

ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING

JESSICA P. )  
)  
Student )  
vs. ) Case No. 3851  
)  
CHICAGO PUBLIC SCHOOLS )  
)  
Local School District )

CAROLYN ANN SMARON, Hearing Officer

**DECISION AND ORDER**

**PROCEDURAL BACKGROUND**

By letter dated February 10, 2004, counsel for the mother of the student requested an impartial due process hearing. ISBE received that request on February 24, 2004 and, by letter dated February 25, 2004, CAROLYN ANN SMARON was appointed the hearing officer.

On March 2, 2004, the hearing officer served the parties with a Notice of Prehearing Conference. The prehearing conference took place on March 10, 2004. Elissa A. Miller represented the local school district. Michael O'Connor represented the interests of the student. Subsequent to the prehearing conference, the parties participated in a multidisciplinary meeting to discuss the eligibility of the student for special education and related services. The participants concluded that the student was eligible for special education and related services on April 7, 2004 and developed an Individualized Education Plan for the student. The parents filed a dissent, objecting to the decisions regarding extended school year, compensatory services, group social work services and the development of an interim behavior intervention plan. In addition, the parents continued to object to the school district's refusal to rescind an expulsion. As a consequence, the parties proceeded to hearing on the issues transmitted to the hearing officer and local school district on April 13, 2004. The hearing commenced on April 26, 2004 and continued on June 1-4, 2004, June 25, 2004 and concluded on July 20, 2004. The parties submitted post-hearing briefs, limited to fifty pages, which were received by the hearing officer via email on August 4, 2004. The record was closed on August 5, 2004 upon receipt of the supporting documentation for the post-hearing briefs. TRACY HAMM, ELISSA MILLER and LUIS RODRIGUEZ represented the school district during some or all of the hearing. MICHAEL O'CONNOR and SARA MAUK represented the mother of the student.

## **ISSUES PRESENTED AND REMEDIES REQUESTED**

The mother of the student alleged that the school district:

- failed to make a timely assessment of eligibility, despite numerous indications of potential eligibility beginning in elementary school and increasing indications during freshman and sophomore years of high school, with the result that student was denied a free and appropriate education;
- improperly invoked disciplinary measures, including suspensions in excess of 10 days and an expulsion, despite evidence of potential eligibility and a failure to conduct an evaluation and thereby denied student FAPE;
- failed to expunge student's expulsion, after finding her eligible for special education services thereby extending the denial of FAPE for this student;
- improperly denied ESY eligibility, with placement in the least restrictive environment;
- denied compensatory services that are needed to restore loss of FAPE;
- denied group social work services, despite clear indications of problems student has encountered interacting with her peers;
- developed a behavior intervention plan without relying on a functional behavioral analysis, and without the advice of staff with skills and training in the development of behavioral intervention plans;
- developed an IEP for the student that lists present levels of performance for social and behavioral concerns that are inaccurate and not measurable. The IEP team failed to undertake a complete review of student's school records concerning discipline in determining the present levels of performance;
- failed to conduct an adequate and appropriate assessment of student's cognitive functioning and academic skills;
- failed to offer an appropriate placement in a regular high school with necessary class size, and supportive services;
- failed to implement the 4/7/04 IEP in the current placement at Vivian Summers Alternative School.

The mother of the student requested an Order directing the school district to:

- expunge student's expulsion;
- pay for an Independent Educational Evaluation;
- provide compensatory services in the form of 100 hours of tutoring;
- provide ESY in the least restrictive environment;
- provide a placement in a regular high school, with appropriate supports;
- provide group social work services, in the amount of 60 minutes per week;

- conduct a functional behavioral analysis of student, using appropriately trained staff, and prepare a behavioral intervention plan relying on data gathered by that analysis;
- prepare an IEP with present levels of performance stated in objective terms that are consistent with assessments of the student;
- pay for expert witnesses of parent at the hearing;

The Local School District denies that

- it failed to make a timely assessment of eligibility;
- denies that it improperly invoked disciplinary measures;
- denies that it should expunge the student's expulsion, after finding her eligible for special education services
- denies that the student was eligible for extended school year.
- denies that compensatory services are appropriate;
- denies that group social work services are appropriate;
- denies that it developed an inappropriate behavior intervention plan;
- denies that the IEP for the student contains present levels of performance for social and behavioral concerns that are inaccurate and not measurable;
- denies that the IEP team failed to undertake a complete review of the student's school record concerning discipline in determining the present levels of performance;
- denies that it failed to conduct an adequate and appropriate assessment of student's cognitive functioning and academic skills;
- denies that it failed to offer an appropriate placement in a regular high school with necessary class size, and supportive services.
- The District concedes that it failed to implement Jessica P.'s 4/7/04 IEP from April 17, 2004 until June 2, 2004.

The District requests that this hearing officer find that it provided a free appropriate public education for the student after it timely and properly identified, assessed and determined specialized services for the student.

