

ILLINOIS STATE BOARD OF EDUCATION IMPARTIAL DUE PROCESS HEARING

A.H..)	
)	
Student)	
vs.)	Case No. 2008-0047
)	
CITY OF CHICAGO SD 299)	
)	
Local School District)	

KRISTINE L. ANDERSON, Hearing Officer

HEARING DECISION AND ORDER

This matter comes before me pursuant to the due process hearing request of the Student's Parents, "Mr. H." and "Ms. N." The Student, "L H." is represented by Matthew Cohen of Monahan & Cohen. The District is represented by Tracy Hamm. I have jurisdiction to hear and decide this matter pursuant to 105 ILCS 5/14-8.02(a) et. seq., and 23 Illinois Administrative Code §§226.600 et. seq.

PROCEDURAL HISTORY

The Parents filed a request for a due process hearing on August 6, 2007. Another Hearing Officer originally was appointed to oversee the matter on August 16, 2007. The parties engaged in resolution but were unable to resolve the dispute. A prehearing conference was held on October 2 and 4, 2007. In February 2008, the first Hearing Officer withdrew from the case, and I was appointed to replace her on February 25, 2008. After conferring with the parties, and because I had previously scheduled other hearings in March, we selected April 15 as the date the hearing would begin. Though we planned for four days, the hearing actually required eight days of testimony, which took place on April 15, 16, 21, 24, May 21, June 4, 27, July 1. The Parents requested a copy of the transcript of the hearing, and the hearing record remained open until a copy was provided to the Hearing Officer, as well. Having access to the hearing transcript was particularly important in this case given the length of the hearing and breadth of the issues. The record closed on August 4, 2008. I rendered my decision on August 9, 2008.

ISSUES

The issues asserted by the Parents at hearing are:

Whether the District violated the Student's right to a free and appropriate education due to:

1. Failure to conduct a timely evaluation of the Student;
2. Failure to conduct a timely IEP meeting;

3. Failure to provide the Student with an appropriate placement;
4. Failure of the IEP team to adequately consider outside evaluations presented by the Student's parents or to meet its child-find obligations;
5. Failure to recognize all of the Student's disabilities;
6. Failure to provide the Student with meaningful present levels of performance and measurable goals and objectives;
7. Failure to provide the Student with an IEP that addresses all her special education needs;
8. Failure to determine Student eligible for, and provide extended school year services;
9. Failure to provide the Student and her parents with an accurate and complete IEP;
10. Failure to consider a functional behavioral analysis and behavior intervention plan for the Student;
11. Failure to consider compensatory services for the Student to address delays in services;
12. Failure to consider a continuum of placement options.

REMEDIES

The remedies sought by the Parents are:

1. That the Hearing Officer order the District to reimburse the Parents for their unilateral placement of the Student at Hyde Park Day School for the 2007-08 school year, and for the 2007 summer school program;
2. That the Hearing Officer order CPS to pay for the Student to attend Hyde Park Day School for the 2008-09 school year as compensation for the District's failure to provide the Student with a free appropriate public education for the 2006-07 school year;
3. Transportation costs to Hyde Park Day School to be paid by CPS
4. In the alternative, an order directing the District to provide the Student with an IEP with appropriate eligibility, goals and services

The District requests a remedy in the form of an order from the Hearing Officer finding that the July 2007 IEP (and the January 2008 revision) is appropriate and ordering that it be implemented.

FINDINGS OF FACT

LH recently completed her seventh grade year at Hyde Park Day School, a private school for students with learning disabilities. She began attending Hyde Park Day in the summer of 2007 and became a full-time student in the fall of 2007. Her parents removed her from LaSalle Language Academy and unilaterally placed her at Hyde Park Day because they believed CPS had failed to provide their daughter with an appropriate education during the 2006-07 school year. They also believed that the IEP CPS had prepared for LH for the 2007-08 school year failed to adequately address her needs. For these reasons, the Parents initiated this due process proceeding and are requesting that the District be ordered to reimburse them for their tuition costs at Hyde Park Day School. They also ask that the District be required to pay for their daughter to attend Hyde Park for the 2008-09 school year as compensation for the District's alleged failure to provide LH with an appropriate education during her 6th grade year at LaSalle. The relevant facts concerning LH's educational needs and learning experiences are discussed below.

The Lycee Francais

Before she began attending LaSalle in 2006, LH had been a student at the Lycee Francais de Chicago from preschool through the fifth grade. The Lycee is a private school specializing in French instruction. According to her father, Mr. H., LH encountered difficulties at the Lycee as early as the first grade. In particular, she struggled with math and showed a lack of organization. (Mr. H. 5/21/08 Testimony, Tr. 82-83) By second grade, teachers began to report that LH wasn't doing her assignments. Though LH struggled academically, Mr. H. testified that in many ways she appeared to be extremely bright. (*Id.* at 86)

The Parents' concern over LH's difficulties led them to Dr. Josh Price. Dr. Price administered a full battery of tests including, the Wechsler Intelligence Scale for Children (WISC), and the Woodcock-Johnson Tests of Cognitive Ability and Tests of Achievement. (2/15/04 Price Report, A 45, 62, HX 42¹) Based on the results, Price concluded that LH is "a young girl of superior intellectual functioning." *Id.* at A 63.² He also concluded, however, that LH exhibited several processing deficits. Achievement testing revealed all but one subtest (math fluency) to be within the average range. (*Id.* at A 49-50) Because of her superior cognitive ability, Price concluded that there was a significant discrepancy between LH's ability and her achievement in the areas of reading comprehension, written language and math. (*Id.* at A 63) This discrepancy, together with her processing deficits, led Price to conclude that LH had a learning disability (*Id.*)

¹ The Parties submitted separate binders of exhibits, which were numerous. In citing to exhibits that were introduced at the hearing, I identify the document, the page number, and then have assigned the document a hearing exhibit number (HX). Thereafter, I refer to the document as "HX__."

² Price noted that on the WISC, there were significant discrepancies between LH's index scores, and concluded that LH's verbal comprehension index -- which was in the superior range -- was the best indicator of LH's true cognitive abilities. The index scores were as follows: Verbal Comprehension: 126 (96%), Perceptual Reasoning: 88 (21%), Working Memory: 102 (55%), Processing Speed: 94 (34%)

Price made a number of recommendations to address LH's academic and organizational weaknesses. (Price Addendum, A 38, HX 17) Mr. H testified that he and LH's mother shared Price's results with LH's teachers. Though the school wanted to help, it was limited in what it could do because there were no formal services for students with special needs. (Mr. H. Tr. at 89-90) The Parents hired private tutors to provide support. (*See, e.g.*, Mr. H. Tr. 86) Still, LH continued to struggle with her organizational skills and academics. A little over a year later, the Parents consulted Dr. Robert Daniels who evaluated LH and concluded that she had attention deficit hyperactivity disorder, along with adjustment disorder with depressed mood.³ (4/28/05 Daniels Report, A 37, HX 18)

LH remained at the Lycee through the fifth grade. She continued to struggle in math and science and, according to Mr. H., was often weeks behind in her assignments. In part because of these struggles, LH's parents decided to remove her from the Lycee Francais and place her in an English language school. (Mr. H. Tr. 93-94) They applied to LaSalle Language Academy on LH's behalf, and she was accepted as a 6th grade student for the 2006-07 school year. Mr. H. testified that he and Ms. N. chose LaSalle because it had an excellent reputation, it was their neighborhood school, and the school offered foreign language instruction. Moreover, the Parents were vaguely aware that CPS provided the kind of services that could help LH. (Mr. H. Tr. 94)

LaSalle Language Academy

As part of the application process, the family visited LaSalle in early 2006 and met with an admissions counselor, Ms. Matos. (Ms. N. 6/27/08 Testimony, Tr. 175) During this early visit, Ms. N. asked that LH be admitted as a fifth grader -- not a sixth grader. Ms. N. stressed that, because LH had started school early, she was a year younger than most of her classmates. She and Mr. H. believed that the new start at LaSalle presented the right opportunity for LH to be placed with students her own age. The Parents also believed that repeating fifth grade would help to alleviate LH's academic difficulties. According to Ms. N., Ms. Matos didn't like the idea and stated that there might not be a spot for LH in the fifth grade. (*Id.* at 175-76)

After LH was accepted at LaSalle, Ms. N. returned to the school to complete pre-registration in June 2006. She met with Matos, and reiterated her request to have LH repeat fifth grade. (Ms. N. Tr. at 177) This time, according to Ms. N., she informed Matos of LH's learning problems, including the diagnoses of learning disabilities and ADHD by Price and Daniels. (*Id.* at 179) Ms. N. testified that Matos became angry upon hearing this information and accused the parents of pulling LH from a private school and "dumping" her into a public school to get help. (*Id.*) Matos then went to speak with someone whom Ms. N. later learned was Principal Narea. According to Ms. N., Narea came out of her office and angrily stated, "I'm not putting your daughter in the fifth grade...I'm not going to put her to be the 34th child in [a fifth grade section]." ⁴ *Id.* at 180 Their request denied, the Parents nevertheless decided to enroll LH at LaSalle, and she entered the sixth grade there in the fall of 2006.

