the decision was made to suspend the Student from school for ten days.[7] The record cited does not indicate that either parent was present at the meeting. The Student's mother had no recall of either she or her husband attending the meeting, only that they were summoned to pick him and that he would be suspended for ten days.[8] According to the District the Student was provided with services while being suspended for those ten days.[9]

On April 13, 2009, the local Deputy Prosecuting Attorney filed a petition with the Juvenile Division in the Circuit Court of Johnson County asking that the Student be adjudicated as a member of a family in need of services (FINS).[10] Even though District personnel were asked by the Court to provide information after the petition was filed, they contend that they did not initiate the FINS petition.[11] However, in October 2007, the elementary school's assistant principal did request a FINS through the Department of Human Services, following an incident where the Student was found to have had bugs in his hearing aids and roaches crawling across his

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[5] Parent Binder, Pages 511-512

[6] Parent Binder, Page 723

[7] Parent Binder, Pages 177-180

[8] Transcript, Vol XVII, Page 55

[9] District Binder, Page F1

[10] Parent Binder, Pages 510

[11] Transcript, Vol X, Page 84

desk.[12] She also testified that she often asked the school's resource police officer for assistance in handling discipline issues, including those with the Student.[13]

The elementary assistant principal testified that she also assisted the Parents in "getting the ball rolling" to help them get the Student enrolled in the ASD in that same school year (2007-08).[14] A notice of conference decision dated November 11, 2007, indicated that "placement at ASD was discussed, as well as transportation, behavioral issues, academics" and that the "Parents decided to place [the Student] at ASD, beginning 11-26-07."[15] However, on November 30, 2007, another notice of conference decision indicated that the "Parents decided NOT to place [the Student] at ASD" and that "he will remain at [the District]."[16] The Student's mother testified that they considered sending the Student to the ASD, some one-hundred miles from home, at that time "because it was often brought to our attention that [he] was not paying attention to his interpreter, was not following the rules at school, just a number of things" and feeling "like that he just wasn't wanted there anymore."[17] They reportedly changed their minds after taking a tour of the ASD campus noting that "he would have to dorm there, and we just weren't willing to let somebody else basically raise our son."[18]

The record shows that it was the local police officer, assigned to the elementary school as the resource officer, whose report following the stolen wedding ring on March 17, 2009, which led to the initiation of the April 2009 FINS petition.[19] His report stated that "during the course of this school year, [the Student] has stolen a variety of items" and that he "also throws rocks at

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[12] District Binder, Page L1-7

[13] Transcript, Vol XIV, Page 100

[14] Ibid, Page 223

[15] Parent Binder, Page 187-189

[16] Parent Binder, Page 190-192

[17] Transcript, Vol XIV, Page 61

[18] Ibid

[19] Parent Binder, Page 512

fellow students during recess." He goes on to say that "the school has implemented a number of interventions and is seeking court assistance."[20] It should also be noted that the family, including the Student, was represented by counsel at the hearing. The Court decided that the Student was "a member of a family in need of services as defined by Arkansas Code annotated Section 9-27-303(18)."[21] That particular code applies to juveniles who meet the definition of being a dependent-neglected juvenile who has either been abandoned, abused, sexually abused, sexually exploited, neglected, having unfit parents, or being present in a dwelling or structure during the manufacturing of methamphetamine with the knowledge of his or her parent, guardian, or custodian.[22] Should the Court be applying the correct statute in this case would be a question beyond the information provided by either the District, the ASD, or the Parents in this proceeding. It would appear from the information provided to the Court through the police report that a more correct statute would involve the Student having stolen a wedding ring of an undisclosed value. Nonetheless, this was the beginning of the Court's decision that resulted in ordering the Parents to enroll the Student at the ASD.

Prior to the Student entering his fourth grade in the District on August 11, 2009, the Circuit Judge once again reviewed the FINS order stating simply that "all orders remain" and that a second review was set for November 10, 2009.[23]

The District personnel may have wanted the Student to attend the ASD for the school year in question (2009-10); however, they were also aware that they could not transfer the Student without parental consent. As previously noted the Parents had already decided they did not wish their child to be housed at and attend school at the ASD. The Student's mother testified that she did not fully understand the purpose for a FINS petition and the involvement of the juvenile court other than she "just thought [the court] was going to help us."[24] Asked why she

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[20] Ibid

[21] Parent Binder, Page 510

[22] A.C.A.§ 9-27-303 (2012)

[23] Transcript, Vol XI, Page 186

[24] Ibid

thought the District would have asked the juvenile court for assistance she replied that "I don't know what to say about that, I mean, other than they were just tired of him stealing, lying, and not following the rules."[25] In a meeting with the court appointed juvenile officer the Student's mother stated that they were asked to meet with her in her office sometime in March 2009 following the stolen wedding ring incident to "talk about his discipline reports and his behavior" along with "some discussion about him attending the School for the Deaf...and again, we were dead set against it...but she asked us to consider it."[26]

The Student began his fourth grade year (2009-10) in the District and on November 24, 2009, he and his Parents returned to face Judge Coker for a review of the FINS petition. His order that day stated that the Student would "attend the school for the deaf" and that the "Parents are to comply with [the] school and enroll [him]."[27] It is not clear as to whether he ordered the Parents to comply with the District, who had to assist in the transfer, or the ASD, who required parental consent in order to enroll the Student. This was never addressed in testimony; however, the ASD as a State agency, serving only children disabled by hearing impairment, must implement the IEP of a student transferring from a school district. Additionally, they provide dormitory facilities for children whose parents either request or where distance dictates such provisions for the students. Since a child cannot be enrolled without parental consent and without a school district's request, it is assumed that Judge Coker intended for the Parents to comply with both the requirements of the ASD as well as the District. The Parents, the District, and the ASD complied with the court order until October 2011, when the parties held a resolution session following the Parents' request for an expedited hearing to address the issue of placement. After which the Student returned to the District for educational purposes.

The Parents have failed to show proof through evidence or testimony that the District denied the Student FAPE by changing the Student's educational placement during the 2009-10 school year. In fact the evidence shows that the decision was taken out of their hands by Judge

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[25] Ibid

[26] Ibid, Vol XV, Page 103-105

[27] Parent Binder, Page 508

Coker. Whether or not employees of the District, including the SRO, contributed directly or indirectly to his decision; or whether or not he knew he was ordering a change in an IDEA student's educational placement at the ASD will not be known since no one from the juvenile court appeared to provide testimony. Could the District have taken steps to challenge the decision of the judge? Yes, but without the authority to do so in that the judge ordered the Parents to take an action and not the Student. Also, as noted above the Parents and Student were represented by counsel throughout the proceedings leading up to the order for him to attend the ASD.[28] However, from the testimony the District appears to have been in agreement with the judge's order in that they believed that the ASD was a more appropriate placement for the Student given the extent of how his hearing impairment negatively impacted not only his academic world, but his social world as well.

2. Did the District deny the Student FAPE by failing to identify and to evaluate for all of the Student's disabilities during the school years in question?

The records presented as evidence consistently list the Student's disability as hearing impaired. The Parents believe however, that the Student should have been evaluated for the possibility of having a learning disability, an attention deficit disorder, an oppositional defiant disorder and a mood disorder, all of which they believe impacted his ability to learn in an academic setting.

A comprehensive evaluation was conducted by the District in November 2006 during the Student's first grade year.[29] The regression analysis performed by the examiner did not indicate the presence of a specific learning disability. When the District's special education supervisor was asked can a child with a hearing impairment have a specific learning disability, she replied "I don't know... I do know a child with hearing impairment can be delayed in all of their learning... Now is that a disability, how are you going to look at it?.. Is it a disability because he can't hear,

[28] Ibid

[29] Parent Binder, Page 225-231

or he can't learn?" And in referring to the Student she stated "He can learn, he just can't hear."[30] When challenged as to whether or not when the District tested the Student if they checked for all the areas of suspected disability, she replied "we suspected he was hearing-impaired."[31] Acknowledging that the Student had extreme academic deficits, she responded "he started school five years behind everybody else, because he had no language."[32] The District's expert witness testified that a critical window for language development is birth to three years of age and that when that window is missed that it is very difficult for a child with a hearing impairment to be expected to advance in the development of language as would a child who along with his or her parents has been exposed to extensive training. She testified that "if they come to us [for the extensive training] and they are eight months old...we feel that time is of essence, we definitely want to get the listening skills in there..because if you don't have the listening skills, you can't listen to learn language."[33] In the Student's case the Parents were not able financially and geographically to take advantage of the extensive training that the expert believed to be critical to the Student's learning. At the same time, since the Student had some residual hearing ability the Parents wanted him to be a verbal learner versus having to depend on the use of sign language since had hearing aids. His mother testified that "he was aided at six months old, shortly after that, like within two or three weeks after he was aided, he was enrolled in Forester Davis...a child development center...[and] he attended there until he was like three and a half."[34] When asked what he learned at the child development center she replied "I can't say he really learned a whole lot there...it was kind of like a day care." She also followed this with stating how "some habits started at day care, biting, kicking, things like that."[35] From her testimony it becomes evident that he missed that critical window of developing language as noted by the expert witness.

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[30] Transcript, Vol X, Page 75

[31] Ibid, Page 76

[32] Ibid

[33] Transcript, Vol XXIII, Page 16

[34] Transcript, Vol XIV, Page 11

[35] Ibid, Page 11-12

The earliest speech/language evaluation presented as evidence was conducted in July 2002, when the Student was three years old. The impression at that time was that the Student was a child with hearing impairment and with language skills significantly below his chronological age. His auditory skills were noted to be poor and that he had made very little progress in the past year. The examiner suggested that his team should consider that the lack of progress being associated with significant time spent without hearing aids and recommended determining if another communication system, such as the use of American Sign Language would be more appropriate for him.[36] Seven months later a speech pathology note from Childrens Hospital recorded the following impressions:

> "[The Student] appears to be developing verbal language, but at a rate much slower than what is expected for his chronological age... [His Parents] were counseled extensively on parents' role in communication development (as primary teachers), need for family focused intervention to facilitate faster rate of development, and need for consistent boundary setting to enhance communication development....As reported, [his] parents understand that he is significantly behind his chronological age for communication development....they understand that he must be placed in an intensive therapeutic environment to rapidly develop skills in the near future...they reported no interest in learning sign language at this time...they reported interest in Cued Speech, but have no avenue to learn this system of communication...they reported that they are unable to commit to weekly therapy offered to them both at Ramey Speech Clinic in Fort Smith and at ACH."[37]

The Student's mother testified that she undertook learning some sign language; however, his father testified that he did not. They further emphasized in testimony that since no one else in the family was hearing impaired and since the Student had hearing aids which permitted him to hear sounds, that they wished for him to be more of an auditory-verbal learner rather than to rely

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[36] Parent Binder, Page 280-282

[37] Parent Binder, Pages -279

on signing as his primary means of communication.[38] They did not agree with the school personnel or even the evaluators and the court who advocated that he would best be served educationally by being exposed to other deaf and hard of hearing students. The Student's mother testified that he was already being exposed to other deaf and hard of hearing children. She stated that a friend of the family "would come pick him up on occasions and take him to Fort Smith to the Boys Club, and he would spend time with other deaf kids."[39]

Neither of the Parents testified that they suspected any other disabilities other than hearing impairment prior to the submission of the request for a due process hearing. The Parents, primarily the Student's mother was in attendance at all of the IEP conferences. Those records which include parental concerns are absent of any concerns about the possibility of additional disabilities which might explain the Student's failing grades.[40] However, whether or not the record reflects the need for the District to have considered additional disabilities has to also be considered in deciding if such a failure occurred.

In October 2009 a notice of conference was given to the Parents notifying them that the District was proposing a comprehensive re-evaluation.[41] The conference was conducted on October 23, 2009, with the Student's mother present. She provided the team with a social history update.[42] In November 2009, at age ten years, three months, while in the fourth grade a comprehensive re-evaluation was conducted by the District's school psychology specialist.[43] The results of the evaluation was presented at an evaluation/programming conference on December 4, 2009. The committee's decision was that the Student's disability was hearing impairment and that the hearing impairment as well as his speech/language impairments affected his ability to understand/comprehend language concepts, follow directions, memory, and present

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[38] Transcript, Vol XVII, Pages 208 and 239

[39] Ibid, Vol XV, Page 35

[40] District Binder, Pages G2, G8, G21, G30, G40, and G52

[41] District Binder, Pages C1-3

[42] Ibid, Pages C11-19

[43] District Binder, Pages C53-60

ideas/information with clarity.[44] No other disabilities were shown to exist that would explain the Student's difficulty in academic achievement. Even though the Student's intelligence level measured in the average range his inability to recognize what he was hearing with the use of his hearing aids did not permit him to achieve academically. As explained by the ASD special education supervisor:

> "There is a clear connection between language acquisition and academic performance....and with a delay in language is going to delay his ability to progress academically...he has the ability to learn, yes...[but] it goes back to language...the ability to write is based on the ability to read, is based on the ability to express that language, is based on the ability to understand that language..and so it really goes back to his language levels....[hearing impaired children] who acquire those reading skills and those academic skills are the ones who had really good, strong, early intervention."[45]

Consequently the Student's failure to perform academically as would be expected of a student of average intelligence appears from the data to be a result of the hearing impairment and not that of a specific learning disability.