### **FACTS**

At the time of the hearing, the student was fifteen years old, completing her second year of high school at Chicago Military Academy. She attended O'Keefe Elementary School from second through eighth grade. The Cumulative Record Card revealed that the student received mostly "C" and "B" grades while in elementary school but spelling grades were mostly "D" grades with one "F". In eighth grade, the student was absent fourteen days and tardy twenty-five times. The student reported to the school district's psychologist, Cary Goldstein that she was suspended twice for fighting and talking back to teachers while in elementary school. **PD33/PD210**

The student applied to and was accepted by the Chicago Military Academy-Bronzeville (CMAB). CMAB is a unique high school in Chicago in that it has a mandatory JROTC instructional component and a required college four-year college preparatory curriculum, emphasizing language arts, mathematics, science and technology. The students wear JROTC uniforms daily. The standards of conduct are more rigorous than the Chicago Public Schools Uniform Discipline Code. **P47/PD49**

On the first day of the student's attendance at CMA, she was assaulted at the local CTA transit stop. During the first semester of the 2002-2003 academic year, the student received written disciplinary notices as a result of which the student was suspended from school for thirteen days plus two Saturday detentions. The misconduct reports involved intense conflict with teachers including yelling and use of obscenities.

October 30, 2002	suspended: 4 days
December 3, 2002	suspended: 3 days
December 19 2002	suspended: 1 day
January 17, 2003	suspended: 5 days

**PD59/PD68** The student was absent twenty-five days and tardy thirty-two times. She flunked all of her academic courses and received "D" grades in her remaining three classes. The school counselor, **Constantina Rapp**, met with the student once during this period of time. The student was emphatic that she did not want to attend CMAB. Ms. Rapp never noticed any out-of-control behavior on the part of the student and recalled that when asked to calm down, the student would calm down. Ms. Rapp never viewed the misconduct reports for the student but believed that the student's conflicts revolved around CMAB teachers and front door security staff. The other counselor, **Jeanette Howard**, met with the student and from their first conversation, the student insisted that she did not want to be CMAB. She recalled that the student was having problems complying with the uniform policy and recalled giving the student money to purchase parts of her uniform. She recalled that she advised the student's mother that the student was not happy at CMAB and the mother responded that the student would be staying at CMAB. Ms. Howard recalled that the student met with the social worker during this period and the social worker advised her that the student did not want to attend CMAB.

During the second semester of the 2002-2003 academic year, the student received more disciplinary notices and was suspended for twenty-five days. These incidents again involved conflicts with teachers, students and school staff. On June 3, 2003, the student was suspended for ten days after bringing a steak knife to school, with expulsion recommended. **PD87** In preparation for the expulsion hearing, the CMAB staff completed an expulsion "packet" consisting of the student's misconduct reports and current grade reports. **PD88** During the second semester, the student was absent fifteen days and tardy seventy-eight times. She again failed all of her academic courses and received "C" grades in her remaining two classes. **PD35** Ms. Howard reviewed the

student's grades at the end of the 2002-2003 school year and investigated the failing grades. In her opinion, the grades reflected the student's desire to exit CMAB and reflected the student's refusal to do her schoolwork. In Ms. Howard's opinion, CMAB was precisely the school that a student requiring a small school environment should attend - the school is small, safe, has good academics, and discipline.

The mother of the student testified that she met with Curtis Brown, the Dean of Students at CMAB in June 2003 after the "steak knife" incident and provided a handwritten letter (handwritten in Mr. Brown's office) to Mr. Brown requesting a special education evaluation. Mr. Brown had no recall of that incident and had no recall of a subsequent conversation with the mother of the student in September, 2003 where she asked about the status of the request.

Ms. Sarah Moon-Sarudi, the CMAB special education case manager, testified that CMAB has a student "intervention assistance team" and classroom teachers, administrative staff and support service staff may refer students to that team if they believed that a student was "at risk". Ms. Moon believed that "an at risk student" meant a student evidencing academic or behavioral difficulties. Ms. Moon received no referrals of the student to the intervention assistance team by CMAB personnel and received no requests to evaluate the student either by CMAB personnel or the mother of the student. At the hearing, Ms. Moon testified that receipt of four "F" grades might indicate academic problems.

During the summer 2003, the student attended summer school where she took an Algebra course, receiving a "D". The record shows no disciplinary or misconduct reports for the summer session. **PD34** The record is "confirmed" by the testimony of Mrs. Howard who was the administrator for the CMAB summer school during the summer of 2003. Mrs. Howard testified that the student had no behavior problems in summer school.