³ LH's parents initiated divorce proceedings around the time Dr. Daniels met with her, and he noted as much in his report.

⁴ Neither Matos nor Narea testified at the hearing. Narea is no longer employed at LaSalle, and Matos' status was not made clear. In any event, I found Ms. N. to be a very credible witness, and do not question the accuracy of

LH's Grades at LaSalle

During the first week of school, Ms. N. contacted Kirsten Surbaugh, LH's homeroom teacher.⁵ She let Surbaugh know her concerns about LH attending sixth grade. She also told Surbaugh about LH's problems with organization and asked that LH be given preferential seating. She also asked for Surbaugh's help to ensure that LH kept up with her assignments. Surbaugh agreed to do what she could. (Ms. N. Tr. 183-84)

From the outset, however, LH did not perform well at LaSalle. By the end of LH's first five weeks, her parents received a progress report from the school, which showed that she was failing or performing poorly in reading, writing, math, science and social studies.⁶ (10/1/06 Special Report, SD 104, HX 6) Written comments from her teachers indicated that the primary reason for her poor performance was her failure to complete and turn in homework and classroom assignments. (*Id.*)

The Parents immediately responded to the progress report by writing a letter to Ms. Surbaugh. In it, they informed Surbaugh that LH had been diagnosed with "certain learning disabilities" by Dr. Price and Dr. Daniels. They included copies of those reports as attachments. (10/3/06 Letter to Surbaugh, F1, HX 1) The Parents then requested that CPS conduct its own evaluation of LH to determine necessary supports and services for her. They stressed their willingness to give their formal consent for testing. (*Id.*) Ms. Surbaugh confirmed that she received the letter and the evaluation reports. She gave the letter to her principal, and believes that she gave the reports to one of the school case managers. (Surbaugh Tr. 203-04)

About a week later, LH's parents wrote a second letter to Ms. Narea. (10/13/06 Letter to Narea, F2, HX 2) The Narea letter is almost identical to the Surbaugh letter. In the Narea letter, however, the Parents specifically requested a meeting with the LaSalle IEP team to discuss the arrangements that could be made to ensure that LH would be a successful student.

Principal Narea gave the letter to Ms. Barnes. Ms. Barnes stated that she considered the letter to be a formal request for evaluation by the parents, and she convened a team meeting to discuss the doctors' diagnoses. (Barnes Tr. 71, 75-76) Participants included Barnes, a psychologist, a special education teacher, a social worker and one of LH's classroom teachers -- most likely Mr. Ciecwa. (*Id.* at.89, 91) Notably, though they had specifically asked to participate in a meeting to discuss strategies for LH, Mr. H. and Ms. N. were not invited to the meeting.

her testimony on this issue. Moreover, though she was not present for that conversation, Kirsten Surbaugh, one of LH's teachers, testified that Narea told her that the parents had requested that LH be admitted as a fifth grader but were told there were no openings in that grade. (Surbaugh 4/16/08 Testimony, Tr. 201-02)

⁵ Ms. Surbaugh testified that she was LH's homeroom teacher as well as her writing teacher. Homeroom teachers act as a liaison between the Student and the administration. They do not formally serve as liaison between parents and other teachers.

⁶ According to Cassandra Barnes, a guidance counselor and case manager at LaSalle, progress reports are issued in the middle of each grading period to students who are receiving a grade below a "C" in any academic area. (Barnes 4/15/08 Testimony, Tr. 85)

In considering the reports by Price and Daniels, Barnes stated that the team was concerned that the evaluations were approximately two years old.⁷ (Barnes Tr. 77-78) They also found it significant that, despite these diagnoses by Price and Daniels, LH had been successful at the Lycee without receiving special education services, or any formal attempts at intervention. (*Id.* at 160-61, 201-02) When pressed on this point, however, Barnes conceded that she had not reviewed any of LH's records from LaSalle, but claimed she was relying on statements by the Parents.⁸

In addition to those factors, Ms. Barnes stressed that the team believed LH had not satisfied the school's criteria for initiating an evaluation, which requires a student to exhibit a learning problem with sufficient frequency, duration, and intensity of an adverse effect before he or she may be evaluated. (Barnes Tr. 98) Thus, according to Barnes the team decided not to evaluate LH, but chose to develop an intervention plan for her instead.⁹ (*Id.* at 90-93) According to Barnes, that plan was to return LH to fifth grade. (*Id.* at 91-92)

Though Barnes asserted that the team developed a plan to return LH to the 5th grade in the October 20 meeting, she readily admitted that she did not discuss this idea with the Parents until sometime in December when she and another case manager met with Ms. N. (Barnes Tr. 92-93) During those intervening weeks, Barnes relied on LH's teachers to develop and implement intervention strategies. (*Id.*)

In November, Ms. Surbaugh, LH's homeroom and writing teacher, created a remediation plan after LH received a report card with failing grades. (11/8/06 Remediation Plan, F 27, HX 22) Specifically, LH's first quarter grades were: Reading: F; Writing: C; Math: C; Science: D; Social Studies: C. (2006-07 Report of Student Achievement, D1, HX 3) Surbaugh and the Parents met on report card pick-up day and discussed LH's grades and the remediation plan. (Surbaugh Tr. 192-93) Surbaugh attributed LH's poor grades to her failure to complete class assignments and homework. She also noted that LH had trouble paying attention, and often did not have the appropriate books available to participate in classroom lessons. LH also would choose to read novels rather than participate in class. (*Id.* at 194)

As noted above, Surbaugh and the Parents also discussed the remediation plan that Surbaugh had prepared. (HX 22) The plan specified several areas of need, such as coming to class prepared and completing assignments and homework. It plan also recommended intervention strategies, such as tutoring for LH and preferential seating. In response to Ms. N's request, Surbaugh

⁷ While it is true that Price's report was over two years old at the time the team met, Daniels' report had been completed about a year-and-a-half before the team met. (*See* HX 42, HX 18)

⁸ Barnes' testimony was not credible on this point. Though it is true that the Lycee did not offer special education services to its students, the weight of the evidence in this case indicates that the Parents were forthcoming in informing school staff that LH struggled at the Lycee with the same challenges she faced at LaSalle.

⁹ The Parents vigorously assert that the school never notified them of the team's decision not to evaluate LH. The only documentation of the team's decision is an October 10, 2007 letter, (*See* 10/20/06 Notification of Referral Decision, SD 94) which both Parents contend they never received. (*See, e.g.* Mr. H. Tr. 116-17)

included the additional strategy that LH's teachers sign her agenda (assignment notebook) to acknowledge that her assignments were recorded accurately. (*Id.*)

Consistent with the plan's recommendations, the Parents obtained math tutoring for LH through an after school program offered by one of the LaSalle teachers, as well as private tutoring by another LaSalle teacher. (Ms. N. Tr. 190-91) Surbaugh also continued to provide LH with preferential seating. With respect to signing LH's agenda, Surbaugh admitted that the practice trailed off after a couple of weeks. (Surbaugh Tr. 214)

The remediation plan had little impact on LH's performance. LH received another progress report on December 5, 2006, for reading, math and social studies. (12/5/06 Special Report, SD 105, HX 45) Surbaugh completed another remediation plan for LH on December 19, 2006.¹⁰ (1/30/07 Remediation Plan, SD 106, HX 46) This plan is almost identical to the plan she completed in November, but it includes additional recommendations that LH receive counseling, use a "special homework notebook," and receive step-by step directions restated to LH individually. When asked, Surbaugh conceded that the need for a second, almost identical plan meant that LH's problems were continuing, and the first remedial plan wasn't working as it should. (Surbaugh Tr. 234) Indeed, Surbaugh testified that her concerns about LH's ongoing difficulties led her to ask the LD teacher to informally evaluate LH¹¹. (Surbaugh Tr. 229) Surbaugh stopped short, however, of formally referring LH for an evaluation.

