

**DUE PROCESS HEARING DECISIONS AND APPEAL REVIEWS  
JULY 1, 2005-JUNE 30, 2006**

**INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)  
PART B**



**SANDY GARRETT  
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION  
OKLAHOMA STATE DEPARTMENT OF EDUCATION**

**SUMMARY**  
Due Process Requests  
(July 1, 2005-June 30, 2006)

**Due Process Cases**

<sup>1</sup> Due Process Request Received	31
Due Process Hearings Cancelled, Withdrawn, or Resolved	21
Due Process Cases Unresolved	9
Resolution Sessions	20
Resolution or Mediation Agreement	19
Due Process Hearing Decisions Rendered	1
Due Process Hearing Appeal Reviews	1
Appeal Reviews Appealed to District Court	1
District Court Decisions Appealed to 10 <sup>th</sup> Circuit Court	0

This report was compiled by:

**SPECIAL EDUCATION RESOLUTION CENTER**  
OKLAHOMA STATE UNIVERSITY  
4825 S. Peoria, Suite 2  
Tulsa, OK 74015  
(918) 712-9632  
(918) 712-9058

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<sup>1</sup> Includes 1 case received in FY 2005-06 and resolved in FY 2005-06

Due Process Hearing Decisions and Appeal Decisions  
(July 1, 2005 - June 30, 2006)

Due Process Number	Decision Date
<b><u>1852 Hearing</u></b>	
I. Order	October 13, 2005
II. Notice of Corrections to Final Order	October 20, 2005
III. Corrected Order	October 20, 2005
<b><u>1852 Appeal</u></b>	
I. Opinion	March 8, 2006
II. Order Overruling Motion To Reconsider And Offering Clarification Of Previous Decision	April 6, 2006

**Due Process Hearing 1852**

**Order  
October 13, 2005**

OKLAHOMA DEPARTMENT OF EDUCATION  
STATE OF OKLAHOMA

RECEIVED  
OCT 21 2005  
CSEDP

vs.

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NO: 1852

**ORDER**

This matter comes on for hearing pursuant to requests for due process hearings filed with the Oklahoma Department of Education by both the School District and the Student. Both parties have stipulated that the student has special needs and the Hearing Officer appointed by the Oklahoma Department has jurisdiction over the issues presented. Specific names have been redacted from this document to protect the privacy of the student.

The school district (SD) first filed its request, requesting placement of the student in a special nighttime program its representatives believed best-suited student's needs. The student's position has been less clear. During the first of three days of hearings, student's position was that she should be placed with little or no restrictions in her local High School. However, during the third day of hearings the student presented evidence suggesting that she should be placed in a private non-residential facility outside the school system. Through the process of the hearing it became clear that neither student's parent or counsel had formed a rational plan for student. Rather they were simply adverse to and challenged any plan submitted by school district. Interestingly, despite arguments submitted on behalf of student, a witness was presented on her behalf

whose conclusions with regard to placement, treatment and care were remarkably similar to the conclusions and plan submitted by the school district.

Therefore, after hearing all the evidence presented in this matter the hearing officer makes the following findings:

The student suffers from various significant psychological and developmental issues. The psychologists who testified directly or by way of written report have submitted a variety of diagnoses. It is not necessary that the HO make a finding of which diagnosis is correct as they each recognize that student suffers from psychological and developmental issues that render her especially distrustful of others, often non-communicative, resistive of authority and prone to occasional psychotic episodes. These psychological problems are the root of much of student's inability to behave in a manner necessary for the educational process.

Student is prone to using abusive and vulgar language directed towards staff and students, has thrown items towards at least one teacher, leaves the classroom or assigned area without permission, is often late to class, runs from teachers or authority figures, chooses to walk home rather than ride the school bus (a serious safety issue), refuses to participate in classroom activity and in a more general sense, is at times grossly disruptive to the educational process for not only herself but others as well. Moreover, her behavior does, at times, escalate to the point where she becomes dangerous to herself and to others. In fact, student has faced juvenile criminal proceedings for her conduct while enrolled in a previous school district.

The SD has attempted various plans to identify and correct the behavioral issues or at least minimize them to allow student to continue in the least restrictive school

environment, to no avail. SD has taken a legitimate interest in student's problems and has made significant efforts to provide her with the free, adequate, public education she, by law, is entitled to receive.

Unfortunately the efforts of SD have been hindered by the parent. For some reason, not clear to HO, parent is extremely mistrustful of SD, and has taken an adversarial posture. The parent seems to have no rational basis for her objections to the proposals of SD. Rather she simply opposes any plan put forward by SD. This is true even in the face of legitimate plans submitted in good faith. The lack of cooperation hinders SD's efforts with regard to student. SD is further hindered by parent's secrecy involving this young lady. For example, although psychological testing and treatment have been provided to student, parent insists on keeping the results secret even where this information would be helpful to student and assist SD in formulating a plan. Lines of communication between the parent and SD have collapsed and parent chooses to communicate only through an attorney.

The current state of the law in this forum only recognizes the school district's responsibility to student.

One witness presented on behalf of student testified that (she) sees a greater rate of success when the parent is participative. Student's success would be greatly enhanced if the parent would play an active yet *positive* role. HO, can only order the school district to give the parent every opportunity to be freely involved and to keep her fully informed of all issues, but parent cannot be ordered to be a positive influence on the process. HO can only deal with the school district's legal obligation. Therefore, HO first orders that school district make a legitimate effort to establish communication with the

parent to make the plan, hereinafter adopted by HO, an interactive process.