The student started the 2003-2004 academic year as a "demote freshman" as she had failed all of her academic classes the preceding year. The student received four misconduct reports as a result of which she was suspended for twenty days. The first incident occurred on September 24, 2003 when she used profanity toward a classroom teacher and was suspended for five days. At the expulsion hearing on September 26, 2003 ("the steak knife incident"), the parties agreed to refer the student to the SMART program in lieu of a one semester expulsion. **SD76** By letter dated November 21, 2003, the school district accepted the stipulated settlement and advised the parent that she should enroll the student in the SMART Program. **SD74** On October 10, 2003, the student received a two day in-school suspension for insubordinate conduct in the drill hall. On November 12, 2003, the student threatened other students after being reprimanded by the teacher and received a three day suspension. Finally, on November 21, 2003, the student was involved in an altercation with another student who had

sprayed Mace in her face. In attempting to separate them, the student punched and kicked a staff member and received a ten day suspension, pending expulsion.

**Dwight Powell**, the social worker at CMAB, met with the student a number of times in the fall, 2003 upon a referral from Mrs. Howard, the school counselor. Mrs. Howard referred the student to him because of her anger over not wanting to be at CMAB. Mr. Powell operates an anger management group but the student only attended one time. On November 25, 2004, Mr. Powell spoke with the student and her mother about what he referred to as "mother-daughter" issues. He referred them to Hartgrove Hospital. **PD41** Hartgrove Hospital is a psychiatric facility treating children, adolescents and adults. The student was admitted into the day treatment program from December 8-23, 2003. **PD157** The hospital reported that the student was admitted because of aggressive verbal outbursts in school and an inability to control her anger. The hospital reported that the student had been referred by the school social worker. The student reported that she had feelings of hopelessness and worthlessness every ten weeks when the report card would arrive with poor grades. **PD172** The admitting and discharge diagnosis was "intermittent explosive disorder". The student's behavior improved in the day treatment setting where she attended small classes and participated in group and individual therapy. The treating psychiatrist, **Dr. Clara Perez**, testified that she expressly ruled out a mood disorder, conduct disorder and oppositional defiant disorder. Dr. Perez further testified that because the student responded well to the small structured classes, she did not prescribe any medication and discharged the student with a recommendation for follow-up counseling on an individual and group basis. Prior to the hearing, Dr. Perez was provided the student's misconduct reports and upon her review of those records, she testified that the misconduct reports confirmed her belief that the student had serious anger problems. Dwight Powell met with the student on January 6, 2004 and discussed her options for high school placement. The student indicated that she wanted to attend her home school, South Shore High School. Mr. Powell did not discuss Hartgrove Hospital with the student at that meeting.

In preparation for the second expulsion hearing ("assaults member of staff incident"), the CMAB staff completed an expulsion "packet" consisting of the student's misconduct reports and current grade reports. At the expulsion hearing held on January 13, 2004, the hearing officer noted that the student had received services at Hartgrove Hospital in December 2003 but recommended expulsion for the remainder of the 2003-2004 academic year with alternative placement. That recommendation was adopted by the school district on January 28, 2004 **SD88/PD114**. The student was accepted at the Vivian E. Summers Preparatory School ("alternative high school") which she attended for the remainder of the 2003-2004 academic year. While in this placement, the student received two misconduct reports reflecting disrespectful behavior toward teachers and classmates on February 23, 2004 and March 8, 2004. **PDA14/PDA15**. The student received a C in English 2, B in World History, B in US History, D in Environmental Science, D in Geometry and a D in Physical Education.

The student's grades during the first semester of the 2003-2004 academic year were again dismal. Her fifth week progress report showed a B in Mixed Chorus, a C in ROTC, a D in Environmental Science and F's in her remaining classes: American Literature, Geometry, US History and Computer Science. At the semester end, she received a C in Mixed Chorus, a D in ROTC, and F's in the remainder of her classes. She had been absent 30 days and tardy 11 times. **PD36/37 Clifford Thebaud** was the student's Environmental Science teacher. Mr. Thebaud was of the opinion that the student had the potential to get an "A" or a "B" but chose not to do the classroom assignments. Mr. Thebaud's policy for missed assignments was posted on the board for all of the students to see. **Scott Fogel** had the student in his morning "division" class. When the student returned in January, 2004, the student advised him that she was glad that she was getting out of CMAB. Mr. Fogel had no problems with the student in his division class. **Timothy Walker** was the student's Chorus teacher. Mr. Fogel reported few issues with the student. Her final grade was based on lack of attendance, lack of participation in class and low test grades. **Vincent Davis** was the student's JROTC drill instructor. The student would not comply with his orders, would not wear her full uniform, and regularly said that CMAB was a stupid place to be. Mr. Davis was aware of her behavior in other classrooms as her name was mentioned as a student with an "attitude" problem. **Gretchen Wilferth** was the student's computer science teacher. Ms. Wilferth recalled that the student was quiet in class, sometimes laying her head down and refusing to work. She recalled that the student was inconsistent in turning in assignments. **Captain James Patterson** was the student's US History teacher. He reported no disciplinary problems. He described her classroom work as "spotty" and inconsistent. In his opinion, the student was capable of doing the classroom work but chose not to. **Daniel Claahsen** was the student's World History teacher in her freshman year. In his opinion the student was not an appropriate student for special education as her classroom difficulties were related to her tardiness, absences, and non-completion of assignments.

