

**ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

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In the Matter of a Special Education)
Due Process Appeal Between:)
)
JACQUELINE B. [REDACTED] ("J.B."))
By Her Guardian, Jacqueline R. [REDACTED] ("Guardian"))
)
And) ISBE Case No. 2007-0175
)
CITY OF CHICAGO SCHOOL DISTRICT 299 ("District"))
Local Education Agency ("LEA"))
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DECISION AND ORDER

ALAN J. COOK, Hearing Officer:

This matter is before the undersigned for a Due Process Hearing concerning the Guardian's request that J.B.'s placement for the 2006-2007 school year be found inappropriate, that her placement be changed to a residential setting, and that she be awarded required services. The Hearing Officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02a *et seq.*, 34 C.F.R. 300.507 *et seq.*, 23 Ill. Admin. Code 226.600 *et seq.*, and the Individuals with Disabilities Education Act, as amended, 20 U.S.C. 1400 ("IDEA"). The parties were informed of their rights under 105 ILCS 5/14-8.02a.(g.), 34 C.F.R. 509, and 23 Ill. Adm. Code 226 Subpart G.

PROCEDURAL HISTORY

J.B.'s Guardian requested a Due Process Hearing in a communication which the District received on February 8, 2007. This Hearing Officer received notice of his appointment on February 22, 2007. After the Hearing Officer contacted the representatives of both parties it was

decided the parties would try to resolve this dispute by participating in an Individual Education Program meeting on March 22, 2007. After this effort was unsuccessful, it was agreed by both sides that a Pre-Hearing Conference would be held on April 4, 2007. The Pre-Hearing Conference was held on that date and the Hearing Officer sent the parties a Pre-Hearing Conference Report. Both parties submitted lists of documents and witnesses for the hearing. Upon agreement of the parties, the evidentiary hearing was conducted on May 3 and 4, 2007 in Chicago, Illinois. At the hearing, the Guardian was represented by Michael O'Connor, Esq., and the District was represented by Tracy Hamm, Esq. The Hearing Officer received a statement of relevant dates from the Guardian on May 10, 2007, and the record was closed at that time. This decision is being issued on May 21, 2007.

BACKGROUND FACTS

J.B. is a fourteen year old student who resides within District 299's boundaries. Her upbringing is noteworthy for several reasons. She is a biracial child who was born with cocaine in her system. Her mother and father had histories of being substance abusers. At about two months of age, authorities found her in a house frequented by drug users. After that event, she was adopted by her paternal grandmother in 1999. J.B. had little contact with her mother and father after she was adopted.

She was raised by her grandmother until her grandmother's death in 2004. The record shows her education during those years took place at the following schools:

Dodge School – Kindergarten thru 5th Grade
Howell School – 6th Grade
Catholic School System – 7th Grade

The record indicates she made academic progress at these schools and did not exhibit noteworthy

problems in behavior or attendance.

After her grandmother died in 2004, J.B.'s uncle tried to be appointed her legal guardian. His petition was denied by the court. Jacqueline Ross is J.B.'s second cousin, and she then filed a petition to be named J.B.'s legal guardian. The court approved her request and Ross was appointed J.B.'s legal guardian on September 6, 2005. Thereafter, J.B. resided in Ross' home.

Ross enrolled J.B. for eighth grade in Powell Academy ("Powell") for the 2005-2006 school term. J.B. attended Powell until an incident occurred in Ross' home in November 2005. At that time, Ross discovered that J.B. and two male acquaintances were involved in inappropriate behavior in her home. After this event, J.B. ran away from home. From this time forward, J.B. was involved in numerous instances of running away and then being hospitalized for treatment. During these occurrences J.B. seldom attended Powell. In a post-hearing submittal, the Guardian's attorney listed J.B.'s activities from November 30, 2005 to May 1, 2007. These events can be summarized in relevant part as follows:

<u>Runaway status</u>	<u>Home</u>	<u>Hospitalization</u>
11/30/05 - 12/19/05	12/19/05 - 1/3/06	
1/3/0 - 1/25/06		1/26/06 - 2/10/06 – St. Mary's
2/10/06 - 2/28/06		2/28/06 - 3/7/06 - St. Mary's
3/8/06 - 3/21/06	3/21/06 - 3/22/06	
3/22/06 - 3/24/06		3/24/06 - 4/11/06 – Riveredge
4/12/06 - 5/15/06		5/15/06 - 5/30/06 – Hartgrove
5/30/06 - 6/10/06		6/10/06 - 6/24/06 – Hartgrove
6/24/06 - 8/11/06		8/11/06 - 8/15/06 – Riveredge
	9/1/06 – 9/8/06	