Given the unfortunate situation, it will be school district's duty to keep the parent fully informed of all issues regarding student. Specifically the school district shall schedule no less than four IEP reviews for each school year, with the last being specifically focused on student's placement for the upcoming school year. The fourth review may be held after the end of classes, but no later than June 10<sup>th</sup> of each year. During student's senior year the fourth review will not be necessary. School district shall be required to contact parent to attempt to formulate a mutual schedule prior to the start of each school year. If one cannot be agreeably formulated, then the school district may formulate its own schedule and forward it by regular mail, no later than the end of the second week of the school term, to the last known address of student and her custodial parent. Additionally, school district shall via regular first class mail send a reminder of the time and place of the upcoming meeting to student's custodial parent no less than ten days prior to the review. For the current year, a plan for the four reviews must be agreed upon or submitted as required no later than November 1, 2005.

The school district shall be required to keep at least weekly summaries of student's progress or lack thereof, with additional reporting of significant events. These documents shall be copied and mailed to parent along with the reminder of the meeting. If after proper notice, parent fails to attend a review, it may be held in her absence. A summary of the meeting shall be mailed to parent via first class mail if it is held in her absence.

In the event of significant occurrences the school district shall in a timely matter, telephonically contact the parent and notify her of the incident. If parent

does not answer or make a return call, then the parent shall be notified of the event in writing, within seven days of the event. Nothing herein shall be construed to limit the number of meetings between school district and parent. Open lines of communication are encouraged and shall be fostered by school district at all times.

In the event the parent is not agreeable to change of placement or other actions taken by SD, so long as those changes fall within the parameters of the plan hereinafter described, SD may make those changes unilaterally, in absence of consent or in the presence of objection by the parent. Nothing herein shall take away any future right to due process by either party.

HO specifically finds that private placement of student is not required and that SD can provide FAPE via its own programs and facilities. As SD has met its burden of proof, it is ordered that \_\_\_\_\_ continue her current placement in the evening program subject to the following plan, which is simply the plan submitted by the school district with certain minor modifications and clarifications.

HO makes special note that the short hours made available to student have been a focus of great concern. However, given student's special needs, the abbreviated program for now, not only is sufficient, it is a necessary first step towards introducing her back into a full-time school environment. Thus subject to the following plan, HO finds that the abbreviated program does provide student with FAPE. Accordingly, student's request for immediate placement in the local high school is denied as is student's request for placement in a private non-residential facility.

#### **MANDATORY PLAN**

The goal of the plan is to facilitate the placement of student in her local high school on a full-time basis with the least amount of restrictions as possible.

The student is currently placed in the evening program. The school district will take thorough and reasonable measures to insure she is compatible with the teacher assigned to her and will train personnel most likely to come into contact with student regarding the correct manner in dealing with her unique behavioral manifestations.

The school district will explore all avenues available with the goal of incrementally increasing student's daily successes and exposing her on a gradual basis to more outside stimuli, additional classes, teachers and students where possible. When student has made substantial progress towards meeting her BIP and IEP goals, every effort shall be made to move her forward as quickly as possible. Possible moves include, and should not be limited to moving her to the credit recovery program, adding a class such as art (art is used by way of example only) to be possibly held at \_\_\_\_\_ if more conducive, using play therapy, adding a block of classes at one of the high schools if possible, adding a second block of classes if possible, any other addition to her daily routine that will assist Student in her transition to full time day time high school including but not limited to possible participation in sports or other extra activities. Introduction to additional activities shall be done as student progresses, rather than on a predetermined schedule. School district should continually look for and identify potential activities and additional settings it can expose student to in order to facilitate her moves forward. None of the items mentioned above are actually required, but are submitted by way of example, as avenues to increase student's participation in school.

It is specifically noted that parent has made an issue of student's non-participation in competitive sports. Student has attempted organized sports in the past. Unfortunately her behavior does not lend itself to the requirements of competitive sports and could be a detriment not only to other students on the team, but could cause a setback to her own progression. While SD should make competitive sports available to student, if her schedule allows it, she must compete and succeed or fail as all other students. She will be granted no special exemptions, additional coaches or aids and must abide by all team rules and requirements, must attend class as required by her schedule and must meet all academic requirements, as competitive sports are not a requirement for student to receive FAPE

It is recognized as a real possibility that student may not progress or cooperate in the transition. If it becomes apparent that student is unwilling or unable to move forward she may be held in the evening program or additional privileges, classes and stimuli previously granted may be removed. Given student's volatility, the district may be forced to make immediate decisions regarding her placement and is herein granted leave to do so where the situation warrants such actions without first notifying or obtaining consent from parent, although parent shall be notified and consulted as quickly as possible. If there is no agreement SD may take actions, as it in good faith deems necessary. Given the fluid nature of the plan, it will be necessary for the SD to document student's progress or lack thereof on a frequent basis.

The IEP team, to the extent the information is available, will seek and use legitimate practical input from any psychologist/psychiatrist or counselor having information regarding student. It shall make its school counselors and psychologists available to student on a regular basis and shall at SD's expense have student reevaluated by the psychologist, who testified on student's behalf, near the end of each school year (excluding her senior year). His evaluation shall be considered when determining student's placement and IEP plan for the upcoming year. SD shall not be responsible for ongoing psychiatric or psychological treatment.

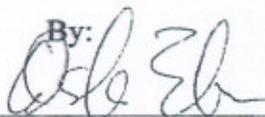
The Behavior Intervention Plan Submitted by school district as part of exhibit 2 is approved with the following caveats:

Suspension with this student should be used as an extreme last resort and only if it is determined that her presence in even the most restrictive school setting could result in harm to herself or to others.