**Joyce T.**, the mother of the student testified that the student's experiences in elementary school were mixed. She recalled one suspension and recalled being called to school multiple times for both behavioral and academic problems. The mother does not recall the student ever telling her that she did not want to attend CMAB, not wanting to wear the JROTC uniform or that she was not happy at CMAB. She recalled meeting with Mr. Brown after the "steak knife" incident and wrote a note requesting a special education evaluation for the student. The mother recalled that she asked about her written request in September, 2003. The mother confirmed the testimony of the school social worker that she asked for help for her daughter. The mother told the hearing officer at the January 2004 suspension hearing that her daughter had just been discharged from Hartgrove Hospital. The mother of the student requested a due process hearing on February 10, 2004. Thereafter the school district initiated the process for investigating whether the student might be eligible for special education. A domain meeting was convened and on March 22, 2004 the mother of the student consented to the collection of additional evaluation data. **SD2**

**Cary Goldstein** has a Masters in Clinic Psychology and has been employed as a school psychologist by the school district for 27 years. The Psychological Evaluation Report prepared by Mr. Goldstein indicated that he had interviewed the student on March 23, 2004 and administered certain psychological tests. He concluded that the student was sensitive with a volatile temper. Based on his review of the student's records, he reported that the student was easily annoyed, frequently refused to follow requests of adults, could be vindictive, impulsive and lacking in judgment and stated that these characteristics meet the criteria for a diagnosis of oppositional defiant disorder. Mr. Goldstein found that the student's cognitive development was average and achievement issues were commensurate with intellectual capabilities. At the hearing, Mr. Goldstein reported that he found the student to be pleasant and to have willingly cooperated with his lengthy evaluation.

Mr. Goldstein conducted an evaluation of the student's levels of cognition. He administered the Weschler Intelligence Scale for Children, Third Edition (WISC-III) and reported that the student's verbal IQ was 95 and her performance IQ was 81, reflecting a fourteen point discrepancy between the student's verbal and performance IQ. Mr. Goldstein found this discrepancy "significant" but did not believe that the student might be learning disabled. Mr. Goldstein testified that he followed the testing protocols in administering the tests.

**Dr. Michelle Rosen** was offered as an expert by the mother in the field of clinical psychology with a specialty in pediatric neuropsychology. Dr. Rosen's current practice consists of children ages 5-21 with a range of disabilities including learning disabilities and emotional disorders. Typically she attends the IEP meetings for all of the children she evaluates and participates in the development of goals and objectives, functional behavioral analysis and behavior intervention plans. Dr. Rosen routinely completes a learning environment assessment which includes an observation of the student and conversations with the student's teachers. In reviewing existing school records, she routinely requests past test protocols to compare them with her current test protocols.

Dr. Rosen testified that she viewed the fourteen point discrepancy on the WISC-III as statistically significant. Dr. Rosen reviewed the Goldstein test protocols and found numerous errors in administration. In her opinion, if the test had been properly administered, there would have been a nineteen point discrepancy. In her opinion, Cary Goldstein's error inflated the performance scores and deflated the verbal scores.

Mr. Goldstein conducted an educational assessment of the student. He administered the Wide Range Achievement Test (WRAT 3) and reported that the student's reading skills were at the 8th grade level, spelling skills were at the 5th grade level and math skills were at the 8th grade level. Mr. Goldstein also administered the Monroe Sherman Group Diagnostic Reading Aptitude Test and reported that the student was reading at the 9th grade level.

Dr. Rosen testified that the WRAT 3 is a screening measure and the Goldstein test protocols contained numerous errors including an apparent failure to reach a ceiling on certain sub-tests and the use of the test results to draw a conclusion regarding the student's decoding skills when the test manual precludes such a conclusion. As a consequence of her review, Dr. Rosen concluded that the test results were not an accurate educational assessment of the student.

Cary Goldstein also measured the student's visual motor integration skills utilizing the Bender Gestalt Test and found her skills to be adequate. He also assessed the student's written language skills by asking her to write a paragraph about her experience at the alternative high school. He reported good organizational skills, sentence structure, punctuation, and age appropriate content. Dr. Rosen found none of these assessments useful as none of the assessments were objective assessments of the student.

Mr. Goldstein also reviewed the Adolescent Symptom Inventory completed by Mr. Jennings at the alternative school and Mr. Patterson, a teacher at CMAB. The various categories within the test correspond to various psychiatric diagnoses. The results were considered by him to be inconclusive but leaning toward oppositional defiant disorder. Dr. Rosen testified that a clinical psychologist may diagnose disorders but a school psychologist is not trained to make such diagnoses; rather they provide therapy and undertake evaluations limited to school performance.