The question of whether or not his behavior issues were or were not related to his disability of a hearing impairment or another disability was also challenged in this allegation. As previously noted the Student experienced several discipline referrals between August and October prior to the District's re-evaluation process in October and November 2009.[46] According to the evidence he also had eighteen conduct referrals the previous school year.[47] As previously noted the manifestation determination results regarding the stealing of the teacher's wedding band was that the behavior was not related to his hearing impairment. His assistant

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[44] Parent Binder, page 155

[45] Transcript, Vol III, Pages 76-79

[46] Parent Binder, Pages 727-734

[47] Parent Binder, Pages 709-726

principal at the time stated that she believed he knew "right" from "wrong."[48]

The possibility was introduced as to whether or not the misbehavior was possibly related to an attention deficit hyperactive disorder (ADHD).[49] Whether or not this was considered as an explanation of the behavior problems he experienced was introduced into the record in October 2004, on his entry into the District as a kindergarten student with a disability (hearing impairment) which made him eligible for special education services. The record indicted that he scored a behavior quotient of 73 on the BDIS which translated into being at a "significant level of concern;" however, the language of attention deficit or hyperactivity was never used.[50] Two years later in November 2006, as a first grade student the same inventory was administered with the same results.[51] The Student scored three standard deviations below the mean on the inappropriate behavior subscale, with sixteen items being checked. The school psychology specialist who used these results to formulate a comprehensive evaluation did not comment on the results after reporting them. Her observations at the time; however, included comments to the effect that the Student "was not always cooperative," "did not always appear to be performing the tasks conscientiously" "he was not persistent when confronted with difficult questions and tasks" "would sometimes appear to be picking wrong answers on purpose" and that he "did not always appear to be taking enough time to completely process an item before picking an answer."[52] The summary of her findings did not suggest any suspicion of a possible attention deficit disorder.

The next indication of ADHD type of behaviors being exhibited in the record is contained in the annual review form of May 2007, at the end of his second grade year. In a description of his unmet objectives the report notes that he failed to respond to the therapist's request by "refusing to participate, speeding through tasks or purposefully not trying to do his best on tasks"

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[48] Transcript, Vol XI, Page 167

[49] Transcript, Vol I, Page 198

[50] District Binder, Page D19

[51] District Binder, Page C161

[52] District Binder, Page C69

and by "running away, or exhibiting anger."[53] Again, these behaviors were not labeled or addressed in the record as possibly being explained by an attention deficit disorder. At the same time, and in agreement with the District personnel, the Student's mother saw his disruptive behavior as purposive. She testified that the Student's kindergarten principal was able to obtain a decrease in the disruptive behavior in discovering that the Student was able to avoid school and be sent home by acting out; a place where he had rather be. She and he discovered that by applying more positive rewards for appropriate behavior that they saw a reduction in the disruptive behaviors. She also attributed a change in the Student's behavior during this time when everyone in his school environment made an effort to use sign language in simple things such as greeting him.[54] She also testified that she did not observe some of the same disruptive behaviors in the home because "it's home...we don't have as many rules at home as school would...we don't have...quiet time or...a certain time for lunch or a certain time for recess...I mean, home is home."[55]

When the Student began his fourth grade in the District, the school year in question, he was provided services in the ALE where counseling services were provided. In order for the services to be reimbursed the therapist providing the services had to assign the Student with a diagnosis. The mental health paraprofessional assigned to the ALE acknowledged in testimony the signature of the psychiatrist who provided the Student with a diagnosis of ADHD and ODD (Oppositional Defiant Disorder) on September 16, 2009.[56] The District did not acknowledge that the Student's behavior problems were related to ADHD and/or ODD, but at the same time agreed to the receipt of services from a outside agency with those diagnoses listed on the agencies documentation to justify his receiving in-school mental health services. In spite of this service provision during the Student's enrollment in the ALE, the District continued to assert that the Student's hearing impairment continued to not account for his problem behaviors. Although not

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[53] District Binder, Page F55

[54] Transcript, Vol XIV, Pages 36-38

[55] Ibid, Page 39

[56] Transcript, Vol XXII, Page 42

qualified to provide a psychiatric diagnosis the mental health paraprofessional made an astute observation while working with the Student when asked if she thought he had ADHD: "I don't, in knowing him [think he has ADHD]...but I could see where that could be formulated upon first meeting him...he is constantly looking around the room, he is moving from side to side...but he is trying to figure out what is all going on...with his hearing impairment, he has learned to look at people and look around the room for clues."[57] According to the number of incident reports his problems behaviors in the classroom setting declined while he was assigned to the ALE.

Even though the Student presented the District personnel with ample reason to suspect that an attention deficit hyperactive disorder may account for the some of his disruptive behaviors, at the same time there was ample evidence to see it as a consequence of his difficulties in communicating and his frustration in developing the listening and learning skills necessary to succeed along with his non-disabled peers. Being able to tease this out was considered by the District. Prior to his court-ordered transfer to the ASD in February 2010, the District obtained the services of a special educational consultant who commented that "in reviewing documentation related to behavior as a professional that has dealt with many students with significant disabilities and behavior problems I am confident in the statement that his infractions have been directly related to his inability to communicate."[58]

It was not until after finishing school year 2009-10 and half way into school year 2010-11 that the issue of an attention deficit disorder was introduced into the Student's due process record. This came from an evaluation by the ASD school psychology specialist in November and December of 2010.[59] The Parent's rating forms to assess for ADHD were not received when that report was first published, but were received later and added as an addendum to the report. There were significant differences in how the Student's teachers rated him on the behavioral scales and how his mother rated him. T-scores on the Conners Rating Scale greater than 65 are considered significant according to the examiner. His classroom teacher at the ASD rated him at the highly

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[57] Transcript, Vol XXII, Page 34

[58] Parent Binder, Page 157

[59] Parent Binder, Page 201-209

significant level on eight of the twelve scales including the oppositional, cognitive problems/inattention, hyperactivity, ADHD Index, restless-impulsive index, DSM-IV inattentive, and DSM-IV hyperactive-impulsive scales. His dormitory houseparent at the ASD rated him at the highly significant level on the oppositional, hyperactivity, social problems, ADHD index, restless-impulsive index, emotional lability, Conners Global index, and the DSM-IV Hyperactive-Impulsive scales. On the other hand his mother did not rate him at the highly significant level on any of the scales. The Student's homeroom teacher at the ASD completed the Behavior Assessment System for Children where she considered him to be at a high level of maladjustment (at-risk range) on all three of the externalizing problems (hyperactivity, aggression and conduct problems); none of the three internalizing problems (anxiety, depression, and somatization); both of the school problems (attention and learning); neither of the behavioral symptoms (atypicality and withdrawal); and none of the adaptive skills scales (adaptability, social skills, leadership, study skills, and functional communication). His mother on the other hand did not rate him as being in the at-risk category on any of the scales. The only subscale that came close to reaching a level of significance for her was the conduct problems scale.[60]

The significant increase in oppositional behaviors observed at the ASD were apparently more numerous and/or of greater concern than those observed and recorded by the District during school year 2009-10. Given the belief that the major disability affecting his academic achievement was directly related to his hearing impairment one would expect for them to have a blind eye to any other explanation for the disruptive behaviors. Does this mean that the absence of evidence is evidence of absence? Not really, the District did develop a behavior intervention plan to address his behavior problems; however, the record shows that they failed to implement the plan the school year it was developed. The IEP for school year 2009-10, indicated that the plan would continue. Additionally, the evidence of a relationship between ADHD and his behaviors appears to have been contaminated with the Student's intellectual ability to manipulate his environment with the acting out behaviors, much to the chagrin of not only the school personnel, but the Parents as well. The evaluation of the possibility of there being an attention deficit disorder was accomplished; however, the District failed to act on their own findings even

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[60] Parent Binder, Pages 201-209 and 243-244

though they differed from those of the Parents.

His psychiatric diagnoses of oppositional defiant disorder and a mood disorder were not given consideration by the District, the ASD, or even the Parents, as a causative factor in his behavior problems until after he was suspended from the ASD and entered a psychiatric hospital where such diagnoses are required for admission as well as reimbursement. There was no evidence that psychological evaluations were completed while in the hospital or even on an outpatient basis when the Student was provided therapy. It would appear that the diagnoses were rendered as a result of history provided by various persons and agencies as well as observations by treating personnel. The dates of these occurrences are important as to whether or not the District should have known or suspected such psychiatric issues to the degree that they would have warranted a recommendation for evaluation.

The record shows that the Student was seen by mental health providers during school year 2007-08. A report by the licensed professional counselor in February 2008 stated that in her opinion "I do not see any symptoms of any conditions requiring regular mental health services. In other words, he seems to have the support system and functioning that are [consistent] with his needs, strengths, and weaknesses, and therefore individual counseling would not be necessary."[61] The next February (2009) the same counseling agency informed the District that they "wanted to follow up with you when you can regarding [the Student] and what was offered to the family. We had to close the case because no services were sought or authorized by the family after the assessment."[62] Another counseling agency which provides services for students in the District completed a screening and referral form at the request of the District following the incident involving the stolen wedding ring on March 18, 2009. Their referral form provided blocks to be checked for the presenting problem. For the Student they checked "aggressive behavior" and "assaultive" behavior. They did not check anxiety, depression, family problems, or blocks related to self-harm or harm to others. The comments read: "[The Student] continues to demonstrate poor behavior including theft, hitting others, defiance to teacher/authority figures,

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[61] District Binder, Page L8

[62] District Binder, Page L10

and dishonesty."[63] In May 2009 the juvenile court ordered the Student and his family to participate in individual and family counseling and were to continue counseling until they were released by the counselor. The Court also ordered the Student to attend the counseling services summer program. The Court further ordered the Parents to make reasonable efforts to learn sign language; to cooperate with the juvenile office to facilitate a plan for school year 2009-2010 including taking a tour of the campus for the school for the deaf and the ALE classroom for the District.[64]

The Student's mother testified that she provided information to the counseling service, but did not recall receiving any therapy for herself or the family. She also recalled that the doctor at the intake recommended medication for the Student, but she "was not for medication at all."[65] Even though she did not recall if the doctor provided the Student with a diagnosis to justify the use of medication she stated that she asked him "How can you make this diagnosis over a few questions...you can't base some kind of – well, anything like that just over a few questions on a piece of paper."[66] She further stated that she discussed medication with the Student's pediatrician and that he was in agreement with her that it was not necessary. She went on to say that to her knowledge the only psychiatric diagnosis provided the Student was when "he was at Pinnacle Pointe, they made a diagnosis for a mood disorder, saying that he was depressed."[67]

The evidence and testimony would indicate that the District did in fact look at the possibility of the Student having an attention deficit disorder as well as emotional problems. However, they continued to see the Student's academic disability being primarily a result of the hearing disability and his behavior issues being related to learned purposive attempts on his part to avoid difficult academic challenges and to obtain the attention of others. Had the Student not been ordered to attend the ASD, the District's placement for services in the ALE would have

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[63] District Binder, Page L12

[64] District Binder, Page K5-6

[65] Transcript, Vol XVII, Page 27

[66] Ibid, Page 28

[67] Ibid, Page 28-29

been consistent for a student where ADHD was considered as the disability qualifying a student for special educations services, in that he was in a smaller classroom environment, with less distractions, with a paraprofessional present, and with more individual attention from the teacher. In that same environment he was able to have access to an in-school provider of mental health services which is also consistent with students who are diagnosed with ADHD. The evidence presented, however, does not support the Parents' allegation that the Student was denied a FAPE by the District for failing to identify and to evaluate for all of the Student's alleged disabilities during school year 2009-10.

3. **Did the District deny the Student FAPE by failing to provide appropriate programming and supports to allow the Student to remain in the least restrictive environment?**

The Parents believe that the least restrictive environment for the Student during the school years in question was and should continue to be with non-disabled peers in a regular classroom in the District. What the Parents considered appropriate programming and supports was not completely clarified in evidence or testimony. It appeared from the testimony sought by counsel for the Parents that one of the programming necessities would be a behavior intervention plan. At the end of school year 2007-08 a behavior modification plan was developed, but there was no record that it was implemented for school year 2008-09. The notation on the plan made on May 8, 2009, was for the plan to be continued in his fourth grade year, the year being challenged. The apparent original development of the plan in 2008 included the presence of an attorney for the Parents as well as a representative from the juvenile court. The plan not only included behaviors of concern in the school setting but it also included those in the home (i.e., stealing from family member's purses/wallets).[68] In testimony drawn out by counsel for the Parents it was evident that even though there was a behavior intervention plan in place for school year 2009-10, that after each of the behavioral incidents the consequences were not always applied according to the plan. A review of the incidents and consequences sustains the Parents position, even when the definition of the behaviors of concern are stretched to comport with the

[68] District Binder, Page G17-19

behaviors described in the incident reports.[69] It would appear that District personnel assigned the responsibility of implementing the plan were not always consistent and no specific records were provided to show how effective or ineffective the plan was determined to be.