Given the possible diagnosis of post-traumatic stress disorder, resulting from a previous incident with law enforcement, police involvement should be used only as a last resort in instances where the school district has lost control of the situation and where the behavior could possibly lead to harm to or others.

This document shall constitute the final order of the Hearing Officer and shall become effective this 13<sup>th</sup> day of October, 20, 2005.

By:



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Dale Ellis Hearing Officer  
Oklahoma State Department of Education

**Due Process Hearing 1852**

**Notice of Corrections to Final Order  
October 20, 2005**

OKLAHOMA DEPARTMENT OF EDUCATION  
STATE OF OKLAHOMA

RECEIVED  
OCT 21 2005  
CSEDP

vs.

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NO: 1852

**NOTICE OF CORRECTIONS TO FINAL ORDER**

Comes now the hearing officer and gives notice that due to scrivener's error only, the final order as previously forwarded to the parties had two omissions as follows:

The first was an omission of a complete paragraph immediately preceding the Mandatory Plan found on page five. Said paragraph is as follows:

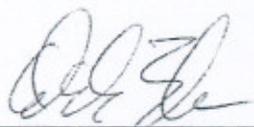
*During the course of the hearing student indicated that school district should be required to provide ESY. However, absolutely no evidence of any sort was provided to support this assertion, therefore the request for ESY is denied.*

The second omission is to be found in the last full paragraph of page 7. That paragraph will be amended to contain the following addition.

Given the possible diagnosis of post-traumatic stress disorder, resulting from a previous incident with law enforcement, police involvement should be used only as a last resort in instances where the school district has lost control of the situation and where the behavior could possibly lead to harm to *student* or others, *or in situations where student may be actually be committing a criminal act.*

The omissions will relate back to the date of the final order.

By:



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Dale Ellis Hearing Officer  
State Department of Education

**Due Process Hearing 1852**

**Corrected Order  
October 20, 2005**

OKLAHOMA DEPARTMENT OF EDUCATION  
STATE OF OKLAHOMA

RECEIVED  
OCT 21 2005  
CSEDP

vs.

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NO: 1852

**CORRECTED ORDER**

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whose conclusions with regard to placement, treatment and care were remarkably similar to the conclusions and plan submitted by the school district.

Therefore, after hearing all the evidence presented in this matter the hearing officer makes the following findings:

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Student is prone to using abusive and vulgar language directed towards staff and students, has thrown items towards at least one teacher, leaves the classroom or assigned area without permission, is often late to class, runs from teachers or authority figures, chooses to walk home rather than ride the school bus (a serious safety issue), refuses to participate in classroom activity and in a more general sense, is at times grossly disruptive to the educational process for not only herself but others as well. Moreover, her behavior does, at times, escalate to the point where she becomes dangerous to herself and to others. In fact, student has faced juvenile criminal proceedings for her conduct while enrolled in a previous school district.

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Unfortunately the efforts of SD have been hindered by the parent. For some reason, not clear to HO, parent is extremely mistrustful of SD, and has taken an adversarial posture. The parent seems to have no rational basis for her objections to the proposals of SD. Rather she simply opposes any plan put forward by SD. This is true even in the face of legitimate plans submitted in good faith. The lack of cooperation hinders SD's efforts with regard to student. SD is further hindered by parent's secrecy involving this young lady. For example, although psychological testing and treatment have been provided to student, parent insists on keeping the results secret even where this information would be helpful to student and assist SD in formulating a plan. Lines of communication between the parent and SD have collapsed and parent chooses to communicate only through an attorney.

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may be held in the evening program or additional privileges, classes and stimuli previously granted may be removed. Given student's volatility, the district may be forced to make immediate decisions regarding her placement and is herein granted leave to do so where the situation warrants such actions without first notifying or obtaining consent from parent, although parent shall be notified and consulted as quickly as possible. If there is no agreement SD may take actions, as it in good faith deems necessary. Given the fluid nature of the plan, it will be necessary for the SD to document student's progress or lack thereof on a frequent basis.

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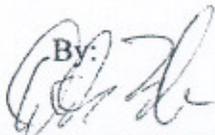
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Given the possible diagnosis of post-traumatic stress disorder, resulting from a previous incident with law enforcement, police involvement should be used only as a last resort in instances where the school district has lost control of the situation and where the behavior could possibly lead to harm to student or others, or in situations where student may be committing a criminal act.

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This document shall constitute the final order of the Hearing Officer and shall become effective this 13<sup>th</sup> day of October, 20, 2005.

By: 

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Dale Ellis Hearing Officer  
Oklahoma State Department of Education

**Due Process Hearing Appeal 1852**

**Opinion  
March 8, 2006**

BEFORE THE STATE DEPARTMENT OF EDUCATION  
STATE OF OKLAHOMA

District.

V.

Due Process Hearing NO. 1852

Student<sup>1</sup>.

OPINION

Appeal from the decision of Hearing Officer Dale Ellis dated October 20, 2005.

APPEARANCES:

Attorneys for Student/Appellant

Attorney for District/Appellee

Before Gary E. Payne, Appeal Officer

**PRELIMINARY MATTERS**

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<sup>1</sup>Name of student must be redacted if this opinion is published beyond the parties and the State Department of Education.

This matter was submitted on the records of the State Board of Education which included a transcript of the hearings held before the Hearing Officer, the pleadings and other documents submitted and the briefs of the parties.<sup>2</sup>

Both parties made a request for a Special Education due Process Hearing. The record indicates that the school district, the Appellee, filed its Due Process request on June 8, 2005. Thereafter, the student/appellant, filed her Request for a Special Education Due Process Hearing on June 12, 2005. The fact that both parties made a request becomes relevant to the issue of burden of proof and will be addressed herein.