Around the time that Surbaugh created the second remediation plan, Barnes and Ms. Miller, another case manager, met with Ms. N. to discuss what should be done next. It was at this meeting that the District proposed moving LH back to the 5th grade. Although they had favored placing LH in fifth grade at the beginning of the school year, the Parents believed a mid-year demotion would be demoralizing to LH, and would hinder -- not help -- her efforts to succeed. Thus, they refused the school's offer.¹²

LH received her report card for the second term in January 2007. Her grades had further declined, and were as follows: Reading: F; Writing D; Science C; Math D; Social Studies D. (HX 3, D3) By mid January Barnes and the school staff had decided to hold a meeting to consider evaluating LH. The domain meeting, however, was not scheduled until March 14th. (See 3/14/07 Consent for Evaluation, SD 90, HX 56) According to Barnes, that was the first

¹⁰ The plan actually has two different dates: It is dated 12/19/06 by Surbaugh's signature. At the top of the form, however, the date has been changed to 1/30/07. Surbaugh testified that the different dates reflect the fact that she completed the plan and sent it home to Ms. N. on 12/19 for comments. Surbaugh asserted that Ms. N. made a number of changes to the plan that Surbaugh felt she could not agree to. Thus, she revised the plan on the later date. (Surbaugh Tr. 230-31)

¹¹ Surbaugh could not recall precisely when she sought guidance from the LD teacher. She testified that she believed it was sometime in the middle of the year.

¹² There was some dispute about how these events transpired. Barnes testified that the Parents initially agreed to the move, but changed their minds over the holidays. (Barnes Tr. 124-25) Both Parents assert that they agreed to consider the move and discussed it over the holidays. They decided against it because they felt it would be detrimental to their daughter. (Ms. N. Tr. 214-16, Mr. H. Tr. 203-05) In any event, the facts are clear that LH was not moved to 5th grade.

available date the team could meet. On March 6, 2007 -- just about a week before the team held the domain meeting -- failure notices were sent out for the third quarter. LH once again received failure notices in five subjects: reading, math writing, science and social studies. (HX 2 at D2)

The domain meeting went forward on March 14 as planned, with the Parents in attendance. The team agreed to evaluate LH in the areas of social/emotional status, general intelligence and academic performance. (*See* 3/14/07 Consent for Evaluation, SD 90-91, HX 56) Significantly, the form indicates that no decision was made concerning the areas of health, vision and hearing. Ms. Barnes asserted that the team couldn't make that decision without the input of a school nurse, and LaSalle did not have a nurse at that time. (Barnes Tr. 165-68)

Almost two more months passed between the domain meeting and LH's evaluation. In the interim, LH received her report card for the third quarter, which showed no improvement. Her grades for the third quarter were: Reading: F; Writing: D; Math: D; Science: F; social studies: C. (HX 2 at D3) Significantly, in her third quarter comments to LH's report card, Surbaugh warned that there was a possibility that LH would have to repeat sixth grade in order to master necessary skills. (*Id.* at D2)

CPS' Evaluation of LH

Kaysa Pelofske, a CPS school psychologist, evaluated LH on May 2, 2007 -- nearly two months after the March 14 domain meeting. (5/2/07 Report of Psychological Evaluation, B17, HX 23) Though she doesn't recall precisely how she learned of LH, Pelofske testified that she met with the Student a couple of times prior to the evaluation. During these meetings, the two talked about how LH was doing in school and Pelofske encouraged LH to set a goal to improve her school performance. (Pelofske 5/21/08 Testimony, Tr. 119-21) Pelofske also advised LH on how to better organize her backpack. (*Id.* at 124-25)

In her evaluation of LH, Pelofske administered the Wechsler Intelligence Scale for Children and the Kaufman Test of Educational Achievement. (5/2/07 Report of Psychological Evaluation, B17, HX 23) Ms. Pelofske also administered the Behavior Assessment Scale for Children (BASC) as part of her evaluation. The rating scales were completed by LH, her parents and two of her teachers, and interpreted by Pelofske. (*Id.* at B20-23) Ms. Pelofske's report of her evaluation is fairly comprehensive. It includes a thorough discussion of the previous evaluations administered by Dr. Price and Dr. Daniels. Indeed, Pelofske's report recounts virtually all of the test scores included in Dr. Price's report. Curiously though, she omits any reference to Price's conclusion that LH had a learning disability. This is particularly puzzling given the fact that Pelofske explicitly references Dr. Daniels' diagnosis of ADHD. During her testimony Pelofske explained that the omission of Price's diagnosis was simply an oversight. (Pelofske Tr. 280)

With respect to her own findings, Pelofske reported that LH's performance on the WISC indicated that her verbal reasoning abilities, which were in the high average range, were significantly more developed than her visual reasoning abilities.¹³ (HX 23 at B26) She noted

¹³ Some of LH's specific scores were:

WISC: Verbal Comprehension: 112 (79%); Perceptual Reasoning: 92 (30%); Working Memory 102 (55%); Processing Speed: 91 (27%)

that this was consistent with Price's findings. Pelofske also reported that test results indicated that processing speed was a relative weakness for LH. Pelofske suggested, however, that LH's "emotionally charged" responses to these tasks likely slowed her responses. LH's performance on the Kaufman revealed that LH's academic skills varied from the average range (math) to the upper extreme range (reading). Pelofske concluded that in comparison to her reasoning abilities, LH was achieving at her potential academically. (*Id.* at B24)

Pelofske observed that LH's poor grades at LaSalle did not reflect her academic skill levels. She attributed this discrepancy to social emotional issues, as well as problems with attention and organizational skills. (*Id.* at B27) Pelofske concluded by offering this recommendation: "[I]t appears that [LH] would benefit from support in the areas of independent functioning with regard to organization and facilitating assignment tracking and completion and social emotional support-counseling services." (*Id.*)

The June 11, 2007 IEP

The parties met on June 11, 2007 to discuss the results of the evaluations and to determine whether LH was eligible for special education services. (*See* 5/30/07 Conference Notification, C3, HX 10a; 6/11/07 IEP, C4, HX 9) The team consisted of Ms. N., Ms. Barnes, Ms. Surbaugh, Ms. Pelofske, Ms. Sadowitz, a special education teacher, and Ms. O'Day, the school social worker. Pelofske shared the results of her evaluations and recorded the scores from the WISC and Kaufman on the IEP (HX 9 at C5-6) Ms. O'Day shared the results of her social assessment of the student, and noted, "ADHD and emotional concerns seem appropriate." (*Id.* at C6) The team concluded that LH did not meet the criteria for learning disabilities but did qualify for services under the category of "other health impaired." (*Id.* at C7)

According to Ms. Barnes, however, the OHI eligibility determination wasn't finalized because without a health assessment and input from a nurse, the team could not identify the health condition that was the basis for the OHI determination. (Barnes Tr. 157-58) Since no health assessment had been completed, and since there was no nurse in attendance, the team tabled the meeting without finalizing eligibility or writing any IEP goals.