In addition to the behavior intervention plan, the Parents alleged that other supports and services including occupational therapy and speech therapy were not provided as scheduled on the Student's IEP.[70] The records presented and the testimony taken from the providers of those services indicate that they did follow the IEP to the extent possible given the presence of the Student on the days designated for the services.

Other supports listed on the IEP included a full time interpreter who would provide ASL interpretation of the academic content taking place in the classroom. She testified that she was not employed to be a teacher's aide and did not provide the Student with any educational instruction other than explaining what the teacher or other District personnel had said or requested.[71] Had she been an educator as well as the person assigned to the Student, one-on-one as the interpreter, the District would more likely than not have fulfilled the Parents' expectations of what constituted appropriate support for the Student. However, the District's position was that she was only the conduit through which he was able to hear and was not a teacher or academic instructor. In an ideal world of education in a rural community where the Student resides this would indeed be the best for him; however, he would still be lacking according to the expert witnesses in being able to communicate effectively in social situations with his peers due to his significant developmental delay in language.

Counseling to address his social deficits as well as behaviors was also considered by the Parents as an essential support which should have been programmed. The District contends that even though his IEP for school year 2009-10 did not contain counseling services that the Student was provided both individual and group counseling while in the ALE for the school year being challenged and continues to be available with Parental consent. The record according to the

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[69] Comparison made between the Behavior Modification Plan at District Binder G17-19and conduct referrals found at Parent Binder, Pages 727-735 and District Binder Pages DK12-13 and DI120.

[70] Parent Binder, Page 136, 155

[71] Transcript, Vol XII, 126-127

District's special education supervisor shows where consent was sought, but not received for in-school mental health services.[72]

The bottom line for a decision rests on would the additional programming and supports that were not being made available to the Student according to the Parents made a difference in the Student's receipt of a free and appropriate education. The Parents have not shown in this case that all that was being provided was not inadequate and all that was being proposed may not have given the Student any better environment in which to learn. The Parent's expert witness talked about the critical involvement of the Parents should the Student be enrolled in the District:

> "Intensive individual work. And you really need an individual that's trained in providing the strict, you know, auditory stimulation that I have talked about. They should be somebody that would be very, very involved with the parent, because the reinforcement at home is critical, just as it would be critical if it were manual, that you need to be reinforcing that communication. Is it different from what you did with your other child, no, but it does involve some other more intense stimulation. It should involve the parent very, very much, it should also be individualized. At his age, it would need to be numbers of times a week. When we start with a child, we usually just started them at twice a week...but you know I'm talking about a child under two years of age. We would do the individual therapy twice a week, auditory/verbal, and as soon as the child was old enough, have them in a normal hearing peer group for stimulation, normal language peer group."[73]

The record and testimony does show that the District failed to implement the behavior intervention plan as it was designed to be implemented. Would it have made a difference if all of the District personnel involved in the Student's behavior problems had followed the plan as designed? One would like to think so. Would following the behavior intervention plan have allowed the Student to remain in the larger classroom? There was no evidence presented that would be convincing enough to say so. The Parents have not shown through evidence or

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[72] Transcript, Vol X, Page 183-184; 191 and Vol XII, Page 159

[73] Transcript, Vol XVIII, Pages 65-66

testimony that any of the other programmed services were not provided and that in their provision, or failure thereof, would have allowed the Student to remain in the larger classroom.

4. **Did the District deny the Student FAPE by failing to educate the Student to remain in the least restrictive environment for the school years in question?**

The Parents contend that both the ALE placement and the ASD placement were and are more restrictive environments. As noted previously, the Student's IEP for school year 2009-10 developed on May 5, 2009, continued to place him in a regular classroom with multiple non-disabled peers. At that IEP conference "ALE services were discussed as a possibility for next year, as well as Daysprings Behavioral Services."[74] Also as noted previously the Student and his Parents were under a FINS petition by the juvenile court. Eight days after the IEP was developed, on May 13, 2009, the Court ordered the Parents to take a tour of both the ASD as well as the ALE at the District.

The consideration of what is the least restrictive environment cannot be a generalized assumption of what is the more or less restrictive in general, but rather what is the least restrictive environment that will best serve the needs of the Student. The Student's placement for special education services during school year 2009-10 according to his IEP was to continue to be the regular general education classroom as well as in a special education classroom for speech therapy 150 minutes weekly. He was also scheduled to receive occupational therapy as a related service for 60 minutes per week.[75] The District asserted that the ALE classroom was the least restrictive for the Student in that it provided the Student with a smaller pupil-teacher ratio, behavioral supports with the presence of a counselor, and more one-on-one instruction with his classroom teacher. The District also asserted that not all of the other students in the ALE were students with disabilities which required special education services. The District's special education supervisor testified that "the alternative learning environment [ALE] is a classroom of just regular ed[ucation] students that can't seem to function well in a regular classroom...they don't, apparently, have any learning disabilities...the ALE room has a teacher, a para, [and] a

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[74] District Binder, Page F1

[75] Parent Binder, Page 49

counselor in that classroom."[76] A classroom based assessment completed by the ALE teacher noted in her comments that her classroom included second, third, and fourth grade students.[77] In general terms the least restrictive environment to initially consider for all special education students would be a regular classroom with most if not all of the other students being non-disabled. In considering the most appropriate as well as least restrictive for an individual student all factors must be considered, including the particular type of disability or disabilities that the student exhibits. In this case even though the Student's mother testified that she did not completely understand what the ALE classroom was, she and her husband were in agreement with the placement.[78] Her understanding was that it would be a smaller classroom of students and an aide in the room along with his interpreter to assist the Student.

Even though the District may have been in agreement with the Court in ordering the Parents to enroll the Student in the ASD, the evidence shows that the District complied with the IDEA in providing the ASD with assistance once the Student was enrolled. There is no evidence to implicate the District as being the agency responsible for the change of placement to the ASD which the Parents allege was a more restrictive environment. The evidence and testimony does not support the allegation that the District failed to provide the Student with FAPE by placing him in the ALE during school year 2009-10 or by following a court order to support the placement at the ASD for the remainder of school year 2009-10 and school year 2010-11. It should also be noted that the attorney representing the Parents and the Student in Court signed an Agreed Order on February 23, 2010, which ordered the Parents to enroll the Student in the ASD.[79]

After the Parents filed for this hearing in October 2011 the Student was eventually returned to the District from the ASD with placement for him to be in a regular sixth grade classroom rather than the ALE. The allegation of whether or not the District denied the Student with FAPE because they did not educate him in the least restrictive environment during the

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[76] Transcript, Vol X, Page 88

[77] District Binder, Page C25

[78] Transcript, Vol XVII, Page 76

[79] Parent Binder, Page 506

school years in question was not shown to be so in evidence or testimony.

5. Did the District deny the Student FAPE by failing to provide the Student with an appropriate individualized education plan (IEP) taking into consideration all of the Student's disabilities, and related behaviors, including, but not limited to failing to provide appropriate goals and objectives, an appropriate behavior intervention plan, social skills training, and related services necessary to address the Student's disabilities and prevent exclusions during the school years in question?

The allegation that the Student was excluded was apparently the primary concern addressed by the Parents during the hearing process. However, the word "exclusion" or being "excluded" was never used in the Parents' opening statement. The word excluded was first associated by Counsel for the Parent in questioning the principal of the ASD with having been suspended from school for having a weapon on campus and thus exclusion through suspension. The question he was asked was "Is your testimony that [the Student's] behavior in the dorm resulted in him being excluded or suspended from school?"

Using this definition of exclusion the record shows that during the school years in question with regard to the District, the Student was suspended for a total of three and a half days from August 2009 until October 2009.[80] There was no record of his being suspended between October 2009 and when he was enrolled in the ASD in February 2010. In fact the only disciplinary incident recorded after October 16, 2009, while in the District's ALE classroom was on January 13, 2010, where he was administered corporal punishment when he "hit/kicked another kid on the slide during recess.[81]

Therefore if exclusion by definition of the Parents involves the failure to provide services while being suspended, the evidence and testimony does not support the allegation that the Student was denied FAPE by the District as a consequence for the school years in question.

6. Did the District deny the Student FAPE by circumventing the IDEA and its procedures

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[80] District Binder, Page I40

[81] District Binder, Page I20

by removing the decisions regarding the Student's educational placement and programming from the IEP team and instead placing those decisions with the Juvenile Court Judge?

The two educational settings recorded in the Court's FINS review included ordering the Parents to visit the ASD and the District's ALE on August 11, 2009.[82] As noted above the Parents agreed in testimony with the ALE placement. Also as noted above the District has denied under oath that no one from the District other than the Resource Police Officer requested the FINS petition which resulted in not only the above order, but the order on November 24, 2009, and the Agreed Order on February 23, 2010, which required the Parents to enroll the Student at the ASD.[83] Even if the District had been responsible for initiating the FINS petition there is nothing in the IDEA which prevents a District from seeking assistance when in fact they believe that a child and his or her family is in need of services that a district cannot provide or when they believe that a student has committed a crime. All of the District's principle leaders were knowledgeable of the fact that the Parent had to enroll the Student at the ASD under this court order and that as a consequence it would not be the decision by his team. Could or should the District have intervened and informed the Juvenile Court Judge of the IDEA and the Student's status under IDEA as well as the federal mandate regarding changing his educational placement? Yes, but there is no way to know now, after the fact, if it would have altered the results of the placement. Even though the testimony and evidence does not support the Parents' allegation that the District circumvented the IDEA by placing the educational placement of the Student in the hands of the Juvenile Court Judge, there is also no evidence or testimony that the District took efforts to protect the Student's rights under IDEA.

7. Did the District deny the Student FAPE by failing to provide a continuum of placements for the Student for the school years in question?

The records reveal that the Student began his 2009-10 school year assigned to the District's ALE classroom with the agreement of the Parents, as noted above. Given that the

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[82] District Binder, Page K6

[83] District Binder, Page K18 & K20

District considers the ALE a regular educational classroom because the students assigned to the class on the whole are not special education students, but rather, as noted above through testimony, students who have difficulty functioning in a larger classroom. From the testimony solicited from each of the District personnel it appeared as though the Parents believed the District should have considered keeping the Student in the regular fourth grade classroom and had him pulled out to a resource room for specialized instruction in all of his academic subjects. The ALE teacher, as noted above, stated that her class consisted of second, third, and fourth grade students. The ALE was not only had fewer students in the class, but the Student also received individual attention from the teacher along with a paraprofessional. Thus the evidence and the testimony shows that District provided services on the continuum of services requirement of the IDEA and consistent with the Student's IEP developed in May 2009.[84]

8. Did the District deny the Student FAPE by failing to provide educational supports and services for the Student to benefit educationally during the school years in question?

The Student's educational achievements are recorded on each of the IEP's developed, which included school year 2009-10's IEP developed in May 2009. At that time the record indicates that his grades as of April 27, 2009, were "Reading-71/C, Math-64/D, Spelling-73/C, English-55/F, Science-63/D, Writing-65/D."[85] At that time the most recent comprehensive evaluation was completed by the District's school psychology specialist on November 29, 2006. At that time he was in one of the District's regular first grade classrooms. The curriculum-based assessment showed that his skill in reading was at the "emerging" level which meant that he possessed some knowledge of what was required to complete the task, but not the full understanding or skill needed to successfully complete the task. The same emerging level was obtained in writing, oral and visual communication, inquiring and researching, and mathematics. As previously noted the regression analysis that she performed at that time did not indicate the presence of a specific learning disability. The school psychology specialist and the speech/language pathologist, who had been his speech therapist since entering the District,

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[84] Parent Binder, Page 55

[85] Parent Binder, Page 50

agreed that the Student's lack of progress was more likely than not attributable to his primary disability of hearing impairment and his lack of sufficient language skills to understand the tasks involved in the academic arena.[86] The speech/language pathologist noted in her testimony that "if you don't hear the language, you are not going to learn it as quickly" and that it will impact his ability and speed at which he can accumulate language.[87]

The next IEP developed for the Student was completed at the ASD in February 2010. Although personnel from the District were present in assisting with developing the IEP, the grades provided on the IEP were identical to those on the previous IEP. The next psycho-educational evaluation was completed in November and December 2010 by the school psychology specialist at ASD after his first year in their program. Other than his ALE teacher testifying that the Student made academic progress in the first semester of school year 2009-10, there is insufficient evidence in the record to show otherwise. On cross examination when asked about his progress in the ALE she stated:

> "he improved so much in his behavior that it turned into his academic...because he was able...I mean ....he felt good about himself, you know, to where his academics just..I mean, it just...I don't know..maybe it was his academics that I saw the most..because once he became comfortable and realized that he could learn, then his behaviors improved..so, I guess it's just the opposite..I guess it was his academics."[88]

As noted above, with the Parents' agreement, the Student was provided individual and group counseling while in the ALE classroom.[89] The mental health paraprofessional assigned to the ALE testified that the Student was seen weekly for individual counseling and twice a week in group therapy by the assigned social worker/school-therapist from Daysprings. She testified that she assisted the social worker/ school-therapist in providing the Student, through his interpreter, social skills training.