Numerous pleadings were filed and several orders were entered by the hearing officer. The officer's order of June 23, 2005, indicates that 64 joint exhibits were presented, one of which was the last Individual Education Program Review for the student dated June 3, 2005. (Joint Exhibit 59<sup>3</sup>). Additionally, Student introduced exhibits 500 through 504.

A final decision of the Hearing Officer was issued effective October 13, 2005. A corrected Order was subsequently entered but it also had an effective date of October 13, 2005. (It appears from the record that both orders were filed with the Oklahoma Department of Education on October 21, 2005).

An original Scheduling Order was entered by the undersigned officer specifying the date of submissions by parties in interest and the date by which the opinion would be issued. After discovering that the record submitted to the appellate review officer was not complete, the date for the issuance of the opinion was extended to this date in order to allow sufficient time to review the entire record of the lower proceedings.

## BACKGROUND

Student had a history of aggressive behavior, using foul language toward fellow students and instructors. She also had a history of truancy and tardiness. Student had a tendency to leave a classroom and roam the school. The school was aware of student's behavior problems from the time the student entered the school. (JE 17).

The student was categorized as a student with Emotional Disturbance, a disability category under IDEA that adversely affects educational performance.

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<sup>2</sup>It was determined by the Review Officer on December 15, 2005, that the record was sufficient and that no additional evidence needed to be submitted.

<sup>3</sup> Joint Exhibits will be referred to as JE with a particular identifying number as shown in the record.

After the student enrolled in the \_\_\_\_\_ she was evaluated by a psychometrist and a school psychologist. (J E 14). Thereafter, she went through several class placements from attending middle school during the day to evening classes, and back to a regular school setting.

On November 8, 2002, the School District held an IEP Review and placed the student on a ½ day program. The IEP shows that the school decreased services to the student. A full day of education was promised if the student's behavior was improved. No change in any behavior goals were made to the existing IEP. (JE 18). On December 2, 2002, less than a month later, the School District held an IEP Review and again decreased the services and changed the placement of the child to an evening program consisting of 2 hours a day. The change was made because the student had exhausted the remedies on the behavior plan. No change to the behavior plan was made. No related services were added to the existing IEP. (JE19).

According to JE 24, some counseling was to be offered to student on Monday nights although the record does not reflect that the IEP was adjusted to reflect the service in time, duration or goals or who the service provider was to be. This was done on December 3, 2002.

Shortly after the 2003-2004 school year began, student was returned to the evening program. She made A's and B's for the remainder of the 2003-2004 school year.

Interestingly, an IEP was drafted by the School on February 6, 2003, wherein behavior was not listed as an educational need. No goals were listed aimed at correcting the student's behavior problems. (JE 25).

On August 29, 2003, an IEP review recommended returning student to the regular school program with monitoring. (JE 27). Fourteen days later the IEP team recommended decreasing services and the return of the student to a 2 hour evening program. (JE 28). Within a month student was relegated to a home based program, then back to evening classes.

For the 2004-2005 school year, it was recommended that student return to regular school on a shortened school day beginning at 10:00 a.m. Student would attend 2<sup>nd</sup> through 6<sup>th</sup> hours of the school day in all regular education classes with only one class in special education. A comprehensive Individualized Education Program (IEP) was established for the student on October 12, 2004. (JE 33). No related services of any type were indicated on the IEP. Aside from identifying a behavior goal with relation to the student's language, no other behavior goals were written to address or diminish known behavior problems.

By the beginning of November, 2004, the school district had already requested a meeting. (JE36). Subsequently there were numerous IEP Review documents filed, most of which modified the original plan.

In January of 2005, the IEP team recommended a change of placement back to an evening program. Because of due process wrangling, the student remained in regular school through out the school year. A Behavioral Intervention Plan (BIP) was implemented for the spring semester.

On June 3, 2005, a new IEP Review was proposed for the student placing her in an evening program for her 9<sup>th</sup> grade school year(2005-2006). Student's mother did not agree to the change of placement from attending school during the day. The new, alternative placement, was for only two hours in the evening

The district, in it's request for a due process hearing simply asked that a hearing officer order the proposed change in placement and rule that it provided a free appropriate public education in the least restrictive environment given the student's disabilities.

In filing her request for a due process hearing, the student asserted that she was placed in an inappropriate setting in violation of 34 C.F.R. §300.522. and §300.305. Student further asserted that the school district had violated her right to the least restrictive environment (LRE) which separated her from her non-disabled peers and took her out of all regular education classes. Additionally, student asserted that the school district failed to provide extended school year services in order to prevent regression in the areas of behavior and academics.

#### APPEAL ISSUES

The Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U.S.C. § 1400 et seq. (1988 ed. and Supp. IV), requires States to provide disabled children with a "free appropriate public education," § 1401(a)(18). In the instant case, herein "Student"), had, and was entitled to, an education program that was part of an Individualized Education Plan (IEP) which charged the Appellee with providing her with a free and appropriate public education (FAPE).

This case presents a student with autism whose condition posses certain barriers to her ability to learn in an ordinary environment and poses the question whether the placement in an evening class setting at an alternative school site and the removal of the student from a public school provides an appropriate education under the least restrictive environment as required under IDEA.

#### DISCUSSION

The IDEA includes two fundamental requirements: that the child receive a free appropriate public education (FAPE) in the least restrictive environment (LRE). This is sometimes called "main streaming." The question set forth herein is, under what circumstances can school districts place children with disabilities in separate special education programs where they are segregated from children who are not disabled?