The July 19, 2007 IEP

LH's IEP meeting reconvened on July 19, 2007.¹⁴ (7/19/07 IEP, C11, HX 16) By now, however, the LaSalle team was unavailable to participate because school was on summer break. Instead, LH's file was turned over to a summer assessment team led by Susan Isaacson, a case manager and special education teacher. (Isaacson 4/16/08 Testimony, Tr. 6-7) Other than the parents, no one on the team had ever met LH prior to that day. Nor had any summer team member conferred with anyone at LaSalle about LH's needs. (*Id.* At 8-9) While Isaacson testified that she did review LH's file prior to the IEP meeting, the information contained in the file was limited. Isaacson testified that she recalled reviewing a psychological report, a social

Kaufman: Reading: 99%; Math: 34%; Written Language 77%

¹⁴ CPS witnesses stressed that the July IEP did not replace the June IEP, but was simply a revision that added new content. Likewise, It is CPS's position that a third IEP that was written in January, 2008, also was a revision.

work assessment and perhaps the eligibility report from the June meeting. (*Id.* at 9-10) The file did not contain any information concerning LH's performance at LaSalle, nor was Isaacson aware that CPS was requiring LH to attend summer school because she had failed reading and math. (*Id.* at 34)

Unlike the LaSalle team, the summer assessment team included a nurse who conducted vision and hearing screenings, and interviewed the parents about their daughter's medical history. (7/19/07 School Nurse Report, SD 58-66; HX 41a) The nurse concluded that LH was eligible for school nursing intervention to "monitor for follow up with ADHD and recommended psychiatric follow up." (*Id.* at SD 61, 63) Though it isn't completely clear what this means, the nurse apparently approved the LaSalle team's recommendation that LH be found eligible to receive special services as "other health impaired" due to her ADHD. With the nurse's sign off, the team completed LH's IEP.

In discussing the basis for LH's eligibility for services, the team expressly noted that there was a significant discrepancy between LH's ability and her achievement in the areas of math calculation and math reasoning. (*See* HX 16 at C14) The team also noted that LH's achievement tests "indicate a weakness in math." (*Id.* at C 18) Isaacson testified that the team based this conclusion on a notable discrepancy between LH's reading levels (99%) and her math achievement levels (34%). The team stopped short, however, of concluding that LH had a learning disability since her math achievement test scores were within the average range for students her age.¹⁵ Isaacson conceded that in ruling out a disability in math, the team did not consider LH's poor performance in math at LaSalle, because that information wasn't provided to the summer assessment team as part of LH's file. (Isaacson Tr. 63)

The team specified that LH needed specialized instruction and/or related services in *every* academic subject, independent functioning, and social-emotional support. (HX 41 at 45) Yet they wrote only two goals, both of which addressed LH's "social-emotional" needs, and provided LH with just forty minutes of special services per week. Moreover, though Ms. Pelofske's report recommended that LH receive support in independent functioning to improve her classroom performance, i.e., organization, and tracking and completing assignments, neither goal directly addressed those skills. (HX 16 at C23-24)

The first IEP goal, for example, provided LH with thirty minutes per week of social work services to help her improve her self-confidence and motivation. (HX 16 at C23) The goal, however, omits any measurable present levels of performance. Instead, it vaguely states that LH has "poor self-confidence and low motivation to succeed in school." (*Id.*) Thus, even though part of the annual goal is stated in quantifiable terms ("[LH] will be able to verbalize at least 10 successes in school this academic year"), the lack of a baseline makes it impossible to measure whether verbalizing 10 successes would be an improvement or a setback for LH.

The quarterly benchmarks in the first goal suffer from the same flaw since there is no way to discern whether listing 5 positive attributes, and 7-10 academic accomplishments would be an

¹⁵ Depicting LH's achievement scores based on age rather than grade norms could be misleading for LH, since she started school a year early and was educated with children who were a year older than she was.

improvement for LH. (*Id.*) Additionally, the third benchmark is so poorly written it is incapable of being implemented. That benchmark requires LH to describe how she develops feelings about herself -- clearly a subjective process -- while at the same time imposing the objective requirement of 75% accuracy. (*Id.*)

The second goal sets aside 10 minutes per week with the school psychologist to help LH develop self-awareness and self-management skills by setting one goal and working to achieve that goal. (*Id.* at C 24) As with the first IEP goal, this second goal lacks any measurable levels of performance. Thus, it is impossible to know whether achieving this goal would provide LH with any benefit. Even if it did, the benefit would be minimal at best, since the goal merely requires LH to set *one* academic or personal goal that she would try to achieve in a period of one or two months.

Significantly, CPS' own staff members confirmed that the IEP goals were not properly written. Susan Isaacson conceded, for example, that the goals lacked measurable present levels of performance and disavowed any personal responsibility for them saying, "I did not write these goals...[i]t's not my job to evaluate the efficiency of the social worker in writing IEP goals." (Tr. 91) Likewise, when Lisa Russell, a LaSalle social worker was questioned about the goals on the July 19 IEP, she conceded that they lacked measurable present levels of performance. (Russell 4/21/08 Testimony, Tr. 177-79) Russell also testified that she would have scrapped one of the benchmarks and re-written it using state guidelines. (*Id.* at 189-90)

As stated above, there are no IEP goals to address LH's academic and organizational needs. The team did suggest some academic modifications and accommodations, however, including: developing a math card file of sequential steps, and using a metacognitive self-talk approach to understanding and solving problems. (HX9 at C22) There also are modifications and accommodations that address LH's independent functioning skills, such as establishing a weekly communication log between home and school. Unfortunately, since LH's special services were limited to 40 minutes per week with the social worker and school psychologist as providers, it is unclear how these modifications were to be implemented, by whom, or how their effectiveness would be assessed.

The Parents' Response

- **The Parents Enroll LH in Hyde Park Day School**

In the spring of 2007, when they were still uncertain about the outcome of CPS' evaluation, Mr. H. and Ms. N. decided to apply to Hyde Park Day School's summer school program on LH's behalf. Ms. N. said she had read about the school, and had heard good things about it from an acquaintance. (Ms. N. Tr. 234-35) LH was accepted to the summer program and, on June 6, 2007, the Parents notified the District of their intent to place her at Hyde Park Day for the summer. (6/6/07 Letter to Narea, F4, HX 47) The Parents made clear that they were making this change because they believed that CPS had failed to provide LH with an appropriate education. They stated that they expected CPS to assume financial responsibility for the placement. (*Id.*)

Shortly after they had placed LH in the Hyde Park's summer program, the Parent learned that because she had received a final grade of F in reading and D in math, CPS was requiring LH to

attend summer school in order to be promoted. (*See* 6/8/07 Promotion Status Notification, D8, HX 15; 6/15/07 Narea Letter to Parents, D5, HX 14) The Parent's nevertheless, proceeded with their plans to send LH to Hyde Park Day.

Likewise, the Parents made their decision to enroll their daughter in the Hyde Park Day summer before the team had completed LH's IEP. According to Mr. H., the parents felt that they needed to do something to try to get their daughter out of a "very deep academic trough." (Mr. H. 5/21/08 Tr. 223) Moreover, by the time of their decision in early June, summer school was on the verge of starting. CPS still had not convened an IEP meeting for LH and the Parents didn't know whether CPS was going to offer any services to LH.

According to both Parents, their initial decision was to place LH in the summer program only. (Ms. N. Tr. 238-39, Mr. H. Tr. 228) Mr. H. testified that they didn't learn that LH had been accepted for the fall until sometime in late July.¹⁶ (Mr. H. 6/4/08 Tr. 162) Moreover, the Parents still hoped that CPS would provide LH with appropriate services so she could attend a public school. (Mr. H. Tr. 163) As Mr. H. put it, LaSalle was their school of choice. After participating in the June and July IEP meetings, however, the Parents decided that LH's needs wouldn't be met at LaSalle. (*See* Mr. H. Tr. 163)

In the meantime, they had come to believe that LH would benefit from attending Hyde Park Day full time. Thus, on August 3, 2007, LH's Parents notified CPS in writing that they had made the decision to place LH in Hyde Park Day School as a full-time student. (8/3/08 Mr. H. letter to Duncan and Heurtefeu, F6, HX 50) In the letter, the Parents stressed their belief that CPS had failed to provide LH with an appropriate education for the 2006-07 school year, and that they expected CPS to assume financial responsibility for this placement. (*Id.*) Three days later, on August 6, 2007, the Parents filed the due process complaint which is the subject of this proceeding.