At the end of August, 2006 Ross informed teachers at Powell that J.B. was being discharged from Riveredge Hospital and would be returning to school. In early September, 2006 J.B. attended school at Powell Academy for five days before she ran away again. On September 5, 2006 Ross signed a consent for testing to begin a case study evaluation. After September 8,

2006, J.B. was either on runaway status or hospitalized until February 15, 2007. Her hospitalizations occurred at Riveredge Hospital, Chicago Girls Rehab Center and Lakeshore Hospital.

She resided at her Guardian's home from 2/15/07-2/23/07 before she went on runaway status until 3/24/07. Meanwhile, she was arrested on a theft charge on 1/24/07 and then was placed in a juvenile detention facility from 3/24/07 to 4/19/07. She returned to her Guardian's home on 4/19/07 and ran away on 4/20/07. She lived with her Guardian from 4/21/07 to 4/30/07 during which time she attended Powell for 7 days. On 4/30/07 she cut her arms near her wrists with a box cutter razor blade. On 5/1/07 she was admitted to Riveredge Hospital where she was expected to stay until at least 5/8/07.

Since J.B. was truant and did not attend Powell for the last half of eighth grade, she was required to repeat eighth grade. When she resumed school at Powell in September 2006, she returned to eighth grade. She attended school for five days before she ran away. The District proceeded to complete her case study evaluation and held an Individual Education Program ("IEP") meeting with her Guardian on October 30, 2006. The records show it was determined J.B. had a primary disability of "Emotional Disturbance" and a full-scale I.Q. of 99. A Mini-Battery of Achievement tests revealed the following grade levels:

Basic Skills 6.3

Reading 8.1

Writing 5.2

Mathematics 6.2

The IEP team decided J.B. should receive 200 minutes per week of Mathematics assistance, on-going services for Independent Functioning and consulting services from the

school nurse and social worker. In regards to placement, the IEP team stated "Residential placement was considered because J.B. is a chronic runaway; the team felt that she should have an opportunity (to) function in her home school after she gets out of Chicago Girls Rehab." (District, p. 32). It appears the team was aware J.B. had a history of being truant from school, running away, having seven psychiatric hospitalizations and being diagnosed with a bipolar condition and depression in December, 2005 (District, p. 36-37). J.B. was also given a Functional Analysis and Behavior Intervention Plan that concentrated on improving her attendance at school.

After Ross filed a request for a Due Process Hearing on February 22, 2007, the parties participated in an IEP meeting on March 22, 2007. J.B.'s primary disability was again listed as "Emotional Disturbance." New testing could not be administered to J.B. since she had not been in school since before the last IEP. The only change in her services was to include thirty minutes per week of direct services by a social worker. Her social/emotional goal was updated. The IEP documents note the Guardian "stated that (J.B.'s) bi-polar disorder requires placement at a residential setting." However, it was decided to not change J.B.'s placement while the District attempted to obtain more medical records.

During the course of these events, the Guardian and J.B. were receiving assistance and counseling from the Ada S. McKinley Community Services, Inc. Center. With the assistance of this organization, the Guardian submitted an application for an Individual Care Grant ("ICG") from the Department of Human Services ("DHS") of the State of Illinois. The ICG is designed to provide services to individuals that meet its qualifications. DHS denied J.B.'s application for an ICG. Thereafter, the Guardian submitted a second application for an ICG. However, DHS denied the second application and determined J.B. did not qualify for a grant.

ISSUES PRESENTED

The issues raised by the Guardian, as stated in the Hearing Officer's Pre-Hearing Conference Report, are the following:

- a. Failure to conduct adequate assessments of all areas of potential disabilities, with the result that the student's IEPs for this period do not address, or address inadequately, the student's learning impediments;
- b. Failure to develop IEPs with accurate statements of present levels of performance, goals that respond to identified learning disabilities, and objectives that were reasonably linked to (the student's) needs and potential for academic growth;
- c. Failure to provide an adequate functional behavioral analysis and behavior intervention plan;
- d. Failure to make an appropriate placement in light of her extensive emotional-behavioral needs.