Mr. Goldstein interviewed the student and reported that the student did not want to attend CMAB, that she was forced to attend, and resented the uniform and the rules of the institution. The student indicated that she intended to do everything possible to sabotage any chance of success that she might have had at CMAB i.e. "she sabotaged her own success".

Mr. Goldstein testified that he reviewed the student's disciplinary record and noted that she had been suspended on numerous occasions and seemed to have great difficulty following school rules. Mr. Goldstein also noticed that the student seemed to have difficulty interacting with adult authority.

Mr. Goldstein also testified that he had reviewed the Discharge Summary from Hartgrove Hospital **SD6**. He testified that he noted the discharge diagnosis of intermittent explosive disorder and was familiar with the diagnosis. Mr. Goldstein testified that the diagnosis applies mainly to males and is very rare, indicative of a person with a hair-trigger temper. In his interview with the student, the student seemed well aware of her temper building up, that it was a gradual process. On the day of the IEP meeting in April, 2004, Mr. Goldstein reviewed a supplement to the Discharge Summary completed by Dr. Perez. Dr. Perez indicated that the student would do well in a setting that provides structure. In the opinion of Mr. Goldstein, CMAB is precisely the setting that Dr. Perez

was recommending (highly structured, small student population) and yet the student had not been successful at CMAB.

**Dr. Terri Finn** is a clinical and school psychologist employed by the school district since 1980. Dr. Finn undertook a "record review" to test the adequacy of the assessments and the results. In her expert opinion, the absence of a learning environment does not invalidate a psychological assessment; the failure to use the most current version of a psychological test does not invalidate the psychological assessment; the failure to note fatigue or to note that the scores are prorated in a report does not invalidate the findings or the scores. In her review of the Goldstein test protocols, she found no significant errors. Although normed in the 1930's, she found the Monroe Sherman Group Diagnostic Reading Aptitude Test helpful in assessing the reading skills of students although there are no standard scores available. Dr. Finn testified that the Monroe Sherman provides a test setting that approximates school learning in textbooks and standardized tests like the Iowa Test of Basis Skills (ITBS).

Dr. Rosen reviewed the Functional Analysis and Behavior Intervention Plan contained within the April 7, 2004 Individual Education Plan **SD36**. Dr. Rosen believed that the targeted behaviors were not measurable and no explanation was provided for the term "inappropriate" in the phrase "inappropriate interactions". Dr. Rosen did review the misconduct reports for the student but was of the opinion that they provided insufficient data for a behavior intervention plan.

The parent filed a request for due process on February 10, 2004 raising issues of "child find" violations. **PD3** The school district initiated the referral process and on March 19, 2004, the parent signed a consent for the evaluation. **PD179** On April 7, 2004, the student was found eligible for special education based on an emotional disturbance and an Individualized Education Plan was prepared. Goals and objectives were developed, a behavior intervention plan developed and the team concluded that the most appropriate placement for the student was a regular education setting with supplementary aides and thirty minutes per week of individual social work services. No compensatory services were included and the student was not found eligible for extended school year services. The school district refused to rescind the January 2004 expulsion and refused to consider that the student might have a learning disability. **SD29**

### **APPLICABLE LAW**

The law applicable to the facts in this case is set forth in the Individuals with Disabilities Education Act (IDEA), 20 USC §1401 et seq., the federal regulations to IDEA, 34 CFR Part 300, the School Code of Illinois, 105 ILCS §5/14-8.02 et seq., and the applicable state regulations, 23 Ill.Admin.Code Part 226. The local school district bears the burden of proof that at all times relevant it properly identified the nature and severity of the student's suspected disabilities and if appropriate, that it offered the

student a free appropriate public education in the least restrictive environment, consistent with procedural safeguards.

**"Child Find"** Each school district shall be responsible for actively seeking out and identifying all children from birth through age 21 within the district, including children not enrolled in the public schools, who may be eligible for special education and related services. Procedures developed to fulfill this responsibility shall include ongoing review of each child's performance and progress by teachers and other professional personnel, in order to refer those children who exhibit problems which interfere with their educational progress and/or their adjustment to the educational setting, suggesting that they may be eligible for special education and related services. When the responsible school district staff member(s) conclude that an individual evaluation of a particular child is warranted based on factors such as a child's educational progress, interaction with others, or other functioning in the school environment, the requirements for referral and evaluation set forth in this Subpart B shall apply. 23 Ill.Admin.Code §226.100

**"Referral Process"** When there is a reason to believe that a child may have a disability requiring special education and related services, the child shall be referred for a special education evaluation. Each school district shall develop and make known to all concerned persons procedure by which an evaluation may be requested. These procedures shall (1) designate the steps to be taken in making a referral (2) designate the person(s) to whom a referral may be made (3) identify the information which must be provided (4) provide any assistance that may be necessary to enable persons making referrals to meet any related requirements established by the district and (5) identify the process for providing the parents with notice of their rights with respect to procedural safeguards. 23 Ill.Admin.Code §226.110