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[86] Parent Binder, Page 225-232; Transcript, Vol X, Page 204

[87] Ibid

[88] Transcript, Vol X, Page 210

[89] District Binder, Page L31

While in the ALE, as previously noted, he continued to have both occupational and physical therapies. Consequently, there is not ample evidence to show that the District failed to the necessary support and services to allow the Student with the opportunity to succeed academically. His academic success was obviously not what the Parents or any parent would want for such a child with such a severe hearing impairment; however, given the limitations placed on him with his failure to have developed adequate language skills during the first three years of his life, the progress that he did make, with appropriate services and supports, was more than minimal.

9. Did the District deny the Student FAPE by failing to implement the Student's IEP or provide the Student any educational services from September 22, 2011 to October 10, 2011?

The Student's last day of school at the ASD was on September 13, 2011, following a three day out of school suspension for having a pocket knife in his possession.[90] The following day and after a court-ordered assessment his Parents admitted him to a psychiatric hospital.[91] Again, in effect a court-ordered educational placement. He was discharged from the hospital on September 21, 2011. Anticipating his return to the ASD, a notice of conference was made on September 29, 2011, for a separate programming conference to be held at the ASD on October 5, 2011.[92] Both the District and the ASD were present for the meeting on that date; however, the Parents did not attend. The conference was canceled and rescheduled for October 17, 2011.[93] Once again the Parents elected to not attend even though the notice for the second conference indicated that the team would consider both the Student returning to the ASD as well as possibly receiving homebound services.[94] On October 6, 2011, the District sought to meet with the Parents on October 10, 2011, in an attempt to provide services following his suspension from the

[90] Parent Binder, Page 380-381

[91] Parent Binder, Page 513

[92] Parent Binder, Page 73

[93] Parent Binder, Page 76

[94] Ibid

ASD.[95] On October 7, 2011, the Parents received a summons dated October 5, 2011, from the Juvenile Court to appear in court on October 11, 2011, in response to a Petition for Citation submitted to the Court by the Deputy Prosecuting Attorney.[96]

The Parents filed their request for this due process hearing with the Department on October 10, 2011 and on October 26, 2011, they sent a letter to both the District and the ASD informing both schools that they had decided to withdraw the Student from the ASD "effective immediately" and that he would be returning to the District effective October 27, 2011.[97] From testimony it would appear that the Student did in fact return to the District and has been receiving special education services under the stay put provision of the IDEA.

The record reflects multiple attempts on the part of both the District and the ASD to provide educational services to the Student during the time period of September 22, 2011 and October 10, 2011 when the due process hearing request was submitted; however, it would also appear that the Parents refused to participate in any of the programming conferences.

10. Did the District deny the Student FAPE by failing to provide the Student with extended school year services for the school years in question?

For school year 2009-10 the ESY decision would not have been made by the District since the Student was enrolled in the ASD at the end of that school year. At the annual review conference held at the ASD on April 29, 2010, however, those in attendance included not only the ASD staff, and the Student's mother, but also the District's special education supervisor.[98] The committee's decision with regard to ESY was that "after reviewing all required factors it has been determined that [the Student] does not qualify for Extended School Year services."[99] The District's special education supervisor was ask by counsel for the Parents about ESY services during his enrollment at the ASD, since the ASD did not offer summer instructions for any of

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[95] Parent Binder, Page 476

[96] Parent Binder, Page 481-485

[97] Parent Binder, Page 480c-480d

[98] Parent Binder, Page 170

[99] Parent Binder, Page 169

their students, if the District was obligated to provide the services. Her response was "I don't think we were under any legal obligation to [provide ESY services but] we did it."[100] The summer before the first year in question the District provided ESY services to the Student even though the record at that time also indicated that no services were justified by a review of the required factors. The statement was that since it was offered in previous years and the Student had benefitted from the structured intervention "it [was] thought that Extended School Years services [would] continue his progress."[101]

The Parents never challenged the record or testimony as to the Student's ability to retain academic information or whether he regressed academically during the summer months. The record and testimony would indicate that were in agreement with the District. Consequently, they have not shown that the District failed to provide the Student with FAPE by failing to provide him with extended school year services for the years in question.

11. Did the District deny the Student FAPE by punishing the Student for behaviors related to his disability and associated with the District's circumvention of the IDEA, which resulted in residential placement for which the ASD is not certified and/or qualified to provide?

Although this allegation as stated makes the assumption that the District purposely circumvented the IDEA and that the ASD is not certified and/or qualified to provide services under the IDEA, the primary issue to be addressed here in the findings of fact is whether or not the Student's behavior for which the court-order resulted in his placement at the ASD was or was not related to his hearing impairment. A review of the documents presented as evidence pertaining to the juvenile courts involvement in the Student's life are as follows:

a. From the school years in question the District's assistant principal at the Student's elementary school testified that she sent a FINS report to the Arkansas Department of Human Services (DHS) following an incident involving his teachers having found bugs crawling out of

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[100] Transcript, Vol XXII, Page 167

[101] Parent Binder, Page 185 and District Binder F74, respectively.

his ears and asking the Parents to take him to the hospital emergency room in October 2007.[102] What was submitted by the DHS to the juvenile court was not available as an exhibit by the parties; however, the court-appointed juvenile officer appears to have been involved with the family outside the school environment and she is recorded as one of the attendees in the development of the initial behavior intervention plan for the District in November 2008.[103] The following year, in September 2009 the District's school nurse sent a Suspected Child Abuse Report to the State Police.[104] Even though this action took place prior to the school years in question, no evidence or testimony was presented to address the event. It does, however, show that the District has attempted to assist the family by involving other State agencies

b. The earliest intervention by an outside agency involving the school years in question for which testimony was elicited was in March 2009, during the Student's third grade school year.[105] The record contains a copy of a FINS petition filed with the juvenile division of the Court by the Johnson County Deputy Prosecuting Attorney on April 13, 2009.[106] The accompanying FINS cover sheet did not contain any information regarding the nature of the request other than the Student's identifying information. The petition itself simply indicated that the Student had "failed to follow school rules." That statement on the petition is the only information as to the District's involvement since the source of this information would most likely not have come from the Parents.

c. The Juvenile Court subsequently adjudicated the April 2009 petition on May12, 2009. The Court placed the Student on court supervision for twelve months; ordered the Student and the family to participate in individual/family counseling; and for the Student to participate in the summer program at Daysprings. The Court also ordered the Parents "to make reasonable efforts

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[102] Transcript, Vol XI, Page 219 and District Binder, Pages 11-8

[103] District Binder, Pages G17-19

[104] District Binder, J95-97

[105] School year 2008-09 is outside the statute of limitations with regard to being addressable under the IDEA for adjudication purposes; however, the information from previous school years was deemed appropriate for consideration in the adjudicating of allegations for the school years in question.

[106] District Binder, Page K-3

to learn sign language" and ordered the Student and the Parents to "cooperate with the juvenile office to facilitate plans for school year 2009-2010 including taking a tour of the campus for school [of the ASD campus] and the [District's] ALE classroom."[107] The order also noted that a review hearing would be held the following August.

d. A FINS review order was issued on August 11, 2009, with the order that the Student would remain on court supervision, with a second review hearing to take place the following November.[108]

e. An affidavit for complaint was submitted to the Deputy Prosecuting Attorney by the District's Assistant Principal on September 16, 2009. The affidavit referred to an accompanying letter from the Assistant Principal in which she stated that "unfortunately, we are sending you another concerning report imploring your prompt response and action with [the Student] , a Pyron Elementary fourth grader."[109] She stated the issues of concern included bringing a pocket knife to school and lying to the principal about it; being referred to the office for mis-behaviors in class; coming to school with his legs covered in insect or parasite bites which caused him to be distracted; being out of compliance with the court-ordered Daysprings counseling services; and being out of compliance with proof of hearing screenings to the school nurse. Her affidavit included copies of seven conduct referrals issued to the Student between September 2 and 23, 2009.

f. On November 23, 2009, the Student's fourth grade teacher, the assistant principal, and the principal received subpoenas to appear in Court on November 24, 2009, to testify on behalf of the plaintiff (the State of Arkansas) and the defendant (the Student).[110] In Juvenile Court on November 24, 2009, the Student was ordered to attend the ASD and the Parents were ordered to comply with the school and enroll the Student. The Court also ordered the Student to remain in court supervision with another FINS review hearing set for January 2010.[111]

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[107] District Binder, Page K5-6

[108] District Binder, Page K7

[109] District Binder, Page K8-14

[110] District Binder, Pages K15-17

[111] District Binder, Page K18

g. A FINS review was held on January 26, 2010, with the result of the Student remaining under court supervision and another review hearing set for the following month.[112]

h. On February 23, 2010, with an attorney representing the Student, an Agreed Order was signed by the Student's attorney, the Deputy Prosecuting Attorney, and the Juvenile Court Judge. The agreed order was that the Student would be enrolled in the ASD; that he would follow the rules and conditions of the ASD's policies; that the Parents would also follow all of the rules and conditions of the ASD; that the Student would not have any unexcused absences; that he would not engage in trouble that would lead to suspension or expulsion; and that he would put forth the effort to be promoted to the next grade.[113]

i. On June 8, 2010, another FINS review order was issued in which the Court ordered the Student to remain in court supervision for another year and for the Parents and Student to comply with the rules of the ASD. Another FINS review was set for September 2010.[114]

j. There is no record of a FINS review that September, but in October another FINS review order was issued in which the Student was to continue be under court supervision; that he would continue to attend the ASD; that he would continue counseling; and that he would submit to a behavioral assessment, follow the recommendations of the assessment, including residential psychiatric treatment. Additional orders were issued to the Parents for them to comply with the ASD, the psychiatric facility and assessment results, the District's behavior consultant, and for them to assist the ASD in services for the Student and his family. A review date for the order was set for January 2011.[115]

k. The next FINS review order was issued on February 8, 2011. The order kept the Student in court supervision and ordered him to follow all of the rules at the ASD and for him to continue counseling. The next FINS review was to be held in May 2011.[116]

l. On May 24, 2011, the Juvenile Court ordered continuation of the Student's court

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[112] District Binder, Page K19

[113] District Binder, Page K20

[114] District Binder, Page K21

[115] District Binder, Page K22

[116] District Binder, Page K23

supervision for six months, as well as ordering him to submit to counseling at Bridgeway and to submit to following the recommendations of a psychiatrist or physician for behavior including medication. A FINS review was set for the following November.[117]

m. On October 7, 2011, the Student and Parents were summoned to appear in Juvenile Court.[118] The petition submitted by the Deputy Prosecuting Attorney at that time stated that the Student had failed to follow the rules of the court supervision by being engaged in multiple infractions at the ASD, which included pushing another student down some stairs and having a knife on school property. The petition further states that after the above two violations the Student was suspended from the ASD, but that the following day he was admitted by his Parents to Pinnacle Pointe Hospital. The petition further stated that the Parents failed to follow the recommendations of a psychiatrist, including medication during the Student's acute care while in the hospital.[119]

The authority of the Court to order an educational placement was subsequently challenged by the Parents resulting in the Student being returned to the District; however, the question of whether or not the District used the Court as a means of accomplishing what they could not through the IDEA is the nature of the allegation. The timing and the causative factors of the initial events which prompted the juvenile court to be involved needs to be addressed in deciding on this allegation. As previously noted the District has contended that the Student's behaviors that have generated the multiple disciplinary problems were not related to his disability of having a hearing impairment. However, the initial causative involvement would appear to have been health rather than behavior. At the same time the record shows that the juvenile court was involved in assisting the District with developing a behavior intervention plan as well as in inflicting punishment for the Student's violation of the plan.