The IEP is the basic mechanism through which each child's individual goals are achieved. The IDEA contains both procedural requirements to ensure the proper development of an IEP, and substantive requirements designed to ensure that each child receives a FAPE. States must comply with the IDEA's requirements, including providing each disabled child with a FAPE in an LRE, in order to receive funds under the statute. 20 U.S.C. § 1412 (a)(1) and (a)(5).

In her Request For Due Process Appeal Review, which is essentially a Petition for Appeal, the student lists 29 specific reasons for her appeal. The brief of student supporting her appeal makes six distinct arguments. Many of the reasons listed for her appeal were not addressed in student's brief.

Both parties have put forth arguments regarding the adequacy of the IPE placement and whether or not it complies with free appropriate public education requirements (FAPE) which is set forth in IDEA.

#### **Initial Due Process Request of School District.**

The school district, in its request for a due process hearing requested that a hearing officer approve the proposed placement of the student in an evening class for the 2005-2006 school year and determine that the placement provides a free appropriate public education in the least restrictive environment given the student's disabilities.

Although the school district did not cite any authority in its request for a due process hearing, the applicable law is as follows:

To the maximum extent appropriate, children with disabilities. ... should be educated with children who are not disabled, and ... special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. 1412(a)(5)(B).

No service plan, related service changes or additional goals were requested by the District.

#### **Initial Due Process Request of Student**

In her initial request for a due process hearing, student alleged 3 violations of IDEA:

1. Services in inappropriate setting (to enable services to be provided in accordance with IEP);
2. Violation of LRE (Least Restrictive Environment); and,
3. Failure to Provide Extended School Year Services ((ESY).

Student noted that the change to an alternative program of 2 hours per day is not appropriate.

Title 34 C.F.R. §300.522 states as follows:

**Determination of setting.** (a) General. The interim alternative educational setting referred to in Sec. 300.520(a)(2) must be determined by the IEP team. (b) Additional requirements. Any interim alternative educational setting in which a child is placed under Sec. Sec. 300.520(a)(2) or 300.521 must-- (1) Be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and (2) Include services and modifications to address the behavior described in Sec. Sec. 300.520(a)(2) or 300.521, that are designed to prevent the behavior from recurring. (Authority: 20 U.S.C. 1415(k)(3))

Sec. 300.305 of 34C.F.R. states:

**Program options.** Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education. (Authority: 20 U.S.C. 1412(a)(2), 1413(a)(1))

Sec. 300.309 of 34 C.F.R. states:

**Extended school year services.** (a) General. (1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section. (2) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with Sec. Sec. 300.340-300.350, that the services are necessary for the provision of FAPE to the child. (3) In implementing the requirements of this section, a public agency may not-- (i) Limit extended school year services to particular categories of disability; or (ii) Unilaterally limit the type, amount, or duration of those services. (b) Definition. As used in this section, the term extended school year services means special education and related services that-- (1) Are provided to a child with a disability-- (i) Beyond the normal school year of the public agency; (ii) In accordance with the child's IEP; and (iii) At no cost to the parents of the child; and (2) Meet the standards of the SEA. (Authority: 20 U.S.C. 1412(a)(1))

#### **Propositions Set Forth in Student's Appeal Brief:**

In her appeal brief, student sets forth the following 6 propositions:

1. The impoverished segregation of an African American student with significant disabilities selected by the school district and mandated by the hearing officer is impermissible;
2. The hearing officer failed to render and write a decision in accordance with appropriate, standard legal practice;

3. The hearing officer erred by failing to require that school district utilize scientifically based programs and teaching methods and impermissibly restricted student from offering evidence of scientifically based methodology;
4. The education offered by school district under the circumstances existing in the "night program" does not offer a free appropriate public education for student;
5. Hearing officer erred by not requiring that school district provide positive behavioral interventions and supports for student; and,
6. Hearing officer incorrectly applied the burden of proof.

**Order requiring student waive confidential relationship with psychologist.** the student set forth as an element of her appeal that the hearing officer erred by compelling student to submit the entire record of her psychologist including office notes if she elected to have her psychologist testify. Although this matter was not raised in student's brief, it is important to note that the standard applied by the hearing officer in ordering the inclusion of "all" records of the psychologist is not the correct standard.

The record reveals that there was no in-camera hearing held by the hearing officer to determine the weight, admissibility, relevance, or prejudice of the introduction of the records of the student's psychologist. Title 12, Section 2503(D)(3) states that an adverse party can only obtain relevant information regarding the patient's condition.

**Student's First Proposition of Error:**

The first proposition of the student's appeal brief relates to the allegation that the student was denied her rights under IDEA due to being of a minority race and being impoverished. This argument is not supported by the evidence and is disregarded.

**Student's Second Proposition of Error:**

Appellant's second proposition in her brief is that the hearing officer failed to render and write a decision in accordance with appropriate, standard legal practice. Specifically, she alleges the hearing officer made no findings of fact and set forth no conclusions of law.

Title 20 of the United States code at Section 1415(h)(4) provides, as one of the safeguards for procedural due process the following:

(h) Safeguards.--Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded-- ... (4) the right to written, or, at the option of the parents, electronic findings of fact and decisions ...."

