

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

<b>IN THE MATTER OF:</b>	)	
	)	
<b>ALEX R.</b>	)	<b>ISBE CASE NO. 002535</b>
	)	
and	)	Gail Tuler Friedman
	)	Impartial Due Process Hearing Officer
<b>FORRESTVILLE VALLEY COMM.</b>	)	
<b>UNIT SCHOOL DISTRICT. 221</b>	)	

**DECISION AND ORDER**

On Monday, May 6, 2002, at 1:00 p.m., a due process hearing was convened on behalf of student at the Ogle County Education Center, 417 North Colfax, Byron, Illinois. By agreement of the parties the hearing was continued on May 7, 8, 9, 10, June 13, July 8, 9, 10, 31, August 1, 7, and 16, -and 12, 2002. This matter came before the undersigned hearing officer for a due process hearing concerning whether the district failed to provide student with a free appropriate public education ("FAPE") when it failed to appropriately train staff in behavioral support, management and interventions and provide appropriate behavioral policies and procedures as written and applied to student; failed to account for student's lack of reasonable progress and to account for regression emotionally, behaviorally and academically; failed to provide appropriate related services to address the student's needs; created a hostile environment for the student; failed to provide updates of progress and regression in the short term objectives of the individual education program ("IEP") during 2000-2001; failed to provide a sufficient IEP for the student; and failed to provide procedural safeguards to the parent at all IEPs in 2001. The hearing officer has jurisdiction to hear and decide this matter under Section 14-8.02 of the Illinois School Code (105 ILCS 5/14-8.02), the Individuals with Disabilities Education Act, as amended, 20 U.S.C. 1400 et seq. (IDEA) and 34 C.F.R. 300.506-509; and 23 Ill. Admin. Code 226 Subpart J. Both parties were represented by counsel. The parties were informed of their rights under Section 14-8.02(g) of the Illinois School Code (105 ILCS 5/14-8.02(g)), the IDEA, 34 CFR 300.509, and 23 Ill. Admin. Code 226 Subpart J.

**Issues Presented by Parent:**

1. Whether the school district failed to appropriately train staff in behavioral support, manage, and interventions and whether the behavioral policies and procedures were inappropriate as written and as applied to student? |
2. Whether the school district failed to account for the student's lack of reasonable progress and to account for his regression emotionally, behaviorally and academically?
3. Whether the school district failed to provide appropriate related services to address the student's sensory, academic, emotional and behavioral needs?

4. Whether the school district created a hostile environment for the student where school staff ridiculed, humiliated, degraded, breached his right to confidentiality and physically abused the student?

5. Whether the school district failed to provide updates of progress and regression in the short term objectives of the IEP during 2000-2001?

6. Whether the school district failed to provide a sufficient IEP for the student, including but not limited to the following, in that goals and current levels of performance were not measurable, vague, and failed to reflect the State standards that were applicable to the goals during 2000-2001?

7. Whether the school district failed to provide procedural safeguards to the parent at all IEPs in 2001?

**Procedural Information:**

Parent requested this hearing in a letter dated October 29, 2001, written by parent's attorney to the superintendent of the school district. The Illinois State Board of Education ("ISBE") received the due process request from the district on November 6, 2001. On December 10, 2001, this hearing officer received her appointment from the ISBE in a letter dated December 4, 2001. On December 10, 2001, the hearing officer took immediate steps to contact the parties. By agreement of the parties, continuances of the pre-hearing conference were requested to review the results of a variety of evaluations of the student, to assess the student's progress in an interim placement, and to develop a new IEP for the student.

On March 4, 2002, the pre-hearing conference was held by telephone. By agreement of the parties, the hearing was scheduled to begin on May 6, 2002, and continue on May 7, 8, 9, and 10, 2002. If additional days were needed, the parties agreed they would continue the hearing to mutually convenient times for all parties. The hearing was to commence at 1:00 p.m. on the first day to accommodate the parties' schedules. The parent requested a neutral setting for the hearing. At the pre-hearing conference, the parties agreed that the documents and updated witness lists would be exchanged five business days before the first day of hearing.

On March 19, 2002, the parent filed a Motion to Compel Production from District and to Add Issues to the Case. The district filed a response to the motion on April 8, 2002. On April 15, 2002, the district filed two motions -- School District's Motion for Order Permitting Independent Medical Evaluation at District Expense and Request for New Hearing Dates and School District's Motion for Subpoenae Duces Tecum. On April 17, 2002, parent filed a response to the two motions filed on April 15, 2002. The hearing officer heard arguments on the motions telephonically on April 19, 2002. In an interim order dated May 3, 2002, the hearing office denied the parent's Motion to Compel Production of Documents from the district; with no objection from the school district, parent was given leave to add issues; the parent was given leave to amend remedy number two as requested; the School District's Motion for Order Permitting Independent Medical Evaluation at District Expense and Request for New Hearing Dates was denied; and the School District's Motion for Subpoena Duces Tecum was denied. The hearing commenced on May 6, 2002, at Ogle County Education Center, 417 North Colfax, Byron, Illinois. On June 6, 2002, the parent filed a Motion in Limine to Exclude Witnesses and

to Limit Testimony. The district filed a response to parent's motion on June 10, 2002. Parent filed a reply to the district's response on June 11, 2002. The district filed District's Additional Citation on June 11, 2002, and the parent filed a response to the additional citation on June 12, 2002. Oral argument on parent's Motion in Limine to Exclude Witnesses and to Limit Testimony was set for August 7, 2002. On August 6, 2002, the parent withdrew the motion. The hearing concluded on August 16, 2002. At the conclusion of the hearing, case law was submitted by both parties.