It would not appear from the evidence or testimony that it was an intentional act on the part of the District to circumvent the IDEA in attempting to meet the needs of the Student; however, once in the hands of the Court and with input from the District regarding the difficulty

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[117] District Binder, Page K24

[118] Parent Binder, Page 481

[119] Parent Binder, Pages 482-485

they were experiencing with understanding and addressing the Student's behavior, the record as noted above, quickly evolved into the Court assuming the responsibility of directing the educational placement of the Student. Had the Parents known earlier in the process that they could have intervened with legal representation more familiar with the IDEA the whole process of being ordered to enroll their son in the ASD might have been avoided. Had the District informed the court of the federal mandates of the IDEA regarding placement, the history resulting from the Student's court-ordered educational placement, including the behaviors which resulted in his suspension from the ASD would never have happened as they did in September 2011.

It is understandable from the testimony of the Student's teachers, therapists, and administrative personnel that they too were desperate to see the Student's behavior under control enough for him to receive his education. Their desire however, was to the degree that they disregarded their responsibility of being the primary agency in determining the educational placement for the Student. To agree with the Parents that the District purposefully circumvented the IDEA in order to have the Court to accomplish what they were unable to do is not an accurate judgement of their behavior according to the testimony. However, that is not to say that the District did not play a major role in how this family was subjected to unwanted actions. Although the actions proposed by the Court and agreed to by the District would appear to have been in the best interest of the Student academically and possibly socially, the Parents wishes were not given significant weight to warrant such action by the Court.

12. Did the District deny the Student FAPE by punishing the Student for and depriving him of special education and related services for behaviors he exhibited in a "dorm type" setting and not for behaviors connected to the Student's behavior at school?

Nothing in the evidence or testimony supports this allegation. The Student's "dorm type" behavior did not occur while the Student was in attendance at the District.

13. Did the District deny the Student FAPE by failing to follow due process procedures by:

a. Not providing the Parents with adequate notice of IEP conferences;

b. Not conducting an evaluation and holding an evaluation conference in a timely manner;

c. Failing to consider the need for re-evaluation for behaviors inconsistent with hearing impairment;

d. Not providing accurate and proper notice of IEP attendees at IEP meetings;

e. Disclosing confidential special education documentation and programming to the Johnson County Juvenile Judge;

e. Failing to conduct a manifestation determination review conference at ASD which resulted in the Student's unilateral change of educational placement back to the CSD; and by

f. Failing to provide the Parents with periodic progress of the Student's academic achievement and goals and objectives on his IEP?

None of the conferences entered as evidence show that the Parents did not receive notice even though most of the conference notices were signed and dated the same date of the conference by the Parents acknowledging its receipt. The testimony by the Parents did not evoke any issues or problems with not being invited or involved in the multiple conferences they attended in behalf of their son.

Whether or not the evaluation conferences were conducted in a timely manner was also not a point of contention during the twenty-three days of testimony. Consequently, there is no evidence to show that the District failed to conduct evaluations or for them to have been conducted in a timely fashion.

According to the record the District first employed the services of a behavior consultant to assist them in addressing the Students multiple behavior issues in February 2010 after the Student had been enrolled in the ASD. Whether they should have acted sooner or whether the delay in taking such action was a failure to follow due process procedures was not shown in evidence or addressed in testimony. The record does show, however, that the District attempted to provide counseling for the Student to address the behavior issues.

In the notices provided to the Parents of conferences the District listed those persons that they believed needed to be present as well as those whose attendance was anticipated. The Parents did not enter any objections at the time when persons other than those listed on the

notices were present. Nothing in the testimony by the Parents would indicate that they were bothered by the presence of persons outside the District such as the District's legal counsel. From the questions asked it would appear that counsel for the Parents appears to have been more disturbed than the Parents. The District's principal expressed discontent to the presence of an attorney friend of the Parents who was present in the initial development of the Student's behavior intervention plan in 2008. Even though the Parents are due notices of when conferences are scheduled to be held and the notices are to list all persons who will be in attendance there does not appear to have been a purposive violation of the IDEA due process procedures on the part of the District to the degree to deprive the Student of FAPE.

Disclosing confidential information regarding a student is a violation of the Family Educational Rights and Privacy Act (FERPA). With regard to student information obtained and maintained under the IDEA, there is no specific due process procedure addressing the release of confidential information. At the same time it became evident in the course of the hearing that there exists a close working relationship between the District, the local police department, as well as the juvenile court. A notification to the Parents and/or copying them on the concerns expressed in writing to the Court would have been a courtesy way of avoiding the possibility of releasing information without parental consent. There is no evidence to show that either was offered to the Parents. At the same time a court can require disclosure if deemed needed to adjudicate a case. Arkansas Code Annotated §§ 9-27-309 and 9-27-352 specifically provides for confidentiality of juvenile court records. The IDEA requires that an agency reporting a crime committed by a child with a disability are to ensure that copies of the special education and disciplinary records of the child with a disability are transmitted for consideration by the appropriate authorities.[120] In this case the Student was not reported to have committed a crime, but nonetheless the District did not violate the Parents and FERPA by providing information about the Student to the Court.

The records show that a manifestation determination review was conducted on October 5, 2011, contrary to the allegation that one was not held.[121] The notice of conference sent to the

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[120] 20 U.S.C. § 1415(k)(9)(B)

[121] ASD Binder, Page 11-12

Parents following the review included the presence of the District's special education supervisor. As previously noted the Parents did not attend the conference.[122]

Goals and objectives on the Student's IEP for school year 2009-10 were reviewed with the Parent's present at the annual review conference held on the campus of the ASD on April 29, 2010.[123] Although the goals listed on his IEP are quite generic, they were testified to as being drawn from the appropriate standards as directed by the Department. The Parents were present when they were provided with copies of the ratings given by those responsible, including the speech therapist and classroom teacher prior to his leaving the District in February 2010. His fourth grade teacher in the ALE as well as his mother testified that periodic reports were sent home and reviewed by the Parents. The only way the reports can be tied to the IEP objectives would be for the individual who designed the objectives to have pointed to each activity and how it related to each of the goals. This was attempted with some degree of success by counsel for the Parents in examination of the providers of the Student's educational services.

There is insufficient evidence to warrant a judgement that the District violated due process procedures to the degree that it deprived the Student of FAPE for the school years in question.

The ASD:

In the Parents request for a due process hearing they alleged that the ASD denied the Student FAPE for only school year 2009-10; however, from the evidence presented and the testimony solicited, it would appear that it was the intention of their legal counsel to include school years 2010-11 and 2011-12, as was the case with the complaints against the District. This decision will include the second half of school year 2009-10 when he began attending the ASD, his full year at the ASD (2010-11) his fifth grade year, and the first part of school year 2011-12 prior to his return to the District.

The allegations of the denial of FAPE by the ASD are almost identical to those alleged against the District. They include allegations that the ASD:

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[122] ASD Binder, Page 9

[123] Parent Binder, Page 169

1. Changed the Student's educational placement without due process;

2. Failed to identify and/or evaluate and/or program for all of the Student's disabilities;

3. Failed to provide appropriate programming and support services in order for the Student to remain in the least restrictive environment (LRE);

4. Failed to provide the Student with a continuum of educational placements;

5. Failed to educate the Student in the LRE;

6. Failed to provide an appropriate IEP taking into consideration the Student's disabilities, and related behaviors, including but not limited to providing appropriate goals and objectives, an appropriate behavior intervention plan, social skills training, and related services necessary to address all of the Student's disabilities and prevent exclusions;

7. Failed to evaluate the Student when he exhibited behaviors consistent with ADHD and learning disabilities;

8. Failed to provide any notice, due process, or other written information to the Parents concerning the ASD's unilateral change of placement due to a constructive "expulsion" of the Student from ASD following an incident which occurred on or around September 20, 2011;

9. Failed to conduct a manifestation determination review following a disciplinary incident which resulted in a unilateral change of educational placement;

10. Disclosed confidential special education documentation and information about the Student's educational evaluation, placement, and programming to the Juvenile Court Judge;

11. Punished the Student for behaviors related to his disability and associated with CSD's circumvention of the IDEA, which resulted in a residential placement for which ASD is not certified and/or qualified to provide;

12. Failed to provide the Student with extended year services (ESY);

13. Punished the Student and deprived him of special education and related services for behaviors he exhibited in a "dorm type" setting and not for behaviors

connected to the Student's behavior at school; and that they

14. Failed to follow due process procedures by:

a. Not providing the Parents with adequate notice of IEP conferences;

b. Not conducting an evaluation and holding an evaluation conference in a timely manner;

c. Failing to consider the need for re-evaluation for behaviors inconsistent with hearing impairment;

d. Not providing accurate and proper notice of IEP attendees at IEP meetings;

e. Failing to conduct a manifestation determination review conference; and

f. Failing to provide the Parents with periodic progress of the Student's academic achievement and goals and objectives.

1. Did the ASD deny the Student FAPE by changing his educational placement without due process during the school years in question?

Most of the evidence and testimony addressing this issue is contained above when addressing the same issue against the District. The ASD, as testified to by their director of student services, as a State agency cannot accept a student into their system without it being an IEP decision for a student's school district, of which a parent or legal guardian is a team member.[124] Her testimony was that students come to them through their home school districts, stating that a home school district has to "be onboard" with the placement, even if only the parent wants to enroll a student. It was not the ASD which forced the Parents or the District, or the ASD to be onboard in enrolling the Student in the ASD, it was on order from the Juvenile Court. The ASD, by testimony, was more than willing to accept the Student, but acknowledged that they had not had a student ordered to attend the school by a court before.[125]

As a state agency, not funded through the Department, could the ASD have denied the

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[124] Transcript, Vol I, Page 63

[125] Ibid

Student's enrollment and thus have avoided the controversy over changing the Student's educational placement outside the decision of an IEP team? This question was never asked directly to any of the ASD witnesses including the superintendent. As a state funded educational agency for students with hearing impairments the ASD provides educational services to both day students and dorm students. Given the distance from the school it was elected, with Parental, although reluctant, agreement for the Student to enroll in the ASD in February 2010. The Parents concerns included his young age, the distance that he would be from home, and as noted previously not wanting their child to be reared by someone other than themselves. Also as previously noted the Parents actually considered enrolling the Student at the ASD in 2007, but changed their minds for the same reasons. There is no evidence or convincing testimony that the ASD was responsible for the enrollment of the Student even though the court order changed his educational placement.

2. Did the ASD deny the Student with FAPE by failing to identify and/or evaluate and/or program for all of the Student's disabilities?

Once registered as a student in the ASD as a fourth grader, a separate programing conference was conducted with both Parents present on February 15, 2010.[126] On the same date the Parents were provided with their rights under the IDEA; a social history was given to the ASD by the Parents; they consented to transfer audiological services to the ASD; they provided a medical release for ASD transportation services; and a vision screening was conducted.[127] Also on the first day the Student received his first incident report that evening in the dorm for pushing and kicking another student.[128] Between that date and the date on which his annual review was conducted (April 29, 2010) he had accumulated twenty-eight incident reports.[129] Prior to the annual review conference an occupational therapy annual review/evaluation was conducted; a functional assessment analysis of behavior was conducted; a behavior intervention plan was

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[126] ASD Binder, Page 131

[127] ASD Binder, Page 134; 172-173; 218; 221-222; and 206

[128] Parent Binder, Page 431-432

[129] Parent Binder, Page 431-496 and Parent Binder Page 177

developed; a functional behavioral assessment was performed; a classroom based assessment was conducted; and an annual speech/language progress report was developed.[130]

Of importance here is whether or not the ASD, according to the allegation by the Parents suspected and/or evaluated for a learning disability, an attention deficit disorder, or an emotional issue that might be contributing to his failure to obtain an educational benefit from his academic instruction. When asked if the IEP team discussed the possibility of a learning disability the ASD director of student services testified that "part of a hearing loss this severe is going to be some learning issues...[but] you can't really substantiate a learning disability in the presence of this much hearing loss...[the test for] a specific learning disability is based on normal hearing."[131] She went on to elaborate saying that "every child in our school has an auditory processing deficit because of the hearing loss...and the language delay from that sort of hearing loss, that severe a hearing loss, it complicates testing...so, to ferret out what would be a specific learning disability and what is just the consequence of pre-lingual hearing loss...you just really can't do that."[132]

On November 9, 2010, the Parent gave consent for the ASD to conduct an ADHD screening. When asked why, the testimony by the ASD director of student services was that it was the result of "the observations of his teachers in class, and trying to plan appropriately for him, and [the District] wanting to assist and provide whatever related services, whatever extra supports and resources that they might be able to provide to give a really good look at this child and what is going on and what do we need to do for him."[133] A conference was set to meet on October 20, 2010, to address developing a behavior plan following the Student's two-day suspension for bullying another student and disobeying a teacher.[134] The December 2010 psycho-educational evaluation's results as previously noted was presented at a separate programming conference where the differences in what his teachers were seeing as possible ADHD behavior

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[130] Parent Binder, Page 242a-242b; 171-174; 468a-468d; 468; 175-176; and 256. District Binder, Page E6

[131] Transcript, Vol I, Page 209-210

[132] Ibid

[133] Ibid, Page 198

[134] Parent Binder, Page 95-97 and 389-390

and what his mother was not seeing. On December17, 2010, the Student was provided a psychiatric evaluation being accompanied to the evaluation by the ASD staff and an interpreter. The results of the evaluation was that the Student was given a diagnosis of oppositional defiant disorder (ODD) and attention deficit hyperactive disorder, combined type (ADHD).[135] The treatment plan as proposed by the psychiatrist was to 1) defer medication at the present time because the family was not interested in medication trial "by history;" 2) the school would continue to educate the family about the Student's behavior problem and the effectiveness of medication, and that the family will come back if they agree to a trial of medication; 3) he did not present with any acute safety issue; 4) for the Student to continue therapeutic services within the Bridgeway's program; and 5) for him to be scheduled to return to see the psychiatrist on an as needed basis only.[136]

The Parents did not agree with the recommendation for treatment with medication to address his behavior and mood problems. It was unclear from the testimony if they also disagreed with the medical diagnoses. The testimony reflected a great deal of trust in the Student's pediatrician who apparently agreed with them regarding the medication trail. The evidence and testimony, however, does not show that the ASD failed to evaluate for all of the suspected disabilities that might have been affecting the Student's educational progress.