In Oklahoma, in the case of Jackson v. Independent School Dist. No. 16 of Payne County, 1982 OK 74, 648 P.2d 26, the Supreme Court of Oklahoma stated:

"... It is fundamental that an absence of required findings is fatal to the validity of administrative decisions even if the record discloses evidence to support proper findings. Findings of an administrative [648 P.2d 32] agency acting in a quasi-judicial capacity should contain a recitation of basic or underlying facts drawn from the evidence sufficiently stated to enable the reviewing court to intelligently review the decision and ascertain if the facts upon which the order is based create a reasonable basis for the order. The protection afforded by findings assures that justice is administered according to facts and law, and not through Star Chamber techniques.

The Oklahoma Administrative Procedures Act, 75 O.S., Section 312 states:

A. A final agency order adverse to a party shall (1.) Be in writing; and (2.) Include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the final agency order shall include a ruling upon each proposed finding.

There can be no doubt that administrative hearing officers must make findings of fact and state conclusions of law in their decisions. With that being said one must review the Order. The first full paragraph on page two of the order states: "Therefor, after hearing all the evidence presented in this matter the hearing officer makes the following findings.." The next three paragraphs set forth specific findings of fact. Although they are not set out in formal fashion, other findings of fact can be found in the opinion.

A mere cursory examination of the Order does reveal that no conclusions of law are set forth offering the weight of any cited authority. This is in error however, since the Appeal Officer has the benefit of all testimony via transcripts and all exhibits and pleadings, it is an error that can be overcome.

#### **Student's Third Proposition of Error – Methodology:**

Student's third proposition for appeal is that the hearing officer erred by failing to require the school district to utilize scientific based programs and teaching methods. Further, student contends that the hearing officer erred by refusing to allow student to offer into evidence certain documents establishing a basis for scientific based methodology.

The IDEA has always been clear that a school district has the discretion to chose methodologies if the one chosen will provide the student with FAPE. Various parts of the regulations support this position.

Section 300, part C of the regulations states in part:

(3)(i) The services provided to the child under this part address all of the child's identified special education and related services needs described in paragraph (a) of this section. (ii) The services and placement needed by each child with a disability to receive FAPE must be based on the child's unique needs and not on the child's disability.

Section 300.26(b)(3) mentions methodology. The discussion of this section states that where a particular methodology is an "integral part" of what is "individualized" about a child's education, it must be put on the IEP.

A number of administrative and judicial decisions interpreting IDEA, and often misinterpreting *Bd. of Education v. Rowley*, (458 U.S. 176; 102 S. Ct. 3034; 73 L. Ed. 2d 690 (1982)) have stated that states and school decisions regarding educational "methodology" must be afforded deference, and may not easily, if at all, be challenged by parents, students or their advocates. The U.S. Department of Education's regulations implementing IDEA, issued on March 12, 1999, defeat such arguments.

The regulations define "special education" as "specially designed instruction...to meet the unique needs of a child with a disability...." 34 C.F.R. §§300.26(a)(emphasis added). The regulations add a definition of "specially designed instruction," defining this term to mean "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction..." 34 C.F.R. §§300.26(b)(3) (emphasis added). The regulations expressly recognize, and provide that, "methodology" is a component of special education - and thus a proper subject for a complaint and due process hearing when a school system's chosen "methodology" denies a child FAPE. See 20 U.S.C. §§1401(8) ("free appropriate public education) means "special education and related services" that meet certain conditions); 20 U.S.C. §§1415(b)(6) (parents may file complaint re: any matter relating to the provision of a free appropriate public education to child). See also 64 Fed. Reg. at 12552 (March 12, 1999) (commentary to new 34 C.F.R. §§300.26).

In *Rowley* the Court held, among other things, that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." 458 U.S. at 207. The "requirements of the Act," include the requirement that the program/services/methodologies employed provide the child with FAPE.

The *Rowley* case stands for the proposition that no matter how well motivated the parents are, they do not have the right under the Act to compel a school district to provide a specific program or employ specific methodology in providing for the education of a disabled child.

At the hearing, evidence was adduced regarding the use of an "eclectic" program. The case of *J.P. v. West Clark Community Schools*, (230 F. Supp. 2<sup>nd</sup> 910, S.D. Ind. 2002) addressed this issue. In that case, the parents were unable to convince the court that a certain methodology for teaching their son was the only appropriate one.

One of student's arguments was that she was denied the right to introduce certain articles and treatises to establish her premise regarding the necessity of scientific methodology. Although an administrative hearing officer is not bound by the strict rules of evidence, the Oklahoma Evidence Code, 12 O.S. Section 2101, et seq, does address the exclusion of evidence, the grounds for same, and the foundation that must be laid. Likewise, the Evidence Code allows the introduction of published treatises, periodicals or pamphlets on a subject such as science or medicine as long as same are read into the record and not received as exhibits. (12 O.S. §2803.18).

It appears from the record that Student's counsel was prohibited from offering certain published legal authorities because it would take up too much time. Expediency should not be a deciding factor in accepting or refusing evidence at a hearing.

#### **Student's Propositions Four and Five:**

Student's propositions four and five are herein addressed together. They relate first to the proposition that student was denied a free appropriate public education and, second, that the school district did not offer proper interventions and support to the student.

Did the School District fail to provide Student with meaningful and appropriate opportunities for inclusion to the maximum extent appropriate? Congress intended that disabled students be educated in the least restrictive environment. The IDEA explicitly requires:

To the maximum extent appropriate, children with disabilities, including children in public and private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.A. §§1412(a)(5)(A).

In the case of *Hartmann vs. Loudoun County Board of Education*, \_\_\_ F.3rd \_\_\_, the U. S. Court of Appeals for the Fourth Circuit found that main streaming or inclusion as anticipated by LRE is secondary to the need to provide a free appropriate education from which the child receives educational benefit:

"The main streaming provision represents recognition of the value of having disabled children interact with non-handicapped students. The fact that the provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled children receive educational benefit."