**Emotional Disturbance** (includes schizophrenia, but does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance): A condition exhibiting one or more of the following characteristics over an extended period of time and to a marked degree that adversely affects a child's educational performance:

An inability to learn that cannot be explained by intellectual, sensory, or health factors;

An inability to build or maintain satisfactory relationships with peers and teachers;

Inappropriate types of behavior or feelings under normal circumstances;

A general pervasive mood of anxiety or unhappiness or depression; or

A tendency to develop physical symptoms or fears associated with personal or school problems. **23 Ill.Admin.Code §226.75**

**Learning disability** A team may determine that a child has a specific learning disability if (1) the child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (2) of this section, if provided with

learning experiences appropriate for the child's age and ability levels; and (2) the team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) oral expression (ii) listening comprehension (iii) written expression (iv) basic reading skill (v) reading comprehension (vi) mathematics calculation (vii) mathematics reasoning. **34 CFR §300.541**

**Protections for Children Not Yet Eligible** A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including behavior described in §300.520 or §300.521, may assert any of the protections provided for in this part if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. **34 CFR §300.541** In Illinois, the school district is deemed to have knowledge that a child may be an eligible child if, prior to the incident, the behavior or performance of the child demonstrates the need, or a potential need, for such services. **23 Ill.Admin.Code §226.430(b)(2)**

In **Board of Education, Hendrick Hudson Central School District. v. Rowley.** 458 US 176 (1982) ("Rowley"), the Supreme Court set forth a two pronged test for evaluating whether or not the school district has complied with applicable special education laws - there must be compliance with statutory procedures and then the individualized education program (IEP) developed through such procedures must be reasonably calculated to enable the student to receive educational benefit.

In **T.D. v. LaGrange School District No. 102, 349 F.3d 469** (7th Cir.2003) the court held that in the absence of explicit statutory authorization in IDEA, there is no authority for allowing expert witness fees.

### **APPLICATION OF LAW TO THE FACTS**

It appears to this hearing officer that the school district's initiation of a "referral" was in direct response to the mother's request for a due process hearing in February, 2004. But the key issue in this case is not whether the student is eligible for special education but when the school district should have contemplated that she might be eligible. That question is at the crux of the "child find" requirements of IDEA and must be addressed prior to any review of the Individualized Education Plan developed in April 2004.

State regulations implementing "child find" require the school district to establish certain procedures:

**"Child Find"** Each school district shall be responsible for actively seeking out and identifying all children from birth through age 21 within the district, including children not enrolled in the public schools, who may be eligible for special education and related services. **Procedures developed to fulfill this responsibility shall include ongoing**

**review of each child's performance and progress by teachers and other professional personnel, in order to refer those children who exhibit problems which interfere with their educational progress and/or their adjustment to the educational setting, suggesting that they may be eligible for special education and related services.**

When the responsible school district staff member(s) conclude that an individual evaluation of a particular child is warranted based on factors such as a child's educational progress, interaction with others, or other functioning in the school environment, the requirements for referral and evaluation set forth in this Subpart B shall apply. 23 Ill.Admin.Code §226.100 (emphasis added)

**"Referral Process"** When there is a reason to believe that a child may have a disability requiring special education and related services, the child shall be referred for a special education evaluation. Each school district shall develop and make known to all concerned persons procedure by which an evaluation may be requested. These procedures shall (1) designate the steps to be taken in making a referral (2) designate the person(s) to whom a referral may be made (3) identify the information which must be provided (4) provide any assistance that may be necessary to enable persons making referrals to meet any related requirements established by the district and (5) identify the process for providing the parents with notice of their rights with respect to procedural safeguards. 23 Ill.Admin.Code §226.110 (emphasis added)

At the conclusion of the student's first semester at CMAB, she had flunked all of her academic courses and received "D" grades in her remaining three classes. In addition, the student's behavior had resulted in suspensions totaling 13 days. The incidents resulting in suspensions occurred on October 30, 2002, December 3, 2002, December 19, 2002 and January 17, 2003. The last two incidents also resulted in Saturday detentions. The sporadic nature of the incidents i.e. occurring sometimes once a month, sometimes two or three times within a one or two day period, not with any regular frequency should not have raised any "red flags" but coupled with the student's dismal academic performance, should have caused someone at CMAB to wonder about the cause of that dismal performance. However, instead of "wondering", CMAB staff concluded that the student had an "attitude" problem and was the cause of her own academic difficulties. Unfortunately, IDEA **requires** that the school district inquire further. **It seems to have escaped everyone's notice that this child failed every single academic class at CMAB!**

By the end of the student's second semester at CMAB, the student's academic profile remained unchanged. She again failed all of her academic classes and her misconduct reports resulted in her suspension for twenty five days and an expulsion recommendation. Jeanette Howard seems to have noticed the student's grades and seems to have investigated further. Her investigation resulted in the conclusion that the student was the cause of her own academic difficulties. As stated above, IDEA **requires** that the school district inquire further. Other than Mrs. Howard's "investigation", it seems to have escaped everyone's notice that this child had again failed every single academic class at CMAB!