The requested remedy is now expressed as follows:

1. Private residential placement at public expenses;
2. Direct that CPS pay for independent educational evaluations in areas of identified need;
3. Direct CPS to offer related services in sufficient intensity to allow student access to educational opportunity;
4. Direct CPS to provide compensatory education services in the form of funding the Guardian's monthly visits to the student at her residential placement to promote J.B.'s continual contact with her limited family; and
5. Direct CPS to convene an IEP meeting that will consider results of evaluations and implement the foregoing relief;

During the course of the Due Process Hearing it became apparent the main issue in this case centers on J.B.'s placement. The Guardian believes the placement should be in a residential setting. The District claims J.B.'s placement should remain in the regular education setting with appropriate instruction and services.

POSITIONS OF THE PARTIES

Guardian:

The Guardian claims there are multiple stressors in J.B.'s life that make her unable to access an education. The record shows she has deep emotional troubles that include the inability to cope with the loss of her grandmother. She has had many instances of running away and at least ten hospital admissions in the last one and one-half years. Her emotional needs affect her ability to function academically.

Ross believes J.B. needs a great deal of support and structure in her life in order to obtain an education. If J.B. is placed in a residential setting, she can receive the counseling she needs to enable her to successfully deal with her emotional problems. This benefit will then allow her to successfully attend classes and obtain an education.

District:

The District believes J.B.'s emotional problems are not connected to the educational environment. In school, J.B. obtains at least average grades, does not exhibit behavioral difficulties, and has not run away from the school premises. Rather, the District contends J.B.'s problems stem from an inability to get along with her Guardian. It points out when J.B. runs away, it is usually from Ross' home.

The District claims it is entitled to pursue a continuum of placement alternatives. It wants to determine if J.B.'s needs can be met in regular education or in a therapeutic day school before J.B. is given a residential placement. Also this approach gives J.B. the opportunity to receive her education in the least restrictive environment ("LRE") where she can have interaction

with non-disabled peers. The District notes a discharge summary from Hartgrove Hospital released her to her “prior school placement at Powell Elementary School regular education placement.”

In addition, the District claims residential placement should be for educational purposes and not justified by social factors. It believes residential placement for J.B. would more serve the purpose of confinement than providing her with a free appropriate public education (“FAPE”).

DISCUSSION, CONCLUSIONS OF LAW AND DECISION

Resolution of this dispute begins with consideration of the two-part inquiry for determining FAPE that is set forth in Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982): “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” The District must identify J.B.’s needs in light of her disabilities and utilize instruction and related services in an appropriate environment to meet those needs. School Committee of the Town of Burlington, Mass. v. Department of Education Mass., 471 U.S. 359, 369, 105 Sup. Ct. 1996, 2002 (1985). The IDEA requires that an IEP not only confer some educational benefit, but it is to provide a FAPE in the least restrictive environment. Accordingly, a student with a disability may be removed from the regular classroom when “the nature or severity of the disability...is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. Sec. 1412 (a)(5).

In this matter, the Guardian is not challenging the procedures utilized in this case. Therefore, the first prong of the Rowley test is not an issue. As to the second part of the inquiry, the placement determination is a main issue. The IEP team determined that J.B. continue in her regular education setting with specified supports and services.

At a due process hearing convened pursuant to 105 ILCS 5/14-8.02a(f), the school district shall present evidence that at all times relevant to the issues presented, “the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate, and available.” 105 ILCS 5/14-8.02a(g). Related services “shall be provided” by the school district “if necessary to assist an eligible child in benefiting from his or her special education” and shall be described in the IEP. 23 ILAC Sec. 226.310.

The IDEA regulations define “Emotional Disturbance” as follows:

- (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:
 - (A) An ability to learn that cannot be explained by intellectual, sensory, or health factors.
 - (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
 - (C) Inappropriate types of behavior or feelings under normal circumstances.
 - (D) A general pervasive mood of unhappiness or depression.
 - (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

Both sides refer to the Dale M. case, as well as other matters, in support of their respective positions. Dale M. v. Board of Education of Bradley-Bourbonnais High School District No. 37, et al., 237 F.3d 813, 2001 U.S. App. Lexis 452. In the Dale M. case, the parent sought payment for the private placement of her son in a residential school in Maine after he had spent time in a therapeutic day school. The student had serious truancy and disciplinary

problems in school. He also had a background of drinking alcohol, taking drugs, and being charged with residential burglary and car theft. He did not have a learning disability, but a psychologist found he had a conduct disorder, suffered from depression and practiced substance abuse.