LH at Hyde Park Day School

As previously noted, Hyde Park Day School is a private school for students with learning disabilities in kindergarten through eighth grade. (Hyde Park Day School Brochure, E1, HX 34) The school is a certified provider for the Illinois State Board of Education. (Bunte Tr. 111.) Classes have a maximum of ten students, with two certified teachers. (*Id.* at 128) The school relies upon technology -- both hardware and software, and various multi-sensory instructional approaches to provide students with individualized instruction. (*Id.* at 130-38)

Each student at Hyde Park Day receives an individualized learning plan. (ILP) The staff meets three times a year to create and assess a student's progress on the ILP. (*Id.* at 125) Principal Mandy Bunte testified that, while an ILP is similar to an IEP, the ILP generally is not as broad as an IEP. On the other hand, an ILP provides more goals for each subject area. (*Id.* at 123-24) Moreover, while an IEP measures progress in benchmarks and percentages, an ILP provides a

¹⁶ Hyde Park Principal Bunte recalls otherwise. According to Bunte, when LH was accepted it was to both the summer and full-time programs. Bunte conceded, however, that Pam Adelman oversaw LH's application and admissions process.

narrative description of a student's progress based on teacher observation of the student's classroom performance and homework. (*Id.* at 124-25)

According to Principal Bunte, Hyde Park has a lengthy application process. The first requirement is a diagnostic evaluation that indicates a student has a learning disability and an average to above average IQ. (Bunte Tr. 141) The school also interviews teachers and other professionals who have worked with the student to determine whether he or she fits the profile Hyde Park is looking for. (*Id.* at 142) Finally, prospective students must also spend a day at the school working with teachers and other students before they can be accepted.

Bunte first became aware of LH when she was admitted to the summer school program in 2007. (*Id.* at 152-53) As a student in the summer program, Bunte testified that it became apparent that LH's attention deficits and executive functioning difficulties were negatively affecting her reading comprehension and written expression. (*Id.* at 159-60) Math was perhaps the most difficult subject area for LH, in part, because she has a math disability that makes it difficult for her to understand math concepts. In addition, LH's attention and executive functioning deficits make it difficult for her to solve word problems and multiple-step problems. (*Id.* at 161-62) Bunte also noted that when LH first arrived at Hyde Park Day, she struggled with poor self-esteem, as indicated by such comments as, "I can't do that," or [I]t's too hard. (*Id.* at 172)

Each of the issues noted above was targeted in LH's ILP in the summer program, and in a new ILP that was created in the fall. (*See* LH Summer 2007 ILP, E 20a, HX 38; LH Sept./Oct. 2007 ILP, E 20, HX 36) The fall ILP includes academic goals for reading comprehension and decoding, written expression, math, science and social studies. The goals are quite detailed. In math for example, LH's ILP required her to "develop and apply vocabulary of primes, factors, divisors, multiples and common factors." (HX 36 at E27) Though her progress was not assessed by administering a standardized achievement test, the team clearly indicated her progress on each of her ILP goals when it met in the winter. (*See* LH Winter ILP, E 42; HX 39) On the math goal, for example, the team concluded that it was a beginning skill for LH, and that she needed continued practice.¹⁷ (*Id.* at E 52)

The ILP does not include formal goals for LH's executive functioning needs. Instead, her organizational needs are specifically addressed in the comments on the ILP's. In math, for example, the overall comments state that LH will, "use a math journal to store all of her math work.... This will serve as a tool for LH so that she will increase her organizational skills...." (*Id.* at E 54) In addition, Bunte stated that teachers integrate and practice executive functioning skills all day long. (*Id.* at 180) Teachers post classroom schedules each day. They also build a routine so that students know when to turn in homework and organize books for the next class. Students also are required to copy assignments into their assignment planner (on their laptop computers), which the teacher checks each day. Time is set aside at the end of each day to allow students to organize materials to go home. (*Id.* at 182)

¹⁷ Each goal provides an assessment grid in which the staff can indicate the student's progress. The grid includes the following levels of achievement: Not Addressed, Beginning Skill, Needs Continued Practice, 60-80% Mastery; 80-100% Mastery.

LH's problems with inattention and distractibility also are addressed in the comments sections of the ILP, and through "growth as a learner" goals, which are intended to help the students become more aware of the learning process and their own learning needs and styles. (HX 39 at E 49) With respect to her social emotional needs, the school teaches a social skills class in which the students focus on success attributes, e.g., perseverance, goal setting and self-confidence. (*Id.* at 174) In addition, LH has access to a social worker when she feels she has something she needs to talk about. (*Id.*)

Bunte testified that she believes that LH has made tremendous progress as a result of the program she has received at Hyde Park Day School. She stressed, however, that she also believes that LH still has a lot of work to do. Besides her academic needs, Bunte stressed that continuing to address LH's self-esteem also is critical to her success. (*Id.* at 245) LH's Parents also testified that LH has made strong academic gains at Hyde Park Day. Beyond her improved grades, the Parents stress that LH loves going to school now. (Ms. N., Tr. 239; Mr. H., Tr. 186-87) She is a confident student who shows initiative in tracking and completing homework and in-school assignments. They would like her to continue at the school for her 8th grade year.

Dr. Laaperi's Independent Evaluation

In addition to enrolling LH in Hyde Park Day School, the parents also retained Dr. Cheri Laaperi to conduct an independent educational evaluation of LH. (Laaperi Report of Psychoeducational Evaluation, A1 - 36, HX 59) Dr. Laaperi administered a comprehensive set of tests to assess LH's cognitive abilities, processing strengths and weaknesses and achievement levels. Most notably, these tests included the Wechsler Intelligence Scale for Children,¹⁸ and the KeyMath Diagnostic Mathematics test. She also provided an opinion, based on her observations, that she believed LH's previous diagnosis of ADHD was still valid. She testified about her findings and recommendations at the hearing, and I found her to be a knowledgeable and credible witness.

With respect to the Wechsler, Laaperi's results showed LH's full scale IQ score to be within the average range of intelligence. There was a significant discrepancy, however, between her verbal comprehension, which was in the high average range, and her perceptual reasoning score, which was in the average range. By administering the WISC and other instruments, Laaperi also found -- just as Price and Pelofske had -- that LH exhibited a number of processing deficits, including visual-auditory integration and visual processing speed. (HX 59 at A13, A22)

Perhaps Laaperi's most significant finding related to LH's math achievement levels, which showed her to be significantly below grade level. Laaperi administered the KeyMath to LH. The test is comprised of sixteen subtests that measure Basic Concepts, Operations and Applications. LH received the following grade equivalent scores: Basic Concepts: 5.7; Operations: 4.3; Applications: 5.1. These scores yielded an overall grade equivalent of 4.9. At

¹⁸ The Parents failed to inform Laaperi that Pelofske had recently administered the WISC. Laaperi testified that had she known that fact, she wouldn't have administered the test. In any event, the abbreviated time between tests does not appear to have rendered Laaperi's results invalid. Laaperi's results are remarkably similar to Pelofske's and Price's. She also studied the scores and concluded that her scores did not reflect a practice effect. Laaperi provided an addendum to her report in which she shared those conclusions. (HX 60 at A66-67)

the time of the testing, LH was in her third month of 7th grade (7.3). Thus, she was functioning more than two to three years below grade level in math.

Based on the results of her evaluation, Laaperi concluded that LH exhibited the characteristics of a learning disability. Specifically, she has average to above average intelligence, demonstrates processing deficits, and scores significantly below average in the academic area of math. Laaperi, therefore, concluded that LH has a math disorder. (*Id.* at A 25) When asked to explain why she diagnosed a math disability when Pelofske did not, Laaperi conceded that LH's scores on the KTEA (given by Pelofske) did not indicate that she was functioning significantly below grade level in math.¹⁹ (Laaperi 6/27/08 Testimony, Tr. 64) Laaperi stressed, however, that with sixteen subtests, the KeyMath provides more insight into a student's strengths and weaknesses than the KTEA's two math subtests. (*Id.* at 69)

In addition to her conclusion that LH has a math disorder, Laaperi found that LH's previous ADHD diagnosis is still valid. She also concluded that LH exhibits a developmental coordination disorder, or fine motor copying deficits. (HX 59 at A 25) Laaperi made a number of recommendations based on her findings. For example, Laaperi recommended that LH be given extra time to take tests, and that she not be required to copy from the board or a book. She also recommended daily school training in executive functioning skills such as, use of an assignment notebook and step-by-step preparation for short and long-term projects. (*Id.* at A26-27) Notably, though she had diagnosed LH with a disorder in math, Laaperi made no recommendations for math remediation. She explained that she didn't include math recommendations because she was aware that Hyde Park had already provided LH with comprehensive math goals on her ILP.