". . . the IDEA's main streaming provision establishes a presumption, not an inflexible federal mandate. Under its terms, disabled children are to be educated with children who are not handicapped only "to the maximum extent appropriate." 20 U.S.C. §§ 1412(5)(B). Section 1412(5)(B) explicitly states that main streaming is not appropriate "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §§ 1412(5)(B); see also *Rowley*, 458 U.S. at 181 n.4."

In *Hartmann*, the Court held that:

" . . . we specifically held that main streaming is inappropriate when "the handicapped child is a disruptive force in the non-segregated setting." 882 F.2d at 879 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6<sup>th</sup> Cir. 1983)). In this case, disruptive behavior was clearly an issue."

The type of educational environment the subject student was placed in for the evening sessions apparently was apparently a hybrid type situation including some students with disciplinary problems, some regular students and students with disabilities. No mention is made in the record regarding the race of the students attending the evening classes. The record does show that the curriculum was fairly comprehensive and included, at least in one instance, physical education.

In the the case of *Neosho R. V. v. Clar*, (315 F.3d 1022, 8<sup>th</sup> Cir, 2003), the Court stated that in a suit by an aggrieved party under the IDEA, the court engages in a twofold inquiry, asking (1) "has the State complied with the procedures set forth in the Act?" and (2) is the IEP "reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 207. While the IDEA requires school districts to provide disabled children with a free appropriate public education, it "does not require that a school either maximize a student's potential or provide the best possible education at public expense." *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8<sup>th</sup> Cir. 1997), cert. denied, 523 U.S. 1137 (1988). Instead, the requirements of the IDEA "are satisfied when a school district provides individualized education and services sufficient to provide disabled children with 'some educational benefit.'" *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8<sup>th</sup> Cir. 1999) (quoting *Rowley*, 458 U.S. at 200).

In *L.B. and J.B. v. Nebo School District*, (379 F.3d 966, 10<sup>th</sup> Cir. 2004) the Court restated congressional intent in enacting IDEA by citing Section 1412 set forth above.

The Nebo court adopted what is called the Daniel R.R. Test, a two-fold test that determines (1) whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate.

In order to determine if the first part of the Daniel R.R. test has been met, the 10<sup>th</sup> Circuit Court said it would consider the following non-exhaustive factors: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom.

Student alleged that the alternative night school location in itself was a denial of FAPE. In the matter of *Lenawee Inter Sch Dist*, (38 IDELR 199 (SEA MI 2002), a parent contended that an adult services classroom was located in a "bad area" that was unsafe. The hearing officer found the claim was unsupported.

Some evidence was presented regarding extra curricular activities. In the case of *Sonkowsky ex rel. Sonkowsky v. Board of Education* (39 IDELR 2, 8<sup>th</sup> Cir, 2003), the Court said it was permissible to refuse to allow a disruptive student to participate in certain activities. The test seems to be whether the school district acted in bad faith or with gross misjudgment.

#### **Extended School Year:**

The issue of including some Extended School Year (ESY) program as part of the student's ISP was a contention made by student in her initial request for a due process hearing and is appropriate to discuss under this proposition. This issue was addressed by two witnesses, and [redacted] is the Assistant Director of Special Education for the school district. [redacted] is a special education teacher and teaches the ED class that student attends. Another witness, [redacted] a Spanish teacher was asked about ESY but had no input. It was elicited that the mother of student signed an ISP Report agreeing that student was not in need of ESY.

#### **Students Proposition Six:**

Appellant asserts that the hearing officer in this case incorrectly applied the burden of proof. The school district counters this by arguing that both parties filed a due process hearing request and that the burden of proof is on the party attacking the student's educational placement.

The United States Supreme Court decided on November 4, 2005, in the case of *Schaffer v. Weast*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 528, that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is the School District. It seeks to challenge the IEP, and thus bears the burden of persuasion.

The real question here is did the school meet its burden of proof and, if so, was it acknowledged in the final order?

### **CONCLUSIONS OF LAW AND DECISION**

In short, the School District did not meet its burden of proof. It failed to provide Student with meaningful and appropriate opportunities for inclusion to the maximum extent appropriate. Student was denied FAPE. The school district moved the student to the district's most restrictive alternative without taking appropriate intermediate, supplemental and progressive steps. The determination of sending student to the District's most restrictive environment was, under the circumstances, inappropriate. (34 C.F.R. §300.522)

The School District seemed to apply a "bouncing ball" approach to student's problems. She was sent back and forth between the regular class room and a limited, off campus, night school that offered minimal standard and elective academic programs and allowed limited social interaction to prepare the student to transition in the future. (34 C.F.R. §305) The District did not mainstream the child involved to the maximum extent appropriate in this case.

The IDEA explicitly requires that, to the maximum extent appropriate, children are to be removed from the regular classroom only when the nature or severity of the disability of a child is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C.A. §1412(a)(5)(A).

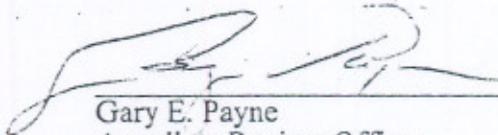
The design of Congress was to begin with attendance in a full time regular school environment and then deviate from that according to special needs and circumstances. In the instant case, a plan that was scientifically, logically and educationally sound and which met educational, behavioral and transitory goals was not adapted for the student.