The Dale M. court found that the Maine school did not provide treatment for the student's psychological needs. The court found it merely provided confinement for a truancy problem, and it held that confinement was not a type of "related services." The court drew a distinction between services that help a child obtain an education and services oriented toward non-educational activities, such as keeping the student out of jail. The District argues J.B.'s case should be decided in the same manner as the Dale M. case. The District believes J.B.'s placement in a residential setting would be no more than a confinement that does not qualify as a related service. The District finds support for its position in the case of Matthew Bickle v. St. Charles Community Unit School District No. 303, 1993 U.S. Dist. Lexis 10396. In this case, the child was a behavioral disordered student with truancy, drug and legal problems who attended a therapeutic day school. The Court held the student was receiving an educational benefit in his day placement and the District was not obligated to place him in the best program, a residential setting.

However, the preponderance of the evidence in J.B.'s case supports a finding that the District's reliance on these cases is not persuasive. J.B.'s situation is different than the record presented to the court in the Dale M. case. In J.B.'s situation, there is no need to compare a child's needs to a facility's program because J.B. has not been placed in a particular facility. Instead, we are faced with the question of whether J.B. should receive a placement in a residential program due to the nature of her particular disabilities. The Bickle case can also be

distinguished. The court found this student responded to instruction and behavior management practices in his day school placement. The court determined the student received educational benefit in his therapeutic day school. Whereas in J.B.'s case, the record shows she is not succeeding in her placement at Powell Academy. In the course of a year and one-half, she attended school for five days in September, 2006 and seven days in April, 2007. Her absence from school does not show success in her placement.

The preponderance of the evidence puts this case more in line with the holdings of the court in the case of Independent School District No. 284, Wayzata Area Schools v. A.C., 258 F.3d 769, 2001 U.S. App. Lexis 17263. In this case, the student exhibited many of the traits J.B. has displayed, including truancy and average intelligence. The District Court had denied residential placement finding that it was necessary only to treat the student's social and emotional problems, not for educational purposes. The A.C. court held the question should not be whether the student's social and emotional problems are educational or non-educational, but whether the student's problems need to be addressed in order for the child to learn (distinguishing the holding in the Dale M. case). Similarly, in J.B.'s case, significant trauma has resulted in psychological problems that prevent her from attending school. J.B.'s truancy must be addressed in order for her to have an opportunity to make academic progress.

Also instructive and helpful is the decision by Hearing Officer Narko in the case of J. Sterling Morton High School District 201, 105 LRP 2601. This case concerned a student with traits that are similar to J.B.'s background. The case involved the question of whether the District should pay the non-special education costs of a residential placement. The Hearing Officer found the student's disabilities affected his education, and they should be addressed in a residential setting paid for by the District.

After reviewing the record developed in J.B.'s case, it must be held the preponderance of the evidence supports the position of the Guardian. J.B.'s IEP shows she has a learning disability in mathematics and writing. It also shows she has psychological problems that interfere with her attending school and obtaining an education. The District must provide psychological services as related service in order for J.B. to obtain an education. Supplying psychological services is necessary predicate for J.B. to learn. Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 693 (3rd Cir. 1981). J.B.'s pattern of truancy prevents her from receiving the related services she needs. Her truancy is directly related to her inability to make educational progress.

Her truancy prevents her from receiving educational benefits in a regular educational setting or in a therapeutic day program. The uncontroverted opinions of psychiatrists, Drs. Nierman and Noorani, are that J.B. needs a highly structured program with appropriate supports to address her behavioral, psychological and educational problems. In a residential placement, she can receive treatment and services for these problems. She can receive therapeutic counseling, medication management and educational instruction.

In a residential setting, her truancy and psychological concerns can be addressed so that she will have the opportunity to make academic progress. Because of her disabilities, she cannot reasonably be anticipated to benefit from instruction without placement in a secure residential setting. Her demonstrated needs overcome IDEA's preference for a mainstream placement in the least restrictive environment.