By the end of the student's second semester at CMAB, the school district had sufficient knowledge of this student's academic performance and conduct at CMAB and was clearly on notice that there was a problem requiring investigation. The "investigation" required by IDEA is the referral process set forth in the regulations implementing IDEA in Illinois. It was not at all clear to this hearing officer that the sporadic nature of the misconduct reports would have caused anyone to suspect that the student might have an emotional disability but the staggering nature of the student's academic failures should have.

IDEA and its implementing regulations provide protections for children not yet eligible for special education and related services. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including behavior described in §300.520 or §300.521, may assert any of the protections provided for in this part if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. **34 CFR §300.541** State regulations track the federal requirements but impose more strict obligations upon local school districts imputing knowledge where the behavior or performance of the child demonstrated the need or a potential need for special education. **23 Ill.Admin.Code §226.430(b)(2)**

There are sufficient facts in the record demonstrating that the school district had knowledge that the student might be eligible for special education before the occurrence of the two incidents which resulting in attempts to expel the student. In light of the foregoing, it is clear that the school district had a burden to offer the procedural safeguards of IDEA to the mother of the student when it suspended the student in excess of ten days and when it twice attempted to expel the student. Those procedural safeguards included but were not limited to a manifestation determination "as if" the student had been a special education student. **34 CFR §300.541** Failure to afford this student the protections to which she was entitled under IDEA renders the expulsions and suspensions in excess of ten days null and void.

It is clear from the record that the school district did not conduct an adequate assessment of the student's levels of cognition or her academic performance. When comparing the testimony of Cary Goldstein and Dr. Michelle Rosen, Dr. Rosen's testimony was simply more persuasive. Efforts to rehabilitate Gary Goldstein with the testimony of Dr. Terri Finn were simply not convincing. The WRAT-3 is a screening device and even allowing for the failure to properly mark the scores on the test protocols causing Dr. Rosen to question whether the student had ever reached a "ceiling", the student's spelling skills were at the 5th grade level. Further, Mr. Goldstein testified that he utilized the test to assess the student's decoding skills, an assessment precluded by the test manual. The WISC-III reported scores suggesting a fourteen point discrepancy between the student's verbal IQ and the student's performance IQ. While allowing that the discrepancy was statistically significant, Cary Goldstein was clearly focused on the

volitional nature of the student's academic failures and did not consider further investigation of a learning disability.

In light of the school district's failure to initiate a case study evaluation until March 2004 and its failure to adequately assess the student's level of cognition or academic performance as part of the evaluation, there was no way that the IEP team could fashion an Individualized Education Plan which might provide educational benefit for this student. With respect to the issue of "extended school year", case law usually focuses on "regression" and "recoupment" but in this case, it is hard to discern how a student could "regress" any more than this student - she failed every single one of her academic classes while attending CMAB. In light of the school district's failure to adequately assess the student's learning deficits, the IEP team was not provided sufficient information from which they could determine whether or not the student required extended school year services or whether or not the student required compensatory services. The situation cries out for another educational evaluation of this student.

The mother's claim for compensatory educational services at the April, 2004 IEP meeting were dismissed. It is understandable that the claim might have been dismissed as the participants did not believe that they had delayed in their evaluation of the student. It is understandable that the claim might have been dismissed as CMAB imposed multiple disciplinary sanctions against a student who they should have known might be eligible for special education. It is understandable that the claim might have been dismissed as the participants did not believe that the assessment of the student's academic skills and cognitive functioning was deficient. For all of the reasons previously discussed, the IEP team should have considered the issue and concluded that the student was entitled to compensatory services.

The mother's claim for group social work services was rejected at the April, 2004 IEP meeting. In light of the report of Dr. Perez, the treating physician at Hartgrove Hospital, the issue should have been considered by the team. Dr. Perez was the mental health professional whose recommendation was before the IEP team. This recommendation was juxtaposed against the statements by Cary Goldstein that the student's behavior was volitional. Cary Goldstein's position is not supported either by his qualifications as a school psychologist or by the projective testing done with the student. Behaviors do not happen in a vacuum and therapy should not take place in a vacuum. The team should have given more consideration to the Hartgrove Hospital information and included group and individual social work services.

The behavior intervention plan contained within the April, 2004 is, on its face, hopelessly defective. The IEP team defined the "targeted behaviors" as "inappropriate interactions (impulsive and defiant) with adults and peers 3-5 times a week. The misconduct reports were sporadic and as a consequence it is hard to discern how the team could have determined that the "targeted behavior" occurred 3-5 times a week. There is

no indication that there has been any data collection as to the "antecedents" to the "targeted behavior".