### **Findings of Fact:**

The student is ten years old, with a birth date of April 10, 1992. In March 1997, the student was diagnosed by a pediatric neurologist with Landau-Kleffner Syndrome ("LKS") Variant, a childhood disorder, a major feature of which is the gradual or sudden loss of the ability to understand and use spoken language. According to the National Institute for Deafness and Other Communicative Disorders (NIDCD), one of the National Institutes of Health maintained by the U.S. Department of Health and Human Services, all children with LKS have abnormal electrical brain waves that can be documented by an electroencephalogram, a recording of the electric activity of the brain, and approximately 80 percent of the children with LKS have one or more epileptic seizures that usually occur at night. In addition, NIDCD has found that behavioral disorders such as hyperactivity, aggressiveness and depression can also accompany this disorder. When the student was two to three years old, he received early intervention services from Malcom Eaton consisting of assessment, and speech and developmental therapy in the home. The student received his early childhood education at Leaf River Elementary School, Forrestville Valley District #221. In February, 1998, while student was still in early childhood education, his occupational therapy was changed from direct model to consultative 30 minutes per month. (Parent Document ("PD") #128, pp. 1662-1664) About that time, he was referred for a three-year case study re-evaluation by the school psychologist to assist in planning for the student's educational program for kindergarten in the 1998-99 school year. At the time of the evaluation, the student's primary eligibility was speech and language impairment. During the social developmental study and health history, the student's mother reported that the student "can be demanding of your time." He can "be aggressive, scratch, throw and be unpredictable. Can lose control in public take off, or throw a tantrum." (School District Document ("SDD") # 4, pp. 27-31, PD # 129, pp. 1665-1669.) The occupational therapist reported that the student's "behavior often gets in the way of his performance. He is able to print his first name now but refuses to attempt to copy any other letters or numbers." Observations of the student showed frequent motor activity during group activity and noises. The student's early childhood teacher reported the concern that student often displayed inappropriate emotions. He would cry when he had to change an activity and displayed inconsistent behavior from day to day. In addition, the early childhood teacher stated that the student's parents had recently separated. She reported needing to say the student's name often to keep him on task. On February 18, 1998, while student was still in early childhood education, an IEP was prepared. (PD # 18, pp. 236-244) Student was to receive 30 minutes per month of occupational therapy, consultative with teacher and direct and 60 minutes per week of speech and language. Short-term objectives to address off-task behavior were included in the IEP.

Student was found eligible for special education services at a multidisciplinary conference ("MDC") held on April 22, 1998 with a primary eligibility of other health impaired – Landau-Kleffner and a secondary of speech/language. (SDD #3, pp. 9-13A, PD #16, pp. 219-

223) The MDC team concluded that "behavioral disturbances may impede participation in educational activities and may negatively effect academic performance." An IEP was developed on May 14, 1998 for the 1998-1999 school year. (SDD # 5, pp. 38-47, PD # 17, pp. 224-233) The student was to be included in the regular education kindergarten classroom at German Valley Elementary School and was to receive individualized instruction, assistance of a classroom aide, an extended kindergarten day for instruction and therapy, and speech/language services for 60 minutes per week. His OT services were to be for 30 minutes per month consultation with teacher and 30 minutes per week of direct services. Objectives to address the student's inappropriate classroom behavior were included on the IEP. The team decided to review the IEP and consider the need for a behavioral plan on October 7, 1998.

The principal of German Valley and Leaf River Grade Schools wrote to the superintendent of Forrestville Valley District #221 on September 8, 1998, that the teachers had been escorting student to his mother's car after classes because of his aggressive behavior around his mother and that the mother's participation in class had been represented to him as "an invitation to chaos." (PD # 88, p. 1355) (The principal writing the memo is presently the superintendent of Forrestville Valley District #221.) On September 9, 1998, the resource teacher wrote a note to student's mother in which she stated that she had been thinking a lot about starting a behavior program with the student. She asked student's mother for suggestions. (SDD #9, p. 60, PD #115, p. 1438) On September 10, 1998, student's mother wrote to student's kindergarten teacher regarding behavior modification and stated that she was open to suggestions too. (SDD # 9, p. 61, PD #115, p. 1439) She did give some suggestions of her own. On September 11, 1998, student's kindergarten teacher wrote back to student's mother, stating that she was not implementing any special behavior modification program with the children other than a time out. (SDD, #9, p. 62) Student's mother responded "if you or anyone else feels we need to do something comprehensive behaviorally for [student] I'd be happy to comply here at home. We rely on avoiding problematic situations (ie crowds & waiting), explaining transition situations & then carrying them out quickly as possible. The most important things at school are probably to be strict and expect him to comply - once he thinks he can get away with something he's relentless!" (SDD # 9, p. 63) The IEP team met as planned on October 7, 1998. (SDD # 10, pp. 68-69, PD # 17, pp. 234-235) At that time a discussion took place regarding the need/appropriateness of developing a formal behavior intervention plan. Student's mother stated that she would like to approach the issue of the student's behavior in a much less formal manner. In addition a discussion regarding the need for a functional behavior analysis took place. It was decided that there was no need for one to be done at that time. Student's mother stated that she saw no need to change the student's IEP to include a formal behavior modification plan. (SDD # 10, p. 71) On January 21, 1999, student's OT services were changed to consultation monthly. According to the OT annual progress report dated April 15, 1999, "the reason for the change was due to the fact that [student] was non-compliant and totally uncooperative during therapy sessions." (SDD #11, pp. 74-76, PD # 126, pp. 1658-1660)

On April 28, 1999, a meeting was held to prepare the student's IEP for the 1999-2000 school year. (SDD # 12, pp. 77-88, PD # 15, pp. 209-218) Student's eligibility remained the same. The student was to receive 30 minutes per week special education consultative services, a classroom aide, and speech and language services for 60 minutes per week. In relation to the student's behavior the IEP stated that student "displays off-tasks behavior in the classroom on a regular basis" and that student "frequently displays inappropriate behavior related to task completion in one-on-one settings and has frequent outbursts." Behavioral concerns were to be

addressed as part of the regular classroom discipline problem. The IEP included two short term objectives dealing with emotions. No goals dealing with behavior were incorporated into the IEP and no OT services were recommended at that time. An IEP meeting was again held on October 25, 1999. (SDD #16, pp. 94-103, PD # 14, pp. 197-208). The student was to receive direct special education services in the regular classroom in order to supplement his reading/phonics skills in addition to consult with the regular education teacher for a total of 155 minutes per week. All other services remained the same. Again the IEP stated that the student displayed off-task behavior regularly. Again behavioral concerns were to be addressed in the regular classroom and no goals to address behavior concerns were incorporated into the IEP.

On April 19, 2000, the IEP team met to prepare student's IEP for the 2000-2001 school year. (SDD # 18, pp. 106-115, PD # 19, pp. 246-265). Eligibility remained the same. The student was to receive 400 minutes per week of replacement reading and language arts instruction in the resource room. Math was to be supplemented with a classroom aide. Student was to receive speech/language services for 60 minutes each week. The student was reported to display off-task behavior and requires frequent prompts. Again behavior concerns were to be addressed in the regular classroom. A goal to address social issues was included, but no goals pertaining to behavior or emotions were incorporated into the IEP. No OT services were provided to the student.