3. Did he ASD deny the Student FAPE by failing to provide appropriate programming and support services in order for the Student to remain in the least restrictive environment during the school years in question?

This issue too has already been discussed at length in responding to the same allegation against the District. The expert opinion of the Parent's witness was that the least restrictive environment for the Student would be in the District with support and services consistent with an auditory verbal (AV) method of addressing the Student's language deficit and thus his educational deficits as well. The District's expert witness, as well as the opinion of the ASD staff, did not agree with the him this regard, because in their opinion the critical window of

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[135] Parent Binder, Page 642-644

[136] Ibid, Page 644

opportunity for the Student to acquire language with his residual hearing ability was between the ages of birth and three.[137] The Parent's expert witness agreed on cross examination that without sufficient language skills the Student would continue to struggle both academically and socially.

The question to be addressed in this case is whether or not the placement at the ASD was the least restrictive environment at the time he was enrolled in the school. Since the ASD was not responsible for the enrollment and was only the recipient by court order, they cannot be held responsible for the placement regardless of whether or not programming and services could have been provided to the Student in the District. Thus, it cannot be said the ASD was responsible for placing the Student in a physically more restrictive environment, even though it was, by all accounts the least restrictive for the Student academically. The ASD may have been able to offer assistance to the District had that location for services been decided on by his IEP team. This option was not available due to the court-ordered placement.

4. Did the ASD deny the Student FAPE by not providing him with a continuum of educational placements during the school years in question?

The ASD, as noted above provides educational services to both day students and dorm students. All students at the ASD are special education students by virtue of their hearing impairments. As pointed out in testimony, for the ASD staff the severity of hearing loss for their students ranges from severely impaired, as in the Student's case, to total deafness. As a consequence the school is unique in that it does not offer the traditional IDEA continuum of placements such as are available in a traditional school district where children with and without disabilities are provided educational opportunities. All students at the ASD are in what they term as regular education classrooms; however, all classes are small with respect to the number of students in each class. Obviously, the Student was not in class with non-disabled peers. When challenged on examination as to how the ASD "got around the IDEA LRE requirement" the ASD director of student services testified that "some of that comes through [the IDEA requirement] that the mode of communication must be considered" and that the LRE at the ASD is determined

[137] See the discussion above.

by whether or not a student is a day school or residential student.[138] It is obvious that the ASD is limited by its very nature in being able to have a continuum of educational placements as is available in a regular school district. There was no evidence presented to suggest this was a purposive or egregious decision by the ASD, or by so being a denial of FAPE to the Student for not having such a continuum of educational placements.

5. Did the ASD deny the Student FAPE by failing to educate him in the LRE during the school years in question?

This allegation was addressed above in the allegation that the ASD failed provide the Student with a continuum of placement to provide special education services. The ASD by the testimony of their staff, as well as that of the District's expert witness, believe that the ASD placement is and continues to be the least restrictive environment. The ASD director of student services testified that in her opinion the District is a more restrictive setting than the ASD because at the ASD the Student is "immersed in a signing environment" where he can communicate directly with other students and staff, without having to rely on an interpreter.[139] Geographically the Parents are correct, the ASD as a location placed the Student over one-hundred miles from home and the school where he could be with his family and non-disabled peers. Educationally, however, the ASD did not violate the IDEA and deny him FAPE by accepting him as a dorm student for the school years in question because he was in fact better able to communicate more effectively, not only in the school classroom setting, but with his peers and other adults in his life in a social context.

6. Did the ASD deny the Student FAPE by failing to provide an appropriate IEP taking into consideration the Student's disabilities, and related behaviors, including but not limited to providing appropriate goals and objectives, an appropriate behavior intervention plan, social skills training, and related services necessary to address all of the Student's disabilities and prevent exclusions for the school years in question?

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[138] Transcript, Vol I, Page 97-99

[139] Transcript, Vol I, Page 92-93

Hereto as previously addressed in the same allegation against the District, the primary consideration given is to the prevention of exclusions, which are equated with his having been suspended from the ASD on several occasions. The first recorded suspension was in October 2010, in his fifth grade year, as noted above, when he was suspended for two days after bullying another student and disobeying a teacher.[140] Also noted in the discussion above this behavior and suspension triggered the court-ordered assessment which resulted in his being diagnosed by the psychiatrist as having ADHD and ODD. Could this have been prevented by the ASD through the provision of the services as suggested by the Parents in this allegation? A question which is addressed in the Student's history following the development and implementation of the behavior intervention plan, the in-school counseling services that were provided, and the social skills training that was a part of his IEP and according to the testimony was provided.[141] Assuming that the ASD staff are correct in testifying that these services were provided to the best of their knowledge, did they inhibit the exclusions by suspension after they were implemented? Even though there were multiple incident referrals for various behavior violations he was not suspended again until September 2011, when it was discovered that he had brought a knife onto the school campus and had shoved another student down some stairs.

Even though there might be a disagreement as to whether or not the Student's behavior warranted being suspended, it is evident that even though the proposed services were provided it did not prevent the two suspensions. At the same time it could be argued that the implementation of the services actually kept the Student from being suspended more than just on those two occasions. The Parents have not shown through evidence or testimony that the ASD denied the Student FAPE by failing to provide an appropriate IEP taking into consideration the Student's disabilities, and related behaviors, including but not limited to providing appropriate goals and objectives, an appropriate behavior intervention plan, social skills training, and related services necessary to address all of the Student's disabilities.

7. Did the ASD deny the Student FAPE by failing to evaluate the Student when he

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[140] Parent Binder, Page 389-390

[141] Parent Binder, Page 28

exhibited behaviors consistent with ADHD and learning disabilities?

The findings of fact on this allegation have already been addressed above with the conclusion that the Parents have failed to substantiate the allegation through either evidence or testimony.

8. Did the ASD deny the Student FAPE by failing to provide any notice, due process, or other written information to the Parents concerning the ASD's unilateral change of placement due to a constructive "expulsion" of the Student from ASD following an incident which occurred on or around September 20, 2011?

This is the event which ultimately triggered the Parents request for a due process hearing as evidenced in the amount of testimony elicited over the twenty-three days of hearing. How the Parents considered the Student's suspension as a "constructive expulsion" was never addressed or explored in testimony. The ASD administrators testified that they do not expel students.[142] The Student's mother on the other hand testified that she was notified to come and pick up the Student because he was being expelled. She testified that "at that time I didn't understand the difference between suspension and being expelled....[and] I remember asking him...how long is he going to be out of school...is it going to be three days, ten days, twenty days...and the interpretation I got back was....that they had to meet with the committee first to find out what the consequences were going to be, but at this time the only thing he could tell me is, according to the school manual, that it means school expulsion, which means he could possibly remain out of school for the remainder of the year...and that's the only thing I had to go on at that point in time that day."[143] Based simply on her understanding of the potential consequences for having a weapon on school property it is understandable that she and subsequently counsel for the Parents, would allege that the Student was being expelled instead of being suspended from the ASD. Being alleged as a constructive expulsion can only be taken to mean that the Parents were helpless to defend the Student or countermand the decision and in being able to have him stay in school at the ASD.

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[142] Transcript, Vol I, Page 111

[143] Transcript, Vol XVII, Page 158

Since the result of the behavior was suspension there is no evidence that the ASD engaged in a unilateral constructive expulsion to deny the Student FAPE.

9. Did the ASD deny the Student FAPE by failing to conduct a manifestation determination review following a disciplinary incident which resulted in a unilateral change of educational placement?

Although the ASD did not unilaterally change the Student's placement as alleged, the question remains did the ASD conduct a manifestation determination review following the behavior for which he was suspended. The evidence presented shows in fact that a manifestation determination review was conducted on October 5, 2011.[144] As previously noted two attempts were made to address the results of the manifestation determination review; however, the Parents did not respond to the notice of conferences and did not attend the conferences. The Parents have not shown that the ASD denied the Student FAPE in this regard.

10. Did the ASD deny the Student FAPE by disclosing confidential special education documentation and information about the Student's educational evaluation, placement, and programming to the Juvenile Court Judge?

Hereto the findings of fact have been found which exonerate the ASD from having violated the IDEA by releasing confidential information protected under the FERPA.[145]

11. Did the ASD deny the Student FAPE by punishing him for behaviors related to his disability and associated with the District's circumvention of the IDEA, which resulted in a residential placement for which ASD is not certified and/or qualified to provide?

The allegation of the District's circumvention of the IDEA has already been addressed above. The evidence shows that the ASD did not participate in the actions taken by the District in this matter. It is assumed, however, that the allegation that the ASD is not a certified and/or qualified agency to provide services for this Student involves the specific and unique educational

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[144] ASD Binder, Page 11-12

[145] See the discussion above regarding the same allegation against the District.

services they believe he is entitled and needs to succeed academically. The ASD's director of student services, as noted above, testified that all of the students who attend the ASD are qualified recipients of special education services due to hearing impairments. The ASD also serves students with hearing impairments who also have other disabilities.[146] All of the teachers at the ASD are considered deaf educators. Two are also certified as special education teachers. According to the ASD director of student services, these two teachers are responsible for providing services to those students with multiple disabilities, "primarily those that have lower IQs, special needs."[147]

Here again, we have a juvenile court taking on the responsibility of deciding on an IDEA student's placement for services. The Parents have failed to show, however, that the ASD teachers assigned to teach the Student were not qualified to address his needs as defined by his hearing impairment disability and as outlined in his IEP.

12. Did the ASD deny the Student FAPE by failing to provide the Student with extended school year services for the years in question?

As noted previously when addressing this allegation with regard to the District, it was found that the ASD does not offer any summer programs such as extended school year services as defined by the IDEA. Why this is so was never addressed, nor need it be considered here as a general allegation, but only as a potential and specific violation of a denial of FAPE for the Student. At the annual review conference held at the end of the first school year (2009-10) of the Student's court ordered attendance at the ASD, the committee did consider ESY services; however, it was determined that after considering the required factors that he did not qualify.[148] The Student's mother was present when those factors were considered and the team made the decision.[149] There is no indication in the record, or in her testimony, that she objected to there being no ESY services for that summer at the ASD. However, the District's special education

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[146] Transcript, Vol I, Page 68

[147] Ibid, Page 69

[148] Parent Binder, Page 169

[149] Ibid, Page 170

continue to reside in the dorm during the summer months even if he qualified by the Department's standards for eligibility.

His eligibility for ESY services during the summer following his second year at the ASD and prior to entering his sixth grade at the ASD, was determined at the annual review conference held on May 26, 2011. Again the committee determined that after reviewing the required factors that he was not eligible to receive extended school year services.[151] The record contains a report of the teacher who provided him with ESY services at the District from the end of the school year through July 11, 2011.[152]

The Parents have not shown that even though the ASD did not provide the Student with ESY services, that was determined by his IEP team as not being needed, he did receive services through the District. Consequently, the ASD cannot be judged to have denied the Student with FAPE for failing to provide him with extended school year services.

13. Did the ASD deny the Student FAPE by punishing him and depriving him of special education and related services for behaviors he exhibited in a "dorm type" setting and not for behaviors connected to the Student's behavior at school?