The District must adopt a new IEP which shows progressive deviation from a normal school environment. It must show how "related services" must be progressively applied to allow "meaningful" access to education. The plan must also include a specific, reasonable, progressive plan for the use of "supplementary aids and services." The plan must show under what circumstances Student may removed to a more restricted environment and upon what circumstances she may be restored. The unique needs of the student, regarding both education and behavior must be addressed in detailed terms. (34C.F.R. 300, part C).

The student's Behavioral Intervention Plan must be reviewed and revised. There are no special IEP team membership rules for students who have or might require behavioral intervention plans however, it is noted that when Student first entered the School District, special steps were taken to engage experts to advise the district. The District is ordered to prepare a compliant BIP plan that addresses the Student's particular needs. District, at it's own expense, shall engage a recognized behavioral specialist to assist in the determination of an appropriate BIP as well as a determination of a revision of the IEP and student's placement. The Student's progress in relation to the plan should be periodically reviewed and measurable success or failures of the Student should be annotated. (See Quaker Valley School District, 31 IDELR 255, (SEA PA 1999).

The Appeal Officer ruled that law enforcement involvement be a last resort. This ruling shall continue to apply.

Dated March 8, 2006.<sup>4</sup>



Gary E. Payne  
Appellate Review Officer  
Oklahoma State Department of Education

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<sup>4</sup>**Notice of Right to Appeal:** Any party that feels aggrieved by this decision has the further right of appeal by filing a civil action pursuant to P.L. 101-476, 34CFR 300.511.

**Due Process Hearing Appeal 1852**

**Order Overruling Motion to Reconsider  
and  
Offering Clarification of Previous Decision  
April 6, 2006**

BEFORE THE STATE DEPARTMENT OF EDUCATION  
STATE OF OKLAHOMA

District.

V.

Due Process Hearing NO. 1852

Student.

**ORDER OVERRULING MOTION TO RECONSIDER AND  
OFFERING CLARIFICATION OF PREVIOUS DECISION**

The original decision was rendered in this case on March 8, 2006. On March 27, 2006, the school district herein involved filed a pleading entitled "*District's Motion to Reconsider And/Or Motion For Clarification And Brief in Support.*" Thereafter, the student filed her response leading to this Order.

**Motion to Reconsider:**

In its first proposition, the school district argued that the Appeal Review Officer failed to give any preference to the factual findings of the hearing officer and went on to cite its authority. The credibility of witnesses as observed by a hearing officer is a factor but not necessarily the deciding factor.

An Appeal Review Officer (ARO), has a duty to review all of the evidence, not only the testimony of witnesses that has been transcribed. Although an ARO cannot judge the demeanor of the witness it can examine the testimony along with all the other evidence. The law in Oklahoma states that an ARO has the plenary, independent, and nondeferential authority to reexamine a hearing officers legal rulings. (*Neil Acquisition, L.L.C. v. Wingrod Investment Corp., 932 P.2d 1100*). According to *Neal*, matters presenting issues of law are reviewed de novo by the ARO.

This case was made difficult in one respect because the opinion of the hearing officer did not cite any legal authority and did not follow the law in setting forth finding of fact and conclusions of law "separately stated," making it a laborious task to examine in minute detail every dot and tittle of evidence.

As to the second proposition of the School District, that exhibit 2 to the September 27, 2005, hearing was not considered, that is in error. The Order issued by the hearing officer on October 20, 2005, specifically mentions the exhibit in question. An organizational letter sent to the parties by the ARO prior to rendering the decision specifically identified the 3 transcripts made at the initial

hearings as exhibits. One of those transcripts included the exhibit in question and it was considered in rendering the opinion.

The BIP shown in the District's exhibit in question may or may not be sufficient in whole or in part only after it is first put into proper perspective of re-examining student's status as a mainstream student. That factor cannot be determined by the ARO.

The School District argued in its third proposition of error for reconsideration that it disagreed on the ruling that student was denied FAPE. The exhibits of the district are themselves evidence that FAPE was denied. Student was taken from one extreme to another without intermediary steps. The child was not mainstreamed to the maximum extent appropriate. This was specifically addressed in the original opinion wherein it stated in the last paragraph on page 12 that, for example, supplementary aids and services were not exhausted prior to placing the student in a 2 hour night program.

Upon review of all the evidence submitted on appeal, the School District's Motion to Reconsider is DENIED.

**Motion for Clarification:**

As to the School District's Motion for Clarification, the APO sets out the following clarification which shall supercede the original opinion where any conflict may occur.

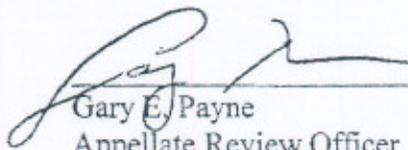
The decision of the hearing officer regarding the issue of the school district meeting its burden of proof and that FAPE was met are overruled.

The order of the hearing officer with respect that there be, at a minimum, four IEP reviews per year was not part of the Mandatory Plan included in the hearing officer's Order but was actually a part of the decision. That order as well as that portion of the hearing officer's decision from the first full paragraph on page 4 of same through the first full paragraph on page 5 of the hearing officer decision is sustained provided that any request for an IEP review or meeting otherwise allowed by law is not precluded.

Private placement of the student is not required.

The Mandatory Plan portion of the hearing officer's decision published at pages 5 and 6 of his decision has some meritorious points which may be adopted by the District as part of a common sense approach to the situation at hand in complying with the Decision of March 8<sup>th</sup>.

Dated: April 5, 2006.

  
\_\_\_\_\_  
Gary E. Payne  
Appellate Review Officer  
Oklahoma State Department of Education