The resource teacher wrote to student's mother on September 27, 2000 that student was having difficulty getting into the second grade "groove". She stated it was especially hard for student to focus on his task and be independent in completing work. In a resource room progress report dated February 16, 2001, the resource room teacher reported that the student "has a very difficult time remaining on-task for any length of time. He is inwardly distracted and must be prompted every minute or so during instruction in order to remain on-task." (SDD #23, p. 121) A conference was held regarding the student's academic performance on February 23, 2001. The resource teacher suggested that the student might need more time removed from the regular education classroom. The mother responded by suggesting such supports as adapting the student's curriculum and obtaining a functional analysis rather than changing his placement. In response to student's mother's request, an OT evaluation was completed on April 10, 2001. (SDD # 28, pp. 127-30) The occupational therapist reported "movement breaks and sensory strategies might be warranted in order to increase the student's energy level and hopefully improve focusing on task."

The student was referred for a triennial evaluation in April, 2001. The student completed the WISC-III and WIAT. The April 25, 2001, report by the school psychologist stated that the student's overall cognitive ability, as evaluated by the WISC-III could not be easily summarized because student's nonverbal reasoning abilities were much better developed than his verbal reasoning. The student's reasoning abilities on verbal tasks were generally intellectually deficient, while his nonverbal reasoning abilities were significantly higher and in the low average range. (SDD #32, pp. 137-41) For the case study re-evaluation, teachers reported that the student's family life had undergone many changes including the recent divorce of his parents and a crisis involving his older sister. A functional analysis summary form was completed on April 11 and 25, 2001. (SDD # 31, pp. 135-36, PD # 12, pp. 188-189) The targeted behavior was described as off-task behavior and noise making. No behavior intervention plan ("BIP") was developed at that time.

An IEP meeting held on May 2, 2001, to prepare student's IEP for the 2001-2002 school year. (SDD # 36, pp. 161-168, PD # 7, pp. 127-140) The student was to receive social studies and math in the regular education classroom and reading, language, and spelling in the resource room. Related services were to include speech/language for 60 minutes per week, a classroom aide, OT for 120 minutes per semester, and social work services for 60 minutes per semester. The team reported the student to be below grade level in reading fluency, comprehension and work attack skills. The student's expressive and receptive language skills were in the low average range. In addition the team stated that the student must be frequently prompted in order to stay on task in the regular classroom. Even though a functional behavioral analysis had been completed no behavior intervention plan ("BIP") was developed at that time either.

In the beginning of September, 2001, the student's mother expressed concern to the third grade teacher that the student was stating that he hated school whereas before he had always liked it. She suggested ways to reward the student for good behavior. (SDD # 38, p. 172) On September 25, 2001, an incident occurred on a class field trip. Student filled a glove with rocks and hit several in the face. In addition the student ran away from the group and toward the river several times on the same trip. On September 26, 2001, student was removed from the class during the Hawaiian party for hitting the students the previous day. (PD #115, p. 1489) The IEP team met on September 26, 2001 to review the student's IEP. (SDD # 41, pp. 214-233, PD # 11, pp. 170-187). The student was reported to require frequent prompting and guidance to attend to instruction and complete tasks. His continuous vocalization was a concern in the general classroom. The student was to remain in the regular education classroom with an individual aide and modifications. The individual aide was to start on October 8, 2001. Related services were to include OT consult for 120 minutes per semester and speech therapy for 60 minutes per week. The student was to receive a sensory diet to improve his awareness of the classroom environment. These goals were to be implemented by the occupational therapist and IEP team and monitored by the occupational therapist and yet the OT minutes remained the same. No goals to address his aggressive behavior were included in the IEP. The IEP team agreed to reconvene on October 10, 2001.

On October 1, 2001, at 11:30 a.m., the student would not come into the school building from the outside and ran from one of the staff. At about 1:30 p.m. student was removed from social studies class after he had verbal outbursts and removed his shirt. At approximately 3:00 p.m. on the same day, student refused to choose between two alternate activities, became very loud and was removed from class. The student was removed from the classroom on the morning of October 2, 2001. He was given two choices by the aide, but refused to do anything but sit in his chair and talk continuously. An inclusion specialist observed the student on October 2, 2001. In math, the specialist found that the student did not attend and engaged in task avoidance throughout. (PD #10, pp. 165-169). The inclusion specialist also found that the student had difficulty with transitioning and recommended behavior modification and certain quick aides to help. Rewards, sensory breaks, and timeout to a quiet room were recommended along with other suggestions. On October 3, 2001, student eloped from school to a body shop across the street from the school and was carried by staff back across the street to the school grounds.

The IEP team reconvened as agreed on October 10, 2001, to prepare a functional behavioral assessment (SDD # 56, p. 259) and a BIP. (SDD # 56, pp. 262) The targeted behaviors were noisemaking and off-task behavior. On October 11, 2001, an incident occurred in which the student began thrashing around on the floor, was carried by four staff members to a