The "dorm type" behaviors referred to in this allegation relate to the Student's actions and interactions with his fellow dorm mates and the dorm supervisors. The Parents would like to contend that such behaviors are equivalent to "home type" behaviors and are unrelated to behaviors associated with his being in an educational environment. The ASD's school counselor was asked on examination if she reported to the juvenile office that the Student brought a knife to "school" or to the "dorm" or had it on the "campus." Her testimony was that she could not recall what she told the juvenile officer, other than she probably read the incident report. She stated that regardless "it's a campus wide program....when [the students] are here 24 hours with us, it is under our care."[153] It would have been a moot point in that the juvenile officer assigned his case was well aware that the Student was a resident at the ASD and that the school's policy referred to

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[151] Parent Binder, Page 130

[152] Ibid, Page 346-347

[153] Transcript, Vol VI, Page 193

what she told the juvenile officer, other than she probably read the incident report. She stated that regardless "it's a campus wide program....when [the students] are here 24 hours with us, it is under our care."[153] It would have been a moot point in that the juvenile officer assigned his case was well aware that the Student was a resident at the ASD and that the school's policy referred to the possession of a weapon as pertaining to the "school."[154] The concept of "school" however, for the Parents' legal counsel should apply only to the time and place where he receives his educational activities and not the place where he resides at night time. Regardless, the Student was spared the entirety of the penalty as stated in the handbook, which reads that the incident will be "reported to the legal authorities and expulsion for one calendar year."[155] The only analogy that can be applied to solving this difference of opinion would be a comparison with a college campus where students reside in dorms and where the rules regarding the possession of a weapon, whether in a dorm or in a building where educational services are being provided would make no difference in the outcome of the penalty applied. The Parents may not have read the ASD student handbook, but they did sign the form acknowledging that they had received it and that they were cognizant of its contents according to the testimony by the ASD school counselor.[156]

There is insufficient evidence presented in testimony to declare that the Student was denied FAPE simply because his suspension and other related discipline actions were related to events that occurred during his dorm hours versus his classroom hours.

14. Did the ASD deny the Student FAPE by failing to follow due process procedures by:

a. Not providing the Parents with adequate notice of IEP conferences;

b. Not conducting an evaluation and holding an evaluation conference in a timely manner;

c. Failing to consider the need for re-evaluation for behaviors inconsistent with

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[153] Transcript, Vol VI, Page 193

[154] Parent Binder, Page 708

[155] Ibid

[156] Transcript, Vol VII, Page 162

hearing impairment;

d. Not providing accurate and proper notice of IEP attendees at IEP meetings;

e. Failing to conduct a manifestation determination review conference; or by

f. Failing to provide the Parents with periodic progress of the Student's academic achievement and goals and objectives?

Hereto as with the same allegations of due process failures on the part of the District, the evidence produced by all parties, including those of the Parents, to not support the allegation that the Parents were not provided with adequate notice of IEP conferences.[157]

The ASD held their first evaluation conference on the Student's entering the ASD in February 2010 and in the process used the previous evaluations provided to them by the District in order to determine services the team thought appropriate for him.[158] A functional assessment analysis was completed in April 2010, to address the Student's problematic behaviors which resulted in the development of a behavioral intervention plan.[159] An audiological evaluation was completed at the beginning of his fifth grade year in September 2010.[160] A vision screening was conducted by ASD on November 16, 2011, as a component of a psycho-educational assessment completed in December 2010.[161] A psychiatric evaluation was completed by the psychiatrist at Bridgeway with the assistance of an interpreter from the ASD in December 2010.[162] It was unclear from the testimony elicited by the Parents as to what additional evaluations they thought

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[157] See ASD Binder, Pages 1159-161; Parent Binder, Page 163-165 & 166-168; ASD Binder, Page 127-129; Parent Binder, Page 92-93; ASD Binder, Page 123-125; Parent Binder, Page 95-97; ASD Binder, Page 119-121; Parent Binder, Page 99-103; ASD Binder, Page 114-116; Parent Binder, Page 106-109; ASD Binder, Page 109-112; Parent Binder, Page 112-116; Page 122; ASD Binder, Page 91-92; Parent Binder, Page 123-129; ASD Binder, Page 7-78; Parent Binder, Page 66-69; ASD Binder, Page 5-10; Parent Binder, Page 478-480; Page 73-75; 76-78; and 470-475.

[158] ASD Binder, Page 131 and Parent Binder, Page 162

[159] Parent Binder, Page 468, 468a, & 468b; and ASD Binder, Page 81

[160] ASD Binder, Page 208

[161] ASD Binder, Page 205; and Pages 193-201

[162] Parent Binder, Page 642-667

were needed or as to when they should have been completed by the ASD.

No evidence or testimony was introduced to warrant a judgement as to whether or not a due process procedural violation was effected by the ASD in not conducting a re-evaluation for assessing the behavior problems and the Student's hearing impairment. However, a behavior consultant's opinion was solicited through observation at the ASD in February 2011, after which the ASD developed a behavior intervention plan. The behavior consultant did not conclude that the Student's behavior problems were related to the disability of a hearing impairment.[163] Another behavior consultant observed the Student shortly before he entered the ASD. His conclusion was that the Student's behavior problems were not related to his hearing impairment.[164]

As to the individuals invited to attend the IEP conferences, here as with the District, the evidence and testimony does not support the allegation that such a violation of the IDEA constitutes a denial of FAPE.

The allegation of not conducting a manifestation determination as a violation of due process procedures guaranteed under the IDEA has also been seen as unfounded.

As with the previous allegation of a denial of FAPE for not providing the Parents with progress on his goals and objectives, the Parents have not shown that they were not made aware of how the Student was progressing, even though the direct correlation to the stated goals and objectives contained on his IEP were considered to be too vague and often unrelated to the actual academic work that the Student's teachers reported that he was accomplishing. Given his extreme delay in developing language it was reported by experts for the District and the Parents that Student had missed a critical window of development and as such would forever be catching up in language development.

Conclusions of Law and Discussion

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the

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[163] Parent Binder, Page 322-327

[164] ASD Binder, Page 132-133

ages of 3 and 21.[165] 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.[166] The term "special education" means specially designed instruction.[167] "Specially designed instruction" means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.[168] As noted in this case the Student presented as being a child eligible to receive special education services due to a severe hearing impairment.

The Department has outlined the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in it's regulations at Section 2.00 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" or FAPE. Given that this is one of the three major elements of the Parent's contention in this case it is critical to understand in making a decision about their allegations as to whether or not the District failed to provide the Student with FAPE. The Court noted that the following twofold analysis must be made by a court or hearing officer with regard to FAPE:

(1). Whether the State (or local educational agency (i.e., the District)) has complied with the procedures set forth in the Act (IDEA)? and

(2). Whether the IEP developed through the Act's procedures was reasonably

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[165] 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

[166] 20 U.S.C. § 1401(3)(A)

[167] 20 U.S.C. § 1402(29)

[168] 34 CFR § 300.26(b)(3)

calculated to enable the student to receive educational benefits?[169]

In 1988 the Supreme Court once again addressed the issue of FAPE by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.[170] In this case the Parents have alleged that the District circumvented the requirements of the IDEA and allowed the local juvenile court to order the Parents to visit the District's ALE as well as the ASD prior to his entering the fourth grade in the District. The Parents complied and agreed with placing the Student in the District's ALE, a more restrictive environment according to the Parents. The Student's Parents were subsequently ordered by the Court to enroll the Student in the ASD, an even more restrictive environment according to the Parents than his regular fourth grade classroom in the District, or even the District's alternative learning environment, the ALE classroom. Even though they could not prove the District's influence on the juvenile court's decision, the Parents would like to believe that it was a decision made by the District and enforced by the court. In the Parent's post-hearing brief they state that "it remains unclear as to what measures were taken by the [District] in order to accomplish [the Student's] transfer from [the District] to the ASD."[171] This being said, as noted in the findings of fact, that the District did not make an effort to inform the court of the Student's IDEA status or of the federal mandate under IDEA with regard to his educational placement.

Congress established and the courts have consistently agreed that FAPE, including educating students in the least restrictive environment, must be based on **the child's unique needs and not on the child's disability**.[172] As is true in this case, too often this hearing officer has found that parents, school administrators and the legal counselors representing them,

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[169] *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206-207 (1982)

[170] *Honig v. Doe,* 484 U.S. 305 (1988)

[171] Parents' Post Trial Brief, Page 8

[172] 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

typically agree on the basis, but do not make this distinction in their arguments on the complaints or the differences they've encountered. The charge given to education professionals is to concentrate on the unique needs of the child rather than on a specific disability such as this Student's severe hearing impairment. The records provided as evidence from the Court did not concentrate on the Student's hearing impairment (except to order the Parents to learn sign language) in ordering him to be enrolled in the ASD. The District provided some, but not convincing evidence that they attempted to address the Student's behavior issues with a behavior intervention plan; however, one of the participants in that development was an officer of the juvenile court. By this time, the ability to be in control of the Student's educational placement had been taken over by the juvenile court.

In reviewing the elicited testimony and the evidence, in this case there is ample testimony and evidence that the District attempted to focus on the unique needs of the Student, that being his inability to develop language skills, having come to the District with a five-year developmental delay. However, in separating his unique educational needs associated with his hearing impairment, they separated themselves from considering early enough in his education his behavior problems. There appears in the court documents to be an entanglement of the Student's hearing impairment and his behavior problems, which was never clarified for the court. The District's behavior consultants were convinced that the behavior issues were not related to the hearing impairment. Then why would the juvenile court be ordering the Parents to learn sign language and why did the court consider the ASD as a means of providing him an education? The court was obviously not required to consider the unique needs of the Student and not just his disability; however, the District was so mandated. In so doing, and in not taking a more aggressive approach to the discipline issues earlier in the educational process, the District unwittingly relinquished to the juvenile court the opportunity to assist them in addressing the issues by changing the Student's educational placement to the District's ALE and ultimately to the ASD.

The IDEA, as amended in 1997 to revise the section on placement of violent and dangerous children and to add Section 1415(k)(9), which reads:

(9) Referral to an action by law enforcement and judicial authorities

(A) Nothing in this part shall be construed to prohibit an agency from reporting a crime

committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability. However, as pointed out in the findings of fact this juvenile court was not responding to the reporting of a crime committed by the Student, even though he reportedly stole a wedding ring and was found to be in possession of a weapon on the ASD campus. The petition submitted to the court to be adjudicated involved the abuse and/or neglect of a child rather than a crime. Nonetheless the court took it upon itself to order the Parents to enroll the Student in the ASD, some one-hundred miles from his home school district.

The District did begin to implement the behavior intervention plan once he was placed, with parental agreement, in the alternative learning environment. The testimony by his ALE classroom teacher was quite convincing in noting that the positive change in his behavior resulted in a positive change in his acquiring greater confidence in being able to learn. Based solely on her testimony, if the court had not intervened and ordered his placement at the ASD, the District's decision to provide him his education in the ALE might have been much more appropriate than in the regular classroom that he attended the year before.

Contrary to the Parents allegations there was insufficient evidence that one of the Student's unique needs that was not appropriately evaluated for by the District or the ASD (i.e., a learning disability and ADHD) which could have been associated with his behavior issues. The diagnoses of ADHD and a mood disorder were eventually rendered by mental health professionals who had insufficient data for the ADHD diagnosis, such as lacking multi-site behavioral observations and relying on his observable emotional response to an ongoing stressful event (i.e., being suspended from school) to establish a mood disorder. Despite the devastating manifestation of his behavior problems, the evidence also shows that in spite of his severe hearing impairment he made educational progress. Unfortunately, based on his extreme developmental delay in language acquisition and even with his average level of intellectual abilities, he will have to really struggle to reach the academic level wished for by his Parents. However, this is not to suggest that either the Parents or the District not continue to expect more and more from the Student with regard to developing language skills, regardless of the approach taken to instruct him.

It is necessary for this hearing officer to look only at the facts in this case as to whether or not the District and the ASD, and as it turned out, in cooperation with the Parents, developed IEP's which concentrated on the unique needs of the Student and not specifically at his disability. Further, that the IEP team considered his unique needs in deciding on an appropriate educational placement to implement his education program in the least restrictive environment.

In their post-hearing brief the Parents suggest following the results obtained by the parents involved in an Eighth Circuit case involving a prelingually profoundly deaf student where it was decided by the U.S. Court of Appeals that the student could receive FAPE in a local school, in conjunction with the provision of additional services, and that such a placement would be the least restrictive environment.[173] In its petition for certiorari to the U.S. Supreme Court, the school district argued that the Court of Appeals erred in, first adopting and applying an incorrect definition of an "appropriate education"; secondly, in determining that the local school placement satisfied the LRE; and thirdly that the Court erred in concluding that State law was irrelevant and could not be considered by the District Court. In this case, however, it was not the District that unilaterally decided on changing the Student's educational at the ASD. Some of the District personnel, and all of the ASD personnel, who testified agreed that the ASD placement was the appropriate and least restrictive for the Student in considering his unique needs and his severe hearing impairment. At the same time some of the District's personnel testified that even though the ASD placement would be the better of the two options, that they would not necessarily agree that such a decision should be made against the Parents' wishes. All in testimony, except the Parents agreed that placement at the ASD would be best for the Student because he would be immersed in both an academic and social environment in addressing his need for developing language skills.