The District's arguments to the contrary are not persuasive. The District believes J.B. must demonstrate failure in a continuum of placements before she can be given residential placement. While there are placement alternatives available for the disabled child, the IEP

should respond to the needs and disabilities attributable to the student at the time the IEP is developed. If residential placement is appropriate, it should be given to the student. It is not necessary to first go through unsuccessful placements in regular education and therapeutic day programs. Besides in this case, the record makes it clear that J.B. could not obtain educational benefit in her regular education program or in a therapeutic day program.

The District also asserts that J.B.'s problems are not connected to her school environment. It believes her problems generate from an inability to get along with her Guardian. However, the record leads to the conclusion that Ross has consistently gone to great lengths to try to obtain the medical, legal, and educational assistance that J.B. needs. The District points out J.B. passes her classes, does not cause a disruption in school, and has not run away from the school setting. However, the District's unacceptable response to J.B.'s attendance of a total of twelve days in one and one-half years is to recommend a return to the same placement that has already been shown to be unsuccessful.

The District further claims that J.B.'s actions are due to a conduct disorder, or social maladjustment, that is a stated exception to the definition of Emotional Disturbance. However, the regulations state "The term "Emotional Disturbance" ("ED") does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance." 34 C.F.R. Sec. 300.7(c)(4). The regulation also provides specific examples of what qualifies as ED. These examples include a broad scope of behavior disorder, including "(c) Inappropriate types of behavior or feelings under normal circumstances" to a marked degree over a long period of time. In J.B.'s case, the reports, assessments and testimony in the record of this hearing show she has exhibited severe instances of inappropriate behavior. In fact, her IEP lists her primary disability as "Emotional Disturbance." The District's claim that J.B.'s conduct is due to a social

maladjustment exception to the definition of "Emotional Disturbance" is not well founded.

In conclusion, it must be held that the preponderance of the evidence supports the position of the Guardian, and it must be concluded the District's arguments to the contrary are not convincing. In respect to the issues presented by the Guardian, the Hearing Officer finds as follows:

- a. The student's IEPs for the period in question do not adequately address her learning impediments.
- b. The student's IEPs for the period under consideration do not contain goals and objectives that are reasonably linked to the student's needs and an opportunity for her to receive educational benefit.
- c. The functional behavioral analysis and behavior intervention plan are inadequate because they merely call for J.B. to improve her attendance at school.
- d. The student's IEPs do not provide an appropriate placement in light of her extensive emotional and behavioral needs.

In respect to the remedies proposed by the Guardian, the Hearing Officer finds as follows:

1. The District is directed to convene an IEP meeting that will consider and implement the below-stated factors.
2. The District will pay for an independent educational evaluation in areas of identified needs.
3. The District will identify and offer related services in sufficient intensity that allows J.B. an opportunity to receive educational benefits.
4. The District will provide J.B. with an interim residential placement at public expense until the above-mentioned IEP process has been completed and J.B. has begun a permanent residential placement.
5. The District will provide J.B. with a residential placement at public expense.
6. As a compensatory education service, the district is directed to fund monthly visits of the Guardian to the student at each of her residential placements to ensure the student's well-being and educational opportunity.

ORDERS

1. The position of the Guardian is upheld.
2. J.B.'s IEP meeting and interim residential placement are to begin within fourteen days of the date of this decision.
3. The other above-stated elements of relief will be put into effect by the District as soon as possible.
4. The District shall submit proof of compliance with these orders to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777 within 35 days from the receipt of this Decision.

Right to Request Clarification

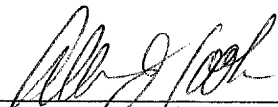
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned Hearing Officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party(ies) and to the Illinois State Board of Education. The right to request such a clarification does not permit a party to request reconsideration of the decision itself, and the Hearing Officer is not authorized to entertain a request for reconsideration.

Right to File a Civil Action

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing who is aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 Ill. Comp. Stat. 5/14-8.02a(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

Certificate of Service

The undersigned Hearing Officer certifies that he served copies of the aforesaid Decision and Order upon parent/student and District/Director of Special Education, through their counsel or representative, and the Illinois State Board of Education at their submitted addresses by certified mail by depositing same with the United States Postal Service at Chicago, IL with postage prepaid before 12:00 p.m. on May 21, 2007.



ALAN J. COOK
Impartial Due Process Hearing Officer

Dated: May 21, 2007