vacant speech room where his third grade teacher remained with him while he continued to act out. School staff photographed the incident, and when the superintendent made a complaint to the police regarding the incident, these photographs along with other information about the student were sent to the police. His mother was called to pick him up. As a result of this incident, student was suspended from school until October 19, 2001. (SDD # 50, pp. 249-250, PD # 78, pp. 1334-1335) and the police were contacted. (PD # 103, p. 1372-1375) On October 14, 2001, student's mother requested an IEP meeting to rewrite the BIP in light of the incident that had occurred on October 11, 2001, leading to the student's suspension. (SDD #54, p. 234, PD # 76, p. 1330) The IEP team reconvened on October 17, 2001, to rewrite the functional behavioral assessment to include elopement, verbal aggression/threats, and physical aggression. (SDD #56, p. 260) The team agreed that the restrictive interventions, if needed for elopement would include the school staff following on foot/in car, and calling police to assist. (SDD # 56, p. 262, PD # 9, p. 164) On Friday, October 19, 2001, the afternoon of the first day student returned to school after his suspension, the student left school and walked home. He was followed by the principal and one of student's aides until he reached his front door. Early on the morning of Monday, October 22, 2001, the student threw a box of legos, scattering them over the room, yelled, talked loud, tore a tissue box with his teeth and bit pencils. The student's mother was called to pick him up. The student was suspended again until October 25, 2001. In a letter dated October 22, 2001, student's mother requested that the student be reassigned to the third grade regular education classroom at Leaf River Elementary School as soon as possible. (SDD # 59, p. 271, PD # 71, p. 1318) The superintendent sent a memo of understanding regarding student's conduct on October 22, 2001. (SDD #63, p. 279, PD # 70, p. 1317) The principal was instructed to suspend the student for a period not to exceed three days from school. The suspension was to be for willful misconduct, violent behavior, and damage to personal property. On October 23, 2001, the principal wrote to student's mother informing her of student's suspension until October 25, 2001. (PD # 69, p. 1316) The IEP team reconvened on October 24, 2001, to revise the student's IEP. (SDD #64, pp. 278-99, PD # 8, pp. 141-160) Student was to be placed in a regular education classroom at Leaf River Elementary School. Related services were to include an individual aide, OT for 120 minutes per semester, speech/language therapy for 60 minutes per week and social work consult for 60 minutes per semester. Behavioral concerns were to be addressed through IEP goals and objectives, the BIP, and sensory breaks. The team reported that the student performed poorly in group situations in class. They stated that the student was easily frustrated and upset and required frequent prompting and guidance to attend to instruction and complete tasks. Continuous vocalizations interfered with student's progress in the general curriculum and redirection and requests for compliance, as well as completing tasks he found undesirable, resulted in avoidance, verbal, and physical aggression. Student started at Leaf River Elementary School on October 26, 2001. That afternoon, the Department of Children and Family Services ("DCFS") came to speak to the student in response to a telephone call made to the agency regarding the student. The DCFS worker insisted on speaking to the student alone. At the conclusion of the interview, the student came out of the room on his stomach on a chair with wheels and aggressively banged the chair into his classroom teacher when she got in his way. Eventually the student left the school building and after a short period in the playground proceeded to walk toward a cornfield near the school. His aide, using a walkie-talkie to communicate with the school office, followed student to the edge of the cornfield. The principal directed the aide to proceed no further, and she watched as the student entered the cornfield at approximately 1:10 p.m. The police were called and arrived at approximately 1:32 p.m. Meantime the principal drove to the highway at one side of the cornfield to watch in case the student emerged on that side. After a three-hour search, with the help of an airplane, Lifeline

Helicopter, and several police agencies, the student was located in the creek about one and one half miles east of the grade school. (SDD # 67, pp. 302-303, PD # 112, pp. 1419-1420) The student was taken to the hospital at 5:50 p.m. with hypothermia and found to have a temperature of 92.7. (PD # 57, p. 1267-1268) A therapist testified that as a result of this incident, student suffers from post traumatic stress syndrome. Student's mother testified that student has recurring nightmares and is at times frightened about attending school. On October 29, 2001, the principal sent a letter to student's mother giving student a ten day out of school suspension for inappropriate conduct, willful disobedience of directions, striking a teacher repeatedly with a chair, and causing significant disruptions to the educational environment of Leaf River Grade School. (SDD # 70, pp. 309-310, PD # 67, pp. 1309-1310) The letter further stated that "no form of approved intervention was successful in reducing the immediate and real danger he posed to himself and others. Law enforcement had to be summoned to locate him off school property." In a letter from mother's attorney dated October 29, 2001, a request for a due process hearing was made to the superintendent of Forrestville Valley School District #221. (SDD #68, pp. 305-306)

After student's suspension, he began attending a behavior disorder classroom at Mary Morgan Elementary School in Byron, part of the Ogle County Education Cooperative ("COOP") Initially, he responded well to the new school. In December, 2001, at the request of the director of the COOP Barbara Doyle completed a consultation regarding the student. She concluded that timeouts were not an effective way of dealing with student's behavior. In March, 2002, student's behavior again began to deteriorate. Student's teacher at Mary Morgan testified that the student was repeatedly escorted physically to isolated timeouts, where he was sometimes kept up to between two to four hours. In April, 2002, the student was again suspended from school for physical aggression.

### Conclusions of Law:

The main issue in this case is whether the school district has offered the student a free, appropriate public education ("FAPE") as required under IDEA. To assure that disabled children receive FAPE, the IDEA requires that districts cooperate with the parents in creating an IEP which sets forth the child's educational goals. 20 U.S.C. §§1401(11), 1414(d); *Honig v. Doe*, 484 U.S. 305, 311 (1988). To determine whether the school district has provided a FAPE requires the determination of whether the school district: (1) complied with IDEA's procedural requirements, and (2) developed an IEP that is "reasonable calculated to enable the child to receive educational benefits". *Board of Education of the Hendrick Hudson Central School District, Westchester County et al. v. Rowley*, 458 U.S. 175, 206 (1982) and *Heather S.*, 125 F.3d at 1054. "Once the school district has met these two requirements, the courts cannot require more; the purpose of the IDEA is to "open the door of public education' to handicapped children, not to educate a handicapped child to her highest potential." *Id.* (quoting *Board of Educ. Of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd of Educ.*, 41 F.3d 1162, 1166 (7<sup>th</sup> Cir. 1994). If these requirements are met, then the school district has complied with its obligations under the law.