The general purpose of a functional assessment of behavior is to identify the targeted behavior (functional assessment of behavior) and then develop strategies for responding to the undesirable behavior (behavior intervention plan). Preparation of the functional assessment is a necessary predicate to the development of the plan. 23 Ill.Admin.Code §226.75 Failure to appropriately address a student's behavior problems is a denial of a free appropriate public education. In **Neosho R-V School District v. Kathy Clark, et al.**, 315 F.3d 1022 at 1026 (2003) the court upheld an administrative determination that the school district failed to develop and implement a behavior management calculated to meet the student's needs and which would enable him to receive an educational benefit and held that this failure denied the student a free appropriate public education. **Neosho, supra at 1028.** The April 2004 IEP contains one single goal in the area of "social/emotional" and defines her present level of performance using the same flawed language as appeared in the behavior intervention plan. In light of the defective plan, the vague goal is understandable - not legally correct, but understandable.

The placement decision at the April 2004 is tainted by the inadequate psychological assessment and defective behavior intervention plan. Consequently it is understandable that the IEP team might have concluded that absolutely nothing of significance should change for this student - regular education placement with thirty minutes of individual social work services. In effect, the student can continue seeing Mr. Powell, but now has an IEP in place to dictate that she receive the services. In effect, the student could remain at CMAB.

Finally, and most chilling of all, the school district failed to forward the April 2004 IEP to the alternative high school until June 1, 2004 when the failure was brought to the attention of counsel for the school district. Consequently the student entered the alternative setting without any directive that she receive the individual social work services to which she was entitled.

In conclusion, the hearing officer further FINDS that the school district did not provide the student with a free appropriate public education while she attended Chicago Military Academy-Bronzville. Further, the hearing officer FINDS that the Individual Education Plan developed on April 7, 2004 did not provide the student with a free appropriate public education. All issues involving attorney's fees and expert witness fees are left for the parties to decide or, in the absence of agreement, the issue is more properly raised on appeal. **T.D. v. LaGrange School District No. 102, 349 F.3d 469** (7th Cir.2003) **see also, Neosho, supra.**

## DECISION

IT IS HEREBY ORDERED that the local school district shall expunge the expulsion proceedings on September 26, 2003 and January 13, 2004 from the record of the student including but not limited to any and all correspondence purporting to accept the recommendations of the expulsion proceeding hearing officer.

IT IS FURTHER ORDERED that the school district conduct an educational evaluation of the student utilizing the services of the "summer assessment team" on an expedited basis. Should the summer assessment team be unable to complete the evaluation within **fourteen** business days of the date of this decision, then the school district is ordered to pay for an independent education evaluation of this student utilizing the services of an independent evaluator acceptable to the mother of the student.

IT IS FURTHER ORDERED that the placement decision within the April, 2004 be implemented by placing the student in her home school. At this location, the school district shall complete a functional assessment of the student's behavior in a manner consistent with applicable regulations.

IT IS FURTHER ORDERED that the school district convene an IEP meeting within ten business days of receipt of the educational evaluation of the student to consider the result of the assessment and if necessary, revise the IEP thereto. With respect to the above referenced functional assessment of behavior, the school district shall convene an IEP meeting to consider the assessment and develop a behavior intervention plan. With respect to the mother's claim for extended school year services for the student after 2005 and 2006 and one hundred hours of tutoring as compensatory services, that decision is best left to the IEP team after careful consideration of the new educational evaluation as the IEP team should not be limited by the number of hours claimed by parent as compensatory services.

## RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the party and to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777. **The right to request such a clarification does not permit a party to request reconsideration of the decision itself and the hearing officer is not authorized to entertain a request for reconsideration.**

**RIGHT TO FILE A CIVIL ACTION**

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.01(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision was mailed to a party.

**ISSUED this 12th day of August 2004.**

---

CAROLYN ANN SMARON  
Due Process Hearing Officer

**CERTIFICATE AND AFFIDAVIT OF DELIVERY BY MAIL**

The undersigned hereby certifies that a copy of this Decision and Order was placed in the U.S. Mail at Flossmoor, Illinois, via certified mail return receipt requested, postage prepaid and directed to:

Ms. Tracy Hamm  
Attorney at Law  
Due Process and Mediation  
Chicago Public Schools  
125 South Clark Street  
Chicago, Illinois 60603

Mr. Michael A. O'Connor  
Attorney at Law  
1427 West Howard Street  
Chicago, Illinois 60626

Dr. Elizabeth Brooks  
Due Process Coordinator  
Illinois State Board of Education  
100 North First Street  
Springfield, IL 62777-0001

on August 12, 2004.

---

CAROLYN ANN SMARON  
Attorney at Law  
635 Argyle Avenue  
Flossmoor, Illinois 60422  
708 798 0966 (facsimile 708 798 3430)