The January 23, 2008 IEP

On January 23, 2008 the LaSalle team met with the Parents and drafted a revision to LH's July 2007 IEP. The primary reason for the meeting was to allow the team to consider Laaperi's findings. The team retained their previous OHI eligibility determination, rejecting Laaperi's conclusion that LH is learning disabled. Nevertheless, the team made a number of significant changes to this IEP, including: a ten-fold increase in the amount of time LH was to receive special ed services -- from 40 to 475 minutes per week, and goals that addressed her academic and executive functioning deficits. (1/23/08 IEP, SD 14, HX 52)

Specifically, despite rejecting Laaperi's conclusion that LH has a math learning disability, the team nevertheless included a goal to address her math deficits. The goal includes measurable present levels of performance, including a 5.7 grade equivalent on the KeyMath Basic Concepts subtest with an overall grade equivalent of 4.9. Of concern, however, is the fact that the team omitted the KeyMath Operations subtest score, which showed a grade equivalent of 4.3. This was LH's lowest math score and it indicates that she was a full three years behind her chronological grade level of 7.3 at the time the test was administered.

¹⁹ Pelofske's results satisfied two of the three criteria for diagnosing a learning disability: LH has average to above average intelligence and exhibits processing deficits. Pelofske's determination that LH is not learning disabled was based solely on her finding that LH was not significantly below grade level in any academic area.

The measurable annual goal for math targets LH's executive functioning deficits by specifying that she will create a math strategy notebook for use in class and for homework. The goal also targets LH's deficits in math operations and applications by specifying that she will demonstrate and apply a knowledge and sense of numeration and operations. (*Id.* at 23) The three quarterly benchmarks generally support the measurable annual goal. To implement these goals and benchmarks, the IEP specifies that LH will receive two hundred minutes per week of collaborative teaching in the regular and special education classroom. (*Id.*)

Second, the January IEP includes a goal to address LH's executive functioning deficits as they impact her written expression. (*Id.* at 24) The goal specifies that because of her ADHD, LH has difficulty organizing and filtering her ideas and thoughts. The annual goal is clear and measurable and specifies that she will use graphic organizers and self-editing techniques to write for a variety of purposes. The benchmarks support the annual goal and also are clear and measurable. (*Id.*) Like math, the IEP allocates 200 minutes a week of collaborative teaching in the regular and special education classroom to implement this goal.

Third, another executive functioning goal addresses LH's organizational difficulties as they relate to organizing items, such as books, notes and class materials. This goal is precise and measurable, and targets a particular area of real need for LH. Unlike the July IEP, this goal specifies that the special education teacher will oversee and assist LH in her efforts to improve her organizational skills.

The January IEP makes clear that the social work goals included on the July IEP are still in effect. (*See* p. 26) Thus, LH was to receive a total of 475 minutes per week of special education and related services. (*Id.*) The January IEP also includes several modifications and accommodations. Unlike the July IEP, however, this IEP specifies who will be responsible for implementing and monitoring the modifications.

CONCLUSIONS OF LAW

This is a case in which the Parents assert that the District failed to provide their daughter with FAPE at virtually every turn -- beginning with an alleged failure to meet its child-find obligations, continuing with a failure to conduct a timely evaluation and a timely IEP meeting, and culminating with the District's alleged failure to provide LH with an IEP that addressed all of her special education needs. In analyzing these allegations it is important to note that the Parents bear the burden of proof in this case as the party seeking relief. *Schaeffer V. Weast*, 546 U.S. 49, 62 (2005) Thus, it is the Parent's responsibility to present sufficient evidence to support their allegations. As will be discussed below, I conclude that the Parents have met that burden.

1. Whether the District Failed to Conduct a Timely Evaluation of LH in Violation of its Child-Find Responsibilities

The Parents' first allegation is that the District failed to conduct a timely evaluation of LH. In support, the Parents aver that they requested an evaluation for their daughter in letters to the District dated October 3 and October 13, 2006. The letters included copies of previous evaluations indicating that LH had learning disabilities and ADHD. The District initially refused to evaluate LH and did not initiate an evaluation until March of 2007. Though the Parents do not expressly state it, their allegation also raises the question of whether the District, by refusing to evaluate LH for so many months, violated its child-find responsibilities under the Individuals with Disabilities Education Act.

According to the IDEA, school districts have a responsibility to identify, locate and evaluate all children residing within the district who have disabilities and are in need of special education and related services. 20 U.S.C. § 1412 (a)(2)(3)(A) (*See also* Ill. Admin Code § 226.100) This child-find duty is triggered when the District has reason to suspect a disability. *See Jamie S. v. Milwaukee Public Sch.*, 519 F. Supp. 2d 870 (D. Wis. 2007). Among other things, a child's behavior or poor performance may trigger a District's child-find duty. *Dept. of Educ., State of Hawaii v. Cari Rae*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001) Thus, the first step in analyzing whether the District violated its child find obligation is to determine when it had reason to suspect that LH. was a student with a disability.

Here, the facts indicate that upon her arrival at LaSalle in the fall of 2006, LH immediately began to perform poorly in virtually all of her academic classes. Indeed, within the first five weeks of school, the District had issued a progress report to the Parents indicating that LH was having difficulty with, or failing, reading, writing, math, science and social studies. (HX 6) To shed light on the reasons for her struggles, the Parents promptly provided the school with copies of two prior evaluations showing that LH had been diagnosed with learning disabilities and ADHD. (*See* HX 1 and HX 2) The Parents also requested that CPS conduct its own evaluation of LH to determine necessary supports and services for her. (*Id.*) Together, these two facts -- LH's poor performance, and two reports of prior diagnoses -- provided ample evidence to cause the District to suspect that LH was a student in need of special education services. Thus, I conclude that the District's child-find duty was triggered by October 3, 2007, when the District received the Parents' letter informing it of LH's previous diagnoses and providing copies of the evaluation reports. At that point, the District had a responsibility to provide LH with a timely evaluation.

In a meeting on October 20, 2006, the team instead refused to evaluate LH. The District argues that its decision was reasonable because the team believed that the evaluations provided by the Parents were not up to date. Staff also concluded that LH had not manifested her problems with sufficient duration, frequency and intensity to warrant an evaluation. CPS' position is unconvincing. While the evaluations were approximately two years old, that did not render them out of date. Indeed, it is CPS' practice to reevaluate its students every *three* years. Moreover, in submitting the evaluations to LaSalle, the Parents were not requesting that the team rely on them for purposes of drafting an IEP for LH. Rather, the Parents offered them simply to show that LH

had been evaluated and diagnosed as a student with disabilities. The District's refusal to rely on them for that purpose was unreasonable.

Further, though CPS claims that LH, a new student, had not demonstrated her learning problems with sufficient frequency, intensity and duration, by the time the team met at the end of October, the first quarter was nearly over. LH had already received a failure notice indicating that she was failing or having significant difficulty in *all* of her academic subjects. In the interim, her grades had not improved -- a fact the team could have verified. Indeed, LH's first quarter report card, issued in early November, included an F in reading and D in science. Nearly a full quarter of failure by LH should have been sufficient to satisfy CPS' criteria -- particularly when considered in light of LH's previous diagnoses.

Nor were the District's intervention strategies appropriate substitutes for an evaluation once the District's child-find duties were triggered. Though IDEA does permit the use of research-based intervention as a means of determining whether a child has a learning disability (34 C.F.R. §300.307(a)(2)), neither Ms. Surbaugh's remediation plan nor the plan to return LH to 5th grade satisfied those requirements.

Finally, though the District ultimately agreed to evaluate LH, it allowed five months to pass before it reached that decision in a domain meeting on March 14, 2007. It took until May 2, 2007 --nearly another two months -- for the psychologist to complete the main portion of the evaluation. The health assessment, which the team deemed critical to its eligibility determination, was not completed until July 19, 2007. By then, of course, the school year was over, and LH had gone an entire year without being identified as a student with a disability, or receiving services for her special education needs. Because of that, she experienced failure for an entire year, too.

For these reasons, I find that the District denied LH FAPE by violating its child-find obligations under IDEA, and by failing to provide her with a timely evaluation as the Parents' complaint alleges. In addition, in their due process complaint, Parents also allege that the District failed to provide LH with an appropriate placement for her sixth grade year at LaSalle. (Parents Cmplt. No. 3) Because the District did not identify LH as a student needing special education services until her sixth grade year was over, it follows -- and the facts demonstrate -- that the District also failed to provide her with an appropriate placement for her sixth grade year. I find in favor of the Parents on that allegation as well.