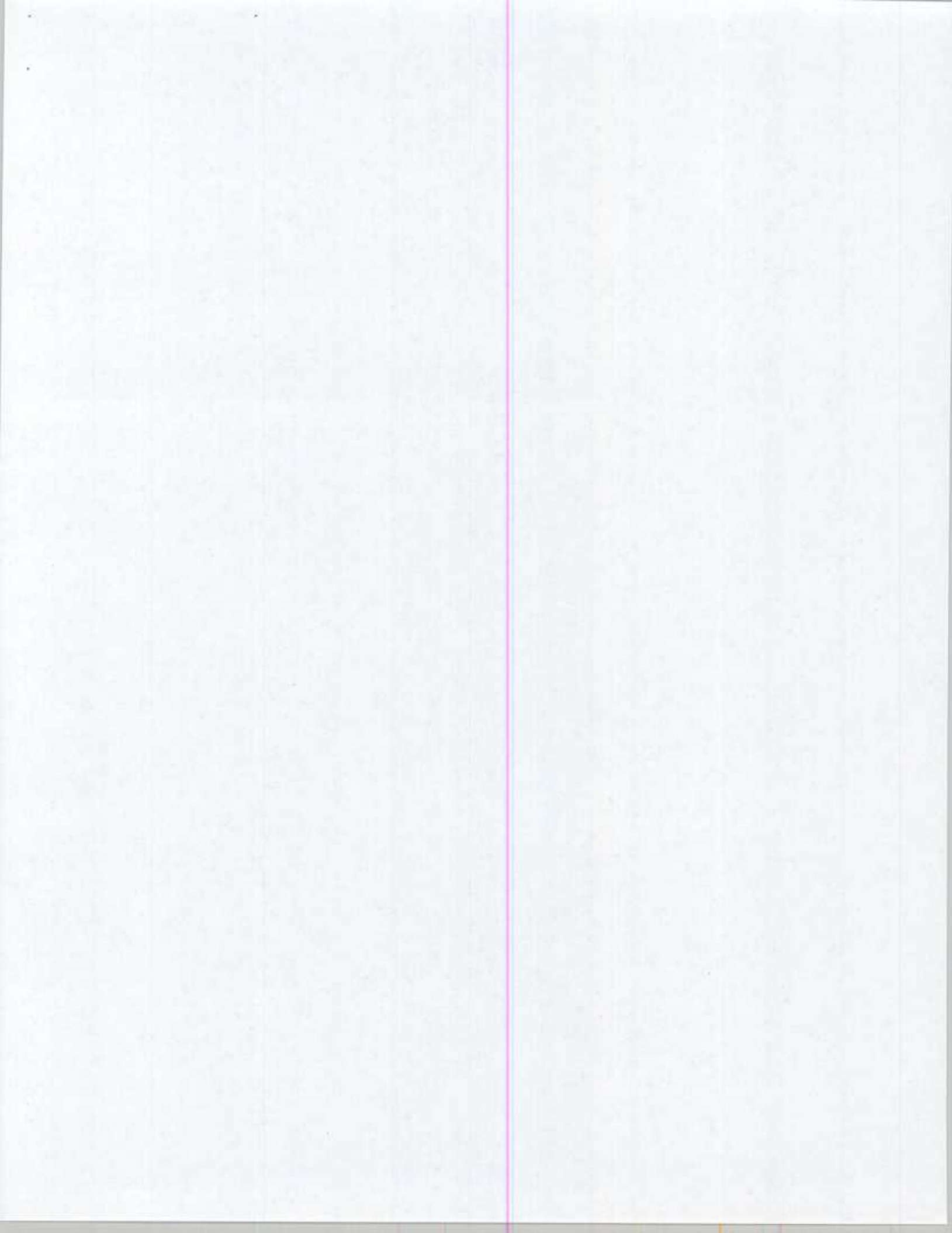
The first inquiry to be made under the *Rowley* test is whether the school district has complied with its procedural obligations under federal and state law. While the procedural requirements of the IDEA have great importance, Congress implemented them to achieve one



central goal: "full participation of concerned parties throughout the development of the IEP." *Rowley*, 458 U.S. at 206. "While parental participation is one of the key components in assessing procedural violations, *see Rowley*, 458 U.S. at 206, the fact that the parents had adequate notice and were able to participate in the proceedings does not end the inquiry. In addition, the fact finder must determine whether the alleged procedural violations deprived the student of an IEP or resulted in the loss of educational opportunity." *Knable v. Bexley City Sch. Dist.* 238 F.3d 755, 766 (6<sup>th</sup> Cir 2000). *See also Bd. Of Educ of Oak Park & River Forest High Sch. Dist.* 200, 21 F.Supp. 2d at 874 ("procedural inadequacies that result in the loss of educational opportunity. . . clearly result in the denial of a [FAPE]"). *Kevin T. v. Elmhurst Community School Dist. No. 205*, 2002 WI 433061 (N.D. Ill.) Parent alleges that the district violated the IDEA's and the state's procedural requirements. The first test of *Rowley* allows relief only if the alleged procedural violations have resulted in substantial harm to the student. Student's mother alleges that she never received her procedural safeguards in 2001 and this inhibited her from being able to fully participate in the IEP process. She testified that she needed the rights in order to know the methods she could use to get services such as due process and mediation. The resource teacher testified that it was her practice to send procedural safeguards with notices of IEP meetings and remembers going to the post office to send a package to student's mother. In addition, the resource teacher stated she was in the office when student's mother received a copy of the procedural safeguards from the school psychologist. The school psychologist testified that she never had the occasion to send out procedural safeguards to student's mother and made no mention of ever giving the student's mother the procedural safeguards at any other time. Procedural flaws are only compensable if they have the effect of denying the student FAPE. *See Heather S.*, 125 F.3d at 1059 Based on the testimony, it is difficult to determine whether student's mother did or did not receive copies of the procedural safeguards. Parents are entitled to receive the procedural rights each and every time an IEP meeting is held. If student's mother did not receive them, this is certainly unacceptable and could have resulted in a loss of educational opportunity. Without more evidence that this one procedural violation alleged by student's mother occurred, though, it is found that taken as a whole, the school district complied with the procedural requirements of federal and state law and under the first prong of the *Rowley* test.

The second prong of the *Rowley* test is whether the school district has developed an IEP that is "reasonably calculated to enable the child to receive educational benefit." The court adopted an approach which would take into account the potential of the disabled student but noted that the school need not "maximize each handicapped child's potential." *Id.* at 199. Parent argues that the student was denied FAPE because the school district failed to account for the student's lack of reasonable progress and to account for his regression emotionally, behaviorally and academically, failed to provide appropriate related services to address the student's sensory, academic, emotional and behavioral needs, failed to provide updates of progress and regression in the short term objectives of the IEP during 2000-2001, and failed to provide a sufficient IEP for the student, including but not limited to the following, in that goals and current levels of performance were not measurable, vague, and failed to reflect the State standards that were applicable to the goals during 2000-2001. An essential element of a FAPE is an appropriate IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals and short-term instructional objectives related to those needs, and provides for the use of appropriate special education services. 20 U.S.C. § 1401(18) The question which must be answered is whether the requirements for an appropriate IEP have been met. The parent argues that the district failed to account for student's lack of reasonable progress and to