Was the District responsible for the juvenile court's decision? There was no evidence to show that they were; however, it was evident that they agreed with the placement as being the least restrictive given the extent of and severity of the Student's disability and made no effort to argue against the court's decision. The testimony by District personnel elicited in the course of the hearing suggests that they truly believed that the unique needs of the Student as indicated in

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[173] *Springdale School District No. 50 of Washington County v. Sherry Grace*, 553 LRP 7266 (1981).

the IEP were being met, not only in the District's ALE classroom, but also in the ASD.

A second question of whether or not FAPE was denied in this case pertains to the allegation that the District and the ASD denied FAPE by not providing specialized instructions including appropriate goals and objectives in the Student's IEP. In more specifically defining what is meant by FAPE, the Court 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;

(3). They approximate the grade levels used in the State's regular education; and

(4). They comport with the student's IEP.[174]

The definition of children covered under IDEA; however, is seen as being doubly circular in that a child with disabilities must be so disabled as to require special education and related services. Again, as noted above, special education and related services 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.

The issues addressed in this case have been presented by the Parents as being such egregious violations of procedural requirements of the Act that they have denied the Student with FAPE. Keeping in mind, 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. Thus the decision process boiled down to: (1) looking at each individual issue to determine whether or not the District and the ASD were in compliance with that definition, and (2) whether or not any single violation, or the accumulation of violations, was severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*[175] agreed with the

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[174] *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

[175] *Zumwalt v Clynes,* (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

Supreme Court's decision in *Rowley* in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their child's education falls short of the federal standard may obtain a state administrative due process hearing.[176] Further, Rowley recognized that FAPE must be tailored not only to the individual child's disabilities, but also to the child's capabilities. The Court of Appeals for the Eighth Circuit has also outlined the procedural process by which a parent and student may pursue their rights under the IDEA:

> "Under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an 'impartial due process hearing.' [20 U.S.C. § 1415(b)(2).] Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. § 1415(e)(2)."[177]

The Eighth Circuit Court of Appeals has addressed the issue of the adequacy of an IEP in meeting the standards established in IDEA in order to provide FAPE. In *Fort Zumwalt School District v. Clynes*, the majority is quoted as stating that the IDEA does not require the best possible education or superior results. This too was pointed out in the Parents' post-hearing brief in referring to the *Springdale v Grace* case above. The court in the *Fort Zumwalt School District v. Clynes* case further stated that the statutory goal is to make sure that every affected student receives a publicly funded education that benefits the student.[178] In their decision the court relied on the previously cited Rowley case by quoting Rowley at 203 (grades and advancement from grade to grade as an "important factor in determining educational benefit").[179] Here, however, the juvenile court's decision to order the Parents to enroll the Student at the ASD raises the question as to whether or not the placement benefitted any party, including the Student, the Parents, the District, or even the Court. In their argument the Parents would like to have

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[176] *Board of Education v. Rowley,* (458 U.S. 176-203, 1982)

[177] *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

[178] *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

[179] Ibid, at 26 IDELR 172

considered the ASD placement as having been a placement in a residential facility, because the Student would be in residence in an ASD dorm. The Department; however, does not consider the ASD to be one of the licensed facility under their definition of a residential facility.[180] The ASD is not required under the same definition as other licensed facilities to meet the standards required by the Department.

A third question of whether or not the Student was denied FAPE was raised by the Parents as to whether or not the IEPs developed by the District and the ASD provided sufficient instruction and services to enable the Student to make progress. FAPE cannot be said to have been denied if, as noted above, the instruction and services comported with the Student's IEP.

The IEP's developed and implemented by the District and the ASD contained sufficient indications of specialized instruction in all of the Student's academic areas. The testimony by teachers in the District and at the ASD reflected their knowledge of the Student's academic needs and the negative impact that the severity of his hearing impairment and the impact it had on his delayed development of language without intensive intervention before the age of three. Once in the District's arena of responsibility he was never without sufficient services as deemed appropriate, including an interpreter, occupational therapist, physical therapist, and counselor. The allegation that the IEPs were not developed and implemented by both agencies was not shown to be an accurate reflection of the IEP team's consideration in developing the IEPs and his teachers in implementing them. The Parents, most especially the Student's mother, were intimately involved in all of the IEP conferences.

It was the intent of the IDEA to encourage parental participation in the development of a disabled student's IEP. The value of parental participation in the development of an IEP has been consistently emphasized in the IDEA.[181] As the Supreme Court stated in the previously cited Rowley case "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the

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[180] Section 18.03.7.2 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008. (Revised 2010)

[181] 20 U.S.C. §§ 1400(c); 1401(20); 1412(7); 1415(b)(1)(A), (C)-(E); 1415(b)(2)

resulting IEP against a substantive standard."[182] The previously cited Eighth Circuit case regarding the necessity of there needing to be serious procedural violations in order to declare a violation of FAPE, on the other hand, takes a strong opinion in the other direction when it comes to the requirement of parental participation: "An 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.'"[183] In this case there is no doubt that the Parents participated in the development of the Student's IEPs. Additionally, there is a preponderance of evidence in the record showing that they were provided with sufficient notice and progress made by the Student.

The frustration the Parents experienced in dealing with the Student's behavior problems in the school; the court-order to enroll him in the ASD and be away from home; and the suspension from the ASD which led to this due process hearing cannot not be ignored. To have been basically accused by the juvenile court to have subjected their child to abuse and neglect also surely lead to additional frustration and feelings of helplessness in their participation of helping to direct the Student's education. Regardless, their testimonies reflected a history of active involvement in the Student's health, welfare, and education which can only be admired by those of us without such challenges as the Parents meet daily.

Also, as noted earlier, the courts have agreed that an IEP must be designed to provide the possibility for a student to obtain an educational benefit from the proposed instruction. What constitutes an educational benefit or meaningful benefit has also been the discussion of multiple court decisions. Again, going back to the Rowley standard, progress according to the courts should be measured in terms of the educational needs of the disabled child and should be more than "trivial" or "de minimis."[184] In evaluating whether FAPE was furnished the courts have demanded an individual inquiry into a child's potential and educational needs. In this case the

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[182] *Bd. of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley*,458 U.S. 176, 189, 205 (1982)

[183] *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996) and *J.P. v. Enid Public School*, No. CIV-08-0937-HE (W.D. Okla. 9-23-2009)

[184] *Polk v. Central Susquehanna Intermed. Unit 16*, 853 F.2d 171 (3rd Cir. 1988); *Ridgewood B. of Educ. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); and *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)

Student's academic progress, although less than would be desired by the Parents, was shown to be more than trivial or de minimis by the evidence and in considering the developmental delay in his acquiring language skills. It is not a mandate of the IDEA that a parent, anymore than an educational agency, be able to forecast with ultimate certainty of the adequacy of a particular IEP. The IEPs, as noted above, must however, have been developed in such a manner as to allow the Student the opportunity to achieve an educational benefit from the educational program. From the documents entered as evidence and the testimony of the educational professionals this would appear to be the case for this Student, even though as noted he may not have achieved academically to the degree believed possible by the Parents. Even the Parents' expert witness could not dispute the difficulty that the District and the ASD faced in assisting the Student with overcoming his developmental delay in language as a consequence of not being exposed to a more intensive therapeutic regime earlier in life.

How the Student's disruptive behaviors were believed to have had a negative impact on his academic achievement was one of the major underlying issues addressed by the Parents. They believed they were the result of the District and the ASD failing to evaluate and program for an attention deficit disorder. The Eighth Circuit addressed this issue in *CJN v. Minneapolis Public Schools* by noting in its decision that it did not mean that a district satisfied its FAPE obligation simply because a student with behavior problems makes academic progress. Rather, it stressed that when a child's behavior, if uncontrolled, would curtail his ability to learn, the fact that he is learning indicates the district has addressed the problem, at least in part.[185] Here however, the District appears to have early on in the Student's education attributed the behavior problems to something other than his inability to hear. As a consequence he was subjected to the regular discipline policies of the District. In the Student's case that meant suspension on multiple occasions. Even with adequate IEPs in place to include a behavior intervention plan the Student continued to display inappropriate behaviors both in the classroom and in the dorm as a student at the ASD. The behavior consultants all agreed that his behavior problems were not related to his hearing impairment. The question then becomes as to whether or not both school

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[185] *CJN, by and through his parent and natural guardian, SKN, Appellant, v. Minneapolis Public Schools, Special School District No.1; Minneapolis Board of Education; Catherine Shreves, Chair; Carol Johnson, Superintendent, in their representative capacities, Appellees,* (323 F.3d 630) (U.S. Court of Appeals, 8th Cir.) (2003)

agencies complied with the IDEA procedures in addressing the Student's behavior problems. There was insufficient evidence to decide that the District's delay in considering the possibility of another disability such as ADHD as being serious enough of a procedural violation to contribute to the denial of FAPE.

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 court when the alleged violation has been based solely on procedural violations.[186] Case law attempting to interpret both Congress and comply with the findings of the Supreme Court have stated that procedural errors are sufficient to deny FAPE if such errors "[1] compromise the pupil's right to an appropriate education, [2] seriously hampered the parents' opportunity to participate in the formulation process, or [3] caused a deprivation of educational benefits."[187] The alleged violations of not following the IDEA's due process procedures such as not providing the Parents with sufficient notice of meetings, not providing them with regular reports of progress on a Student's goals and objectives, not having appropriate personnel present and unannounced attendees at IEP meetings, or not conducting manifestation determination reviews were not shown by the evidence or testimony to warrant a judgement that the District or ASD failed to follow due process procedures in regard to the allegations.

Although outside the judicable time range of this hearing, had the District acted sooner and more aggressively in addressing the Student's behavior issues, however, there might have been a significant enough change for him to have been able to stay within the District's educational parameters without court removal.

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[186] *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 Co*unty, 841 F.2d 824 (8th Cir.1988). (See also *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th 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 (5th Cir. 2003); *School Board of Collier County v. K.C..*, 285 F. 3d 977 (11th Cir. 2002), 36 IDELR 122, *aff'g* 34 IDELR 89 (M.D. Fla. 2001); and *Costello v. Mitchell Public School District 79,* 35 IDELR 159 (8th Cir. 2001).

[187] Roland M. V. Concord Sch. Comm. 910 F.2d 994 (1st Cir 1990); accord Amanda J. ex rel. Annette J. V. Clark Cnty. Sch. Dist., 267 F.3d 877,892 (9th Cir. 2001).

Order

The results of the testimony and evidence warrant a finding for the ASD and for the District; however, only in part for the District. Although, there is not sufficient evidence to warrant a denial of FAPE, as alleged, the Parents have introduced sufficient evidence in the record to reflect that the District failed to take action with regard to the Student's behavior problems prior to the years in question which may have averted the ultimate juvenile court involvement and in the non-IDEA educational placement by the Court. At the same time the Parents can be seen in the evidence as well as in testimony to have been equally responsible for having contributed to the Student's ultimate placement for the years in question by not taking advantage of the offers and recommendations in providing the Student with a more intensive learning environment for developing language between birth and three years of age. Hereto, these years are beyond the scope of this due process hearing; however, whether due to financial constraints or lack of knowledge in how language is acquired, the Parents need to acknowledge some degree of responsibility for placing the District in a difficult position in attempting to educate the Student while being five years in arrears for language development.

It is not possible to compensate the Student for missed developmental opportunities or to expect either the District, the ASD, or the Parents to make such opportunities possible. It is only possible to order the District and the Parents to work together to provide the Student with access to an environment where instructors can take advantage of his language development deficits. Based on the evidence that environment would be either the ASD where he can be immersed in language development both academically and socially, or in one of the District's small classes such as the ALE where he will be able to have significant attention from the instructor with minimal distraction from other students. Obviously at the ASD there would be no need for an individual interpreter to be present with him during his school day. Whereas, should the IEP team elect for him to continue to reside and be educated in the District a full time interpreter who also has skills in assisting the teacher would be preferable for him to advance academically.

It is hereby ordered for the District to conduct a separate programming conference and to invite experts as deemed needed by the Parents, to develop an IEP that will include placement in on of the educational environments as described above. Further, the District will absent themselves from the involvement of the Student's education with the juvenile court and will remain so unless criminal activity warrants such involvement.

rcvd dated 4/26/13

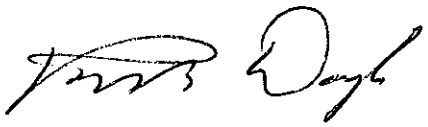
All other issues as noted above and as alleged by the Parents as a denial of FAPE by the District and the ASD are hereby dismissed with prejudice.

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.



Robert B. Doyle, Ph.D.
Hearing Officer

January 11, 2013
Date