2. Whether the District Denied LH FAPE by Committing Procedural Violations in Developing her IEP

In their complaint, the Parents assert that the District failed to observe various statutory requirements under IDEA related to its responsibility to create an appropriate IEP for LH. In particular, the Parents maintain that the District: 1) Failed to conduct a timely IEP meeting; 2) Failed to provide LH with an IEP with meaningful present levels of performance and measurable goals and objectives; 3) Failed to provide the LH with an accurate and complete IEP; 4) Failed to consider a functional behavioral analysis and Behavior Intervention Plan for LH; 5) Failed to

consider a continuum of placement options; and 6) Failed to offer compensatory services for LH.²⁰

The analytical framework for any inquiry concerning the adequacy of educational services is provided in *Board of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982). That case established that a free appropriate public education is an education “specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.” In *Rowley*, the United States Supreme Court set forth a two pronged test to determine whether a school district has offered a student FAPE. The first inquiry to be made is whether the school district has complied with the statutory procedures required by IDEA. (20 U.S.C. §§1401 et seq.) Procedural violations do not automatically require a finding of a denial of FAPE. Instead, a student is entitled to relief for procedural violations only when the violations result in a loss of educational opportunity. *WAG. v Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) The second prong of the *Rowley* test, which will not be considered here, is whether a district has developed an IEP reasonably calculated to enable the child to receive an educational benefit. *Rowley* at 206-07. The Parents’ procedural allegations are considered individually below.

- **Failure to conduct a timely IEP meeting**

Parents contend that the District failed to conduct a timely IEP meeting for LH when it began the evaluation process on May 2, 2007 but did not complete LH’s IEP until July 19, 2007.²¹ Though the Parents do not offer a legal basis for their assertion, under Illinois law, once a district decides to conduct an evaluation (and parental consent has been obtained), the evaluation and the IEP meeting must be completed within 60 school days after the date of the referral. 23 IL Admin. Code Sec. 226.110(d)(1) Here, the facts reveal that the District decided to evaluate LH on March 14, 2007 when it held a domain meeting and obtained parental consent.²² (HX 56) The District, therefore, had 60 school days from March 14 to complete LH’s evaluation and IEP. Since it did not complete LH’s evaluation and IEP until July 19, simple math reveals that the District did not meet its obligation.

The District would undoubtedly argue that it met its legal obligation because it convened an IEP meeting on June 11, 2007. That date is of no legal consequence, however, because even though the parties met and discussed some of LH’s test results, they were unable to finalize LH’s eligibility determination or write any IEP goals for her since the District had failed to complete vision and hearing assessments. Thus the meeting was “tabled” and the IEP meeting was rescheduled to July 19, 2007.

²⁰ See Parents Complaint, Allegations 2, 6, 9, 10, 11 and 12

²¹ To be precise, the main features of LH’s IEP, e.g., LH’s eligibility determination and IEP goals, were completed on July 19th, but a copy of the IEP was not completed and provided to the Parents until a few weeks later.

²² Whether the District should have decided to evaluate LH sooner is addressed in the previous section. For purposes of this analysis, the relevant question is the actual date that the District decided to initiate LH’s evaluation.

While the District clearly committed a procedural violation, *Rowley* establishes that it will not be deemed to have denied LH FAPE unless the violation denied her educational opportunity. I find that it did. Specifically, as a result of the District's inability to complete LH's IEP in a timely way, the IEP meeting was postponed to July 19th. By that time, school was no longer in session, and LH's IEP meeting was conducted by the summer assessment team. None of the team members had ever met LH, nor had they had the opportunity to confer with LaSalle staff to gain greater insight into her needs. Additionally, the case manager, Susan Isaacson, conceded that LH's file was devoid of any information pertaining to her performance at LaSalle. (Isaacson Tr. 33-37) In short, the team had very limited information with which to write LH's IEP, and as will be discussed later, they failed to provide her with an IEP capable of providing her with educational benefit.

In addition, CPS' failure to convene a timely IEP meeting also precluded LH from receiving extended school year services. (Isaacson Tr. 40) The record establishes that because of her failures in reading and math, CPS had required LH to attend summer school to progress to 6th grade. Had her IEP been completed sooner, LH likely would have been eligible to receive esy services to address these needs. By July 19th, however, it was too late for LH to attend esy. The loss of the opportunity to receive this service was a denial of FAPE.

The fact that the Parents decided to enroll their daughter in summer school at Hyde Park Day School is not to the contrary. Because of the District's delay in completing LH's evaluation and IEP, the Parents still did not know what, if any, services CPS intended to offer their daughter at the time summer school was about to begin. Thus, in order to ensure that LH received specialized instruction during the summer, the Parents placed her in Hyde Park's summer program.

- **Failure to Provide an IEP with Meaningful present levels of performance and measurable goals and objectives**

Parents assert that the District failed to provide LH with an IEP that included meaningful levels of performance and measurable goals and objectives. This allegation arises directly from IDEA which requires that an IEP must include:

- 1) A statement of the child's present levels of academic achievement and functional performance, including (i) How the child's disability affects the child's involvement and progress in the general education curriculum;
- 2) A statement of measurable annual goals, including academic and functional goals designed to ...enable the child to make progress in the general education curriculum. 34 C.F.R. 300.320 (a)(1) and (2)

As previously discussed in my Findings of Fact (pp.10-11), the evidence confirms that CPS failed to include measurable levels of performance in LH's July 19 IEP goals. This omission made it impossible to determine whether the annual goals and benchmarks were capable of providing LH with educational benefit, and constituted a denial of FAPE. There were other

significant deficiencies as well, including a goal that provided only de minimis benefit, and at least one benchmark that was incapable of being implemented. Indeed, CPS' own staff conceded that the goals and benchmarks were poorly written. See *Evans v. Board of Educ. of Rhinebeck Central School Dist.*, 930 F. Supp. 83, 98 (S.D.N.Y. 1996)(District's failure to provide student with adequate present levels of performance, and measurable IEP goals was denial of FAPE).

- **Complete and Accurate IEP**

The Parents' next contention is that there were a number of inaccuracies and omissions on LH's July 19 IEP, which constituted a denial of FAPE. While I find that the evidence supports several of the Parents' allegations, I conclude that none of these mistakes or omissions, either separately or together, resulted in a denial of FAPE for LH. I did, however, find one of the Parents' assertions to be of particular concern and I address it below.

Specifically, LH's July 19 IEP includes the statement, "Parent left the building before the IEP was completed." (HX16, at 13) The Parents contend that not only is the statement incorrect, but that it falsely implies that they refused to participate fully in the IEP meeting. According to Mr. H, the IEP meeting was over when he left, but the District told him that it would take several days to complete the IEP, and that it would be sent to him once it had been approved by CPS. (Parent's Complaint, No. 9)

Ms. Isaacson, the case manager at the July 19 IEP meeting confirmed the Parent's version of events. According to Isaacson, Mr. H. did not leave before the meeting was over. Further, Ms. Isaacson conceded that, [t]his is the phrasing that we are directed to use when the IEP has to be finished after the meeting is over." (Isaacson Tr. 99-100) She also testified that Mr. H. requested a copy of the IEP before he left, but was told that it would not be ready for several days. (*Id.*)

Though I do not believe this statement constitutes a denial of FAPE, the phrase is not only misleading but it casts the Parents in a negative light. This practice should end. If an IEP has not been completed by the end of a meeting, the District should simply say so.

- **Failure to Consider a Behavior Intervention Plan**

The Parents contend that because LH's IEP indicated that she had attention difficulties and made a reference to "behavioral difficulties," the District should have completed a functional analysis and behavior intervention plan. The evidence does not support the Parents' contention. Specifically, though the IEP does reference LH's attention and behavior, Ms. Isaacson testified that such plans are required only when a student is found to be eligible for services under an emotional disturbance classification. While behavior intervention plans are sometimes created for students with ADHD, it is up to the discretion of the team. In this instance, according to Isaacson, the team did not feel a plan was warranted. The Parents failed to show that the team's decision was wrong.