account for his regression emotionally, behaviorally, and academically. The district argues that until the beginning of the 2001-2002 school year, student was making progress academically, behaviorally, and emotionally and that any regression in student's behavior was a result of his maladaptive behavior at home. The resource teacher who worked with student from first grade until he left German Valley Grade School at the end of October, 2001, testified that at the beginning of the student's second grade year, his off-task behavior was not a problem. Up until Christmas vacation of second grade, student's behavior was not impeding his learning. From February, 2001, on the student's behavior began to take a turn and his off-task behavior increased. She stated that she was having a more difficult time refocusing the student. She could still redirect him, but it was much more difficult. The resource teacher testified that she saw a decline in the student – stubbornness and uncooperativeness. She stated that the student could exhibit intermittent bad temper. Up to that time his bad temper had never impeded his behavior. The staff could always get student back on track. The resource teacher further stated that she was aware of the student's maladaptive behavior at home at the end of the second grade. Although she agreed that a line cannot be drawn between home and school, she testified that the school has a limited role in home support and acknowledged that this so called maladaptive behavior at home was never documented in the student's IEP. The resource teacher said it was not her role to suggest anyone observe at home for extreme maladaptive behavior in the home. In addition she stated that counseling would not be offered if behavior does not have an impact on a child's educational environment, but would be offered if it does. Student's second grade teacher left for maternity leave after the first three weeks of the 2000-2001 school year. She returned for the last nine weeks of school. She testified that at the beginning of the 2000-2001 school year, student's noise making and off-task behavior impeded his learning. When she returned to school at the end of the school year, the student was making more noise and had more off-task behavior than at the beginning of the year – greater intensity and frequency. She stated that the off-task behavior and noise making certainly impeded his education at the end of the year. She further stated that the student's behavior was impacting him academically and socially and that student's gains academically in second grade were minimal. She stated that he was about the same at the end of the year as at the beginning. Student's second grade teacher testified that she knew that the student had a difficult time understanding emotions. When the second grade teacher was questioned about a functional behavior assessment or BIP, she could not define them and admitted to not knowing if a BIP could be used to address noise making or off-task behavior. She testified that the student was the most disabled child she had ever taught in the eight years she was a teacher. The student's afternoon classroom aide stated the student exhibited the same behaviors -- noise making and off-task behavior -- in third grade as in second, but they were more intensified in third grade. She testified that the student's behavior required a lot of redirection verbally. She said verbal redirection was frequent. At times it was effective, but often it was not. She further testified that in second grade the student was not on task, was talking, and avoided doing his work. The aide stated that in second grade, the student could not grasp harder things. As the second grade year progressed, it was more difficult for her to deal with the student. She testified that she does not believe that the student made a great deal of progress in second grade. The school psychologist testified that the student's noise making and off-task behavior might not necessarily be the reason for the student's lack of progress but that his disability caused his lack of progress. She stated that the student's verbal and comprehension skill are very low and that educational performance is closely linked to verbal abilities. She stated that student's lack of progress can be explained because his mental age is about five. She agreed that the student did not meet the goal in understanding emotions written into the April 19, 2000, IEP for the 2000-2001 school year. The school psychologist agreed that understanding



emotions is a major deficit for the student, and yet, goals for emotions were dropped in his IEP for the 2001-2002 school year. She stated that even though goals dealing with emotions did not appear in the IEP, that they were not really dropped. The school psychologist testified that she did not conduct a functional behavioral assessment until April, 2001, when she received a letter from student's mother requesting one. She stated that since the staff was using positive intervention strategies that according to ISBE guidelines (PD #36, pp. 744-838), she was not required to conduct a functional behavioral analysis or record the behavior interventions in the IEP. The school psychologist agreed that the reason for a functional behavioral analysis is to identify and teach new socially acceptable behavior in lieu of inappropriate behavior and agreed that a BIP should be coordinated with the home. She further testified that the student exhibited very different behavior in the home. She stated that she thought the student's behavior was due to the nature of LKS, the student's age and size, and behavior patterns that were extremely maladaptive that had occurred for a long time outside of the school setting. The school psychologist stated that the student's mother reported the student's aggressive behavior as early as early childhood. Many of the behaviors that the staff started to see in third grade were behaviors that the student had exhibited at home. She stated that she did not see those types of behaviors in the educational environment prior to third grade. She further stated that the student was being positively reinforced at home for the aggressive behavior. He was reinforced by being allowed to do what he wanted to do. If Alex did not want to do something at home he would have a tantrum and then he would not be made to do those things. Intermittent reinforcement was happening – positive reinforcement for good behavior at school and positive reinforcement for bad behavior at home. She agreed the way behavior is managed at home does effect behavior at school. The behaviors exhibited at home from early childhood began to be exhibited at school in the school setting. Yet the school psychologist testified that nothing in the student's IEPs in first and second grade mentioned this maladaptive behavior. No social work services were offered. No one ever went to observe at home. No one offered parenting classes to student's mother. The school psychologist agreed that she never wrote or discussed student's maladaptive behavior with student's mother, and she never brought up the need to address behavior consistently at home and at school. She agreed that the IEPs did not show that the district was trying to have behavioral consistency between home and school and no intervention is reported on the IEP. In conclusion, the school psychologist agreed that the student's behavior negatively impacted his education.

Although the report cards for the 2000-2001 school year expressed some concern regarding the student's lack of concern in math, neither the resource teacher or second grade teacher reported student's lack of progress to student's mother. (SDD # 37, pp. 169-171) As a matter of fact, the student's record shows satisfactory for every course in student's second grade. Except for the progress report by the student's resource room teacher in February, 2001, no one reported to student's mother regarding his increased noise making and off-task behavior. The district knew that the student was worried about his sister and his parents' divorce, and yet no one ever considered that there was any connection between student's increased noise making and off-task behavior and the traumatic events that were going on at home. No social work services were offered to the student to help him cope. Despite knowing of student's lack of progress and his increasing inattentiveness, the district did not take any actions to revise or adjust student's 2000-2001 IEP to account for these difficulties. Testimony from the resource teacher, afternoon aide, second grade teacher, and school psychologist confirms that student's noise making and off-task behavior impeded the student's learning in second grade, and yet the IEP team never determined that any of student's behavior was impeding his learning, documented behavioral

interventions or strategies in his IEP, or provided student with OT services to address his sensory needs.. Parent's nationally known OT expert testified at length regarding the student's sensory integration problems and his need for a sensory diet. She stated that the student was denied FAPE when he was not provided with an appropriate sensory diet. Yet the district's OT therapist stated that the student had no sensory needs and that all his problems were behavior based. The testimony of the school psychologist is consistent with student's mother's testimony that the functional behavioral assessment was only done at the request of student's mother. As a matter of fact, the school psychologist testified more than once with absolute certainty that since positive interventions were being used, according to the ISBE guidelines on behavioral interventions, she did not have to do a functional behavioral assessment and develop a BIP. As a matter of fact, *Behavioral Interventions in Schools: Guidelines for Development of District Policies for Students with Disabilities* specifically states on page 9 that "the recommended approach to the implementation of any behavioral intervention, however, involves a functional analysis of the behavior of concern, careful planning and monitoring of the intervention procedures, and systematic evaluation of intervention outcomes." Two short term objectives were written into student's 2000-2001 IEP, but student failed to meet these objectives by the end of the school year, and they were not repeated in third grade. The district argues that student's mother never requested any additional OT services or social work services or complained about student's 2000-2001 IEP. Student's mother was not required to ask for services before student was provided them. "[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child's teachers, therapists, and administrators – and of the multi-disciplinary team that annually evaluates the student's progress. . . ." *J.D. v. Central Regional School District*, 81 F. ed 389 (3<sup>rd</sup> Cir. 1996), 23 IDELR 1181.

The court in *Amanda J. v. Clark County School District*, 35 IDELR 65, stated: "Although the instruction provided need not be the 'absolutely best' or 'potential maximizing,' *Gregory K*, 811 F.2d at 1311(citation omitted) "Congress did not intend that a school system could discharge its duty under [IDEA] by providing a program that produced some minimal academic advancement no matter how trivial." *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4<sup>th</sup> Cir. 1985) (holding that a child was denied a FAPE when the school failed to inform his parents of their procedural rights, including the right to an independent evaluation, and failed to develop an IEP which met the reasonably calculated to enable the child to receive educational benefit). The district has failed the second prong of the test under *Rowley*. It has failed to develop an IEP that is reasonably calculated to enable this student to receive educational benefit.

The parent argues that the school district failed to appropriately train staff in behavioral support, management, and interventions and that the behavioral policies and procedures were inappropriate as written and as applied to student. The district argues in response that the incidents that occurred in the fall of 2001, were emergencies and there was no way to predict that the staff would need to be trained. From the evidence it is clear that the teachers and aides were ill equipped to handle the student's increasing noise making and off-task behavior. Although staff testified that course work in college and occasional seminars addressed behavior management techniques, the teachers, aides and even the principal agreed, they had absolutely no experience dealing with student's elopement and aggressive behavior. Yet the district failed to train staff in behavioral support, management, and interventions, even after the incidents became

frequent enough to no longer be considered emergencies. If the staff had been properly trained, student's terrible ordeal on October 26, 2001, might have been prevented. No history of physical aggression occurred until the student entered into the third grade classroom and began experiencing harassment and abusive treatment by this third grade teacher. The district blamed the student and student's mother for reinforcing maladaptive behavior at home for student's deteriorating behavior and failed to acknowledge their role in creating a hostile learning environment and the predictable worsening behavior. The district failed to provide adequate training and supervision of a teacher whose behavior can only be construed as abusive. The district failed to implement an adequate functional behavioral assessment and behavioral intervention plan. Staff were not adequately trained or supervised in the implementation of what behavior program procedures did exist. The district should have anticipated that the student would run away from Leaf River based on his history of elopement at German Valley. When he did predictably leave the school and ran into a cornfield, the school did not ensure his safety by following him. This resulted in student becoming lost and being found in the creek at dusk, minutes from death. The school staff, at the direction of the superintendent, failed to ensure his safety in a situation that a reasonable person would assume would result in his becoming lost at best, and significantly harmed at worst. The speech therapist, principal, and aides all agreed that a cornfield can be a dangerous place. The student's behavior further deteriorated after this event. A mental health therapist who observed and interviewed the student testified that the student has post traumatic stress syndrome. Both of parent's expert witnesses testified that the event in the cornfield has negatively impacted all aspects of student's life. These experts agreed that student's behavioral events were not consistently addressed in accordance with what guidelines did exist in student's BIP. The district conducted inadequate functional behavioral assessments and inconsistently implemented behavior interventions. Relevant data was not collected, and because of this, no decisions were made based on data collection. As a result of ineffective and punitive behavioral treatment, student lost his placement in a regular education classroom, and eventually from a behavior disorders classroom. The district is now seeking an even more restrictive placement in a therapeutic day school. These unfortunate and preventable events resulted in student being denied FAPE under the applicable state and federal statutes.

Parent argues that the school district created a hostile environment for the student where school staff ridiculed, humiliated, degraded, breached his right to confidentiality and physically abused the student. District denies that such a hostile environment exists and that student's right to confidentiality was never breached. Testimony given by student's first grade teacher, second grade substitute and regular education teacher, aides, and the principal showed that these staff members showed a genuine fondness for the student. When the student was sent to the principal for time outs, the student never thought of this as a punishment. He was always treated with kindness and understanding by the principal. The principal spoke emotionally about his fondness for the student. The aides cried when they spoke about the student and some of the incidents that occurred. They seemed to really care about his safety. The teachers and aides did their best, but they were not trained to handle the student's problematic behavior. The school psychologist, charged with doing the functional behavior analysis and BIP had done four of each in her whole career. Many of the teachers had not even heard of a BIP. The second grade teacher admitted to never having anyone as disabled as the student in her classroom in her eight years of teaching. The district gave absolutely no support to the staff members that worked with the student day in and day out by bringing in qualified consultants to train them or sending them to meaningful seminars. These staff members were alone doing the best they could under the circumstances.

The testimony of the third grade teacher and the superintendent reveal behavior to the contrary. The situation with student worsened dramatically when he entered third grade. He had numerous difficulties with his teacher. She destroyed his artwork even though she knew that he cherished it, threw away his papers when he had no name on them even though she knew it might be difficult for him to remember to do this, "consequenced" him for behaviors that were part of his disability, humiliated him in front of his peers, and in general created a hostile environment. During the student's behavioral episode on October 11, 2001, she kicked the student, claiming she was blocking his kicks. The student's mother reported a contusion on student's chest from this incident. During testimony, this third grade teacher denied having kicked the student in the chest, but the principal stated that the teacher admitted to having kicked student while blocking his kicks, although he thought she had kicked student in the leg.

The superintendent of the district testified how much he cared about the student and gave examples of his concern. His testimony was not believable. None of his responses were straightforward. He was trying to protect himself. As a matter of fact, he lied under oath when he stated that he attended the October 17, 2001, staffing. Not only did he not sign in for this meeting, but both the resource teacher and school psychologist confirmed that he was not present. All his actions prove that he was doing everything possible to get rid of this student. He ordered the staff to take notes regarding every incident involving the student and gave some of these reports to the police. This was something that was never done with any other child. He did nothing to train his staff in behavior intervention strategies. He wrote a memo to staff on October 16, 2001, stating that they were not to put themselves in harms way to protect the student. (PD #61, p. 1298-1299) He even had a meeting with staff without the student's mother to discuss with them that they were not to put themselves in front of a moving truck to protect the student. During his testimony the superintendent even admitted to buying substandard Radio Shack walkie-talkies to use by teachers and aides in case of elopement by the student while given Motorola walkie-talkies to the bus drivers and custodians. The resource teacher confirmed this and almost used the exact same words. The student was suspended after the October 11, 19, and 26, 2001, incidents, in effect almost excluding the student from the district. These suspensions were so devastating to student that each time he returned to school his behavior escalated. The superintendent's actions humiliated, harassed the student, and breached his right to confidentiality. The demeanor of the school staff when testifying with the superintendent present, evidenced how they were intimidated by the superintendent into furthering his agenda to rid the district of student's presence.

The district argues that the student's behavior has now escalated to the point where he can only be educated in a therapeutic day school. Special education law requires that a student be educated in the least restrictive environment and that removal of a child with disabilities from the regular education environment should occur only when the nature and severity of the disability are such that education in regular classes with the use of supplementary aids and services cannot be satisfactorily achieved. (20 U.S.C. §1412(a)(5)(A), 23 Ill. Adm. Code § 226.240) To the maximum extent appropriate, each child shall be educated with children who are nondisabled and the placement shall be as close as possible to the child's home. The therapeutic day school meets none of these criteria and is an unacceptable placement. The parent has requested placement at German Valley with accommodations and related services. With proper staff training and assistance from experts, there is no reason to believe that parent's requested placement will not be successful.

**IT IS HEREBY ORDERED THAT:**

1. Within 10 days of receipt of this order the district shall hire an independent and qualified consultant to provide intensive training for all staff at German Valley Elementary School, including all administrators, related services personnel from the Ogle County Cooperative Service, contract employees, bus drivers and other persons working in the school on a regular basis in the areas of functional behavior assessment, behavior support, intervention and management, including but not limited to physical restraint, non-restrictive interventions, and positive behavioral methods.

1. Within 10 school days of receipt of this order, the district shall hire an expert in positive behavior interventions such as Barbara Doyle, Alice Belgrade, Vic Morris or other independent and qualified personnel agreed upon by the parties, to develop and oversee the systematic implementation of a behavioral intervention plan. The consultant must train the staff and parent and direct the consistency of the program throughout student's day. This same consultant shall work with student's mother to provide consistency with behavioral strategies at home. The consultant shall determine how many hours per month will be required to accomplish the development, implementation, and monitoring of the behavior intervention plan in the school and at home. This consultant shall decide when the staff is ready for reintegration of the student into the fourth grade classroom shall begin.

2. Within ten days of receipt of this order, the IEP team shall meet to prepare an IEP for the student with the necessary services and accommodations to foster his participation in the regular education setting in the fourth grade of German Valley Elementary School and decide how to best reintegrate student into the regular education classroom. The independent behavioral consultant shall decide if additional independent professionals experienced in working with autism spectrum disorders and communication language disorders need to be part of the IEP team. If the independent behavioral consultant believes these professionals are necessary, he/she shall recommend the professional who shall be part of the IEP team, and the district shall hire the professional or professionals. The IEP team shall meet on a monthly basis until the end of the 2002-2003 school year to evaluate the student's progress and revise goals and objective and the behavior intervention plan when necessary. The team shall evaluate student's progress at the end of the year and determine how often it will meet in the 2003-2004 school year. Until the student can be reintegrated into the regular classroom, he shall receive homebound instruction, speech/language therapy, social work services, occupational services, and additional tutoring in subject areas at his home or in the community. These services shall be paid for by the district.

3. The superintendent of the district shall not have any direct or indirect contact with the student unless his mother or legal counsel is present.

4. The district shall return all photographs and negatives taken of the child and avoid any action which will breach the confidentiality of the student or humiliate the student.

5. The district shall expunge all suspensions from student's records and request that any police records relating to student be expunged.



6. The district shall use Project Choices to facilitate the reinclusion of the student into German Valley Elementary School at least three times per semester for the 2002-2003 and 2003-2004 school years.

7. The district shall develop a disability awareness and sensitivity curriculum and begin teaching this curriculum to every class within the district from kindergarten to twelfth grade by the second semester of the 2002-2003 school year.

8. The district shall employ Sheila Frick or an occupational therapist recommended by Sheila Frick to conduct training sessions for the teachers, aides, and related services personnel who will be working with student in the area of sensory integration and to assist in sensory planning. This occupational therapist shall be part of the IEP team. In addition, the occupational therapist shall decide the amount of services the district shall provide to student both in and outside of the school and decide, with the student's mother's approval, on an occupational therapist to provide those services outside of the school setting. The district shall be responsible for paying for the outside services as compensation for occupational services that were not provided in second and third grade.

9. The district shall provide compensatory education and related services. The IEP team, with the help of the behavior consultant, and occupational therapy consultant, shall determine the amount of speech/language therapy, social work services and therapy for post traumatic stress syndrome, and occupational therapy the student requires to be able to benefit from his education. If any of these services need to be provided outside of the school setting, the district shall pay for providers, agreeable to student's mother, for these outside services. In addition, the student shall receive tutoring in subject areas to compensate him for loss of educational opportunities and to bring him to a level of performance determined to be appropriate by the IEP team. The tutor shall be experienced in working with receptive and expressive language disorders and shall be paid for by the district.

10. The student's mother shall receive social work or psychological services to assist her with behavior strategies and the reinclusion of student into German Valley for 60 minutes each week for three months. The therapist shall be of the mother's choosing and shall be paid for by the district.

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 30 days of 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 me, Gail Tuler Friedman, 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 other parties and 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 I, Gail Tuler Friedman, am not authorized to entertain a request for reconsideration.

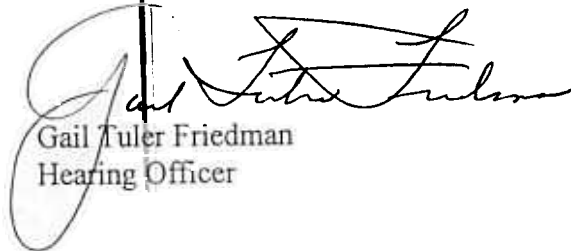
**Finality of Decision:**

This decision shall be binding upon the parties unless a civil action is commenced.

**Right to File Civil Action:**

Any party to this hearing aggrieved by this final decision as the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS 5/14-8.02(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision was mailed to the party.

This Decision and Order rendered this 29<sup>th</sup> day of August, 2002.