- **Failure to Consider a Continuum of Placement Options**

Like the allegations concerning the behavior intervention plan, the evidence fails to support the Parents' claim that the parties did not consider a continuum of placement options for LH.

- **Failure to Offer Compensatory Services to Address Delays in Services**

The Parents assert that because the District improperly delayed evaluating and providing services to LH during the 2006-07 school year, it was required to offer her compensatory services. Its failure to do so, according to the Parents, was a denial of FAPE. Addressing this issue would require me to analyze whether the District was reasonable in assuming that its services to LH were reasonable. I will address the issue of compensatory services in a more straightforward discussion of remedies, instead.

3. Whether the District Failed to Provide LH with an IEP that Provided her with Educational Benefit

The two remaining claims by the Parents are that the District failed to recognize all of LH's disabilities, and that it failed to provide LH with an IEP that addressed all her special education needs.²³ Since these claims go directly to the substance of LH's IEP, they must be analyzed under the second prong of *Rowley*, which establishes that, in order to provide FAPE, an IEP must be reasonably calculated to provide the student with benefit. To meet the substantive criterion of *Rowley*, an IEP must respond to all significant facets of a student's disability. (*Alex R. v. Forestville Valley CUSD*, 375 F.3d 603, 613 (7th Cir. 2004)(citing *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 642 (8th Cir. 2003))

- **Failure to Recognize LH's Disabilities**

In asserting that the District failed to recognize all of LH's disabilities, the Parents maintain that the District erred during the July 19, 2007 IEP meeting when it found LH eligible for special education services under the other health impaired classification. In doing so, the Parents claim that the District overlooked key information supporting a determination that LH had learning disabilities. The information included a previous diagnosis of learning disabilities by Dr. Price, as well CPS' own testing results that showed a significant discrepancy between LH's achievement and her ability in math calculation and reasoning. Indeed, the team went so far as to note these discrepancies on LH's IEP, yet stopped short of finding that she had a learning disability. (HX 16 at C14) Though these factual assertions by the Parents are not in dispute, they do not establish that the District should have found that LH was a student with learning disabilities, or that the District's OHI eligibility determination was in error.

First, though Dr. Price diagnosed LH with a learning disability prior to her arrival at LaSalle, CPS conducted its own comprehensive evaluation of LH in May 2007. According to the examiner, the results failed to support a finding that LH was learning disabled. Some of the

²³Parents' Cmpl. Nos. 5 & 7

criteria for diagnosing a learning disability-- average to above average intelligence, and evidence of processing deficits -- were satisfied. LH's achievement test results, however, indicated that she was functioning within the average range in every academic area measured. Because this criteria was not satisfied, the District did not err when it concluded that LH was not learning disabled. Indeed, Parents' consultant, Dr. Laaperi testified that had she been relying on the results obtained by Ms. Pelofske, she would not have concluded that LH was learning disabled either.

Nor was the team's OHI eligibility finding without basis. A number of witnesses testified that students who are diagnosed with ADHD often are found eligible for services as other health impaired. LH had previously been diagnosed with ADHD by Dr. Daniels. Though, Ms. Pelofske stopped short of reconfirming that diagnosis, she testified that this was due to her belief that a medical doctor should make that determination -- not that she rejected the diagnosis.

Even if the District had incorrectly identified LH as OHI, that in and of itself, is not a denial of FAPE. The Seventh Circuit established as much in *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997). In that case, the parents brought a due process complaint alleging, among other things, that the District had incorrectly identified the student as cognitively disabled instead of learning disabled. The Seventh Circuit ultimately held that the District had not misidentified the student and, in considering that question made it clear that for purposes of FAPE, a student's label is irrelevant. As the Seventh Circuit put it, "[t]he IDEA concerns itself not with labels but with whether a student is receiving a free and appropriate education." *Id.*

In short, I find that the District did not err when, during the July 19, 2007 IEP meeting, it failed to find LH eligible for services as a student with learning disabilities, but instead, found her eligible for services under the Other Health Impaired classification.²⁴

• Whether the IEP Addressed All of LH's Special Education Needs

Since *Heather S.* proves that a student's label is irrelevant, the critical inquiry raised by the Parents is whether the July 19 IEP adequately addressed all of LH's special education needs. As *Alex R.* teaches, to satisfy FAPE, LH's IEP should have addressed all significant facets of her disability. The evidence shows that the IEP did not.

First, in determining LH's needs, the record overwhelmingly shows that she had significant difficulties with attention, and executive functioning skills, particularly as they related to organizing and completing her homework and classroom assignments. In progress reports and remediation plans, LH's teachers stressed that she needed to improve these skills in order to succeed academically. Pelofske's assessment supported teacher observations, and she expressly recommended that LH receive support in the areas of independent functioning and organization in addition to social emotional support. In addition, LH encountered particular difficulty with math. She received an final grade of D in math, despite the fact that she was tutored regularly and often by LaSalle teachers.

²⁴ It must be stressed, however, that subsequent to that meeting, LH has undergone additional assessments by Dr. Laaperi and by teachers at Hyde Park Day School, which support the conclusion that LH has ADHD *and* learning disabilities.

In preparing her IEP, the summer assessment team specified that LH needed specialized instruction and/or related services in *every* academic subject, independent functioning, and social-emotional support. (HX 41 at 45) Yet the team wrote only two goals, both of which addressed LH's "social-emotional" needs and provided LH with just forty minutes of special services per week.. There were no goals to address her math deficits or any other academic needs. Finally, though Ms. Pelofske's report expressly recommended that LH receive support in independent functioning to improve her classroom performance, i.e., organization, and tracking and completing assignments, the IEP fails to provide a goal that directly addresses those needs. (HX 16 at C23-24) In short, the July 19 IEP fell well short of *Alex R.*'s requirement that it address *all significant facets* of LH's disabilities.

That the District recognized its failure can be found in the IEP revision that the parties drafted on January 24, 2008.²⁵ That revision increases LH's services from 40 to 475 minutes per week. It also adds goals to address LH's deficits in math, executive functioning/written expression, and organization.

Accordingly, I conclude that the District failed to provide LH with an IEP reasonably calculated to provide her with educational benefit, because it did not adequately address all significant facets of her disability. This was a denial of FAPE.

²⁵ The District's January 24, 2008 IEP represents a marked improvement over the July 19 IEP. It addresses many of LH's needs. Likewise, present levels of performance and annual goals would likely pass muster under *Rowley's* procedural analysis. Because it was drafted after the relevant period of this proceeding, however, the January 2008 IEP has no bearing on my determination concerning whether the District provided LH with FAPE during the 2006-07 school year and the summer of 2007.

Pursuant to the above findings of fact and conclusions of law, it is hereby ordered:

1. The Parents' request that the District be required to reimburse them for their unilateral placement of LH at Hyde Park Day School for the summer 2007 program and the 2007-08 school year is granted.

In granting the Parents' request, I expressly find that the Parents have satisfied the relevant legal requirements for reimbursement for unilateral placement. Specifically: 1) the District failed to provide LH with a free and appropriate public education, 2) the Parents have demonstrated that Hyde Park Day School offers an appropriate placement for their daughter and 3) the Parents provided the District with appropriate and timely notice of their decision. *See* 34 C.F.R. Sec. 300.148

2. The Parents' request that the District be required to pay for the Student to attend Hyde Park Day School for the 2008-09 school year, in compensation for the District's denial of FAPE for the 2006-07 school year is granted in part. The District is not required to pay for that portion of the school year prior to the date that its child-find duties were triggered. Since the District's child-find duties were triggered on October 3, 2006, the District will not be required to pay for one month of LH's 2008-09 school year at Hyde Park Day School.

3. CPS will reimburse the Parents for transportation costs to Hyde Park Day School for the 2007-08 school year, and will pay the Parents' transportation costs to Hyde Park Day School for the 2008-09 school year (less one month).

4. The District shall provide proof of compliance with the aforesaid orders to the Illinois State Board of Education, Compliance Division, 100 no. First St., Springfield, Il. 62777-001, on or before September 2, 2008.

DATED: August 9, 2008

Kristine L. Anderson
Impartial Hearing Officer
P.O. Box 7065
Evanston, Il. 60204

Date visited 11/26/12

Date visited 11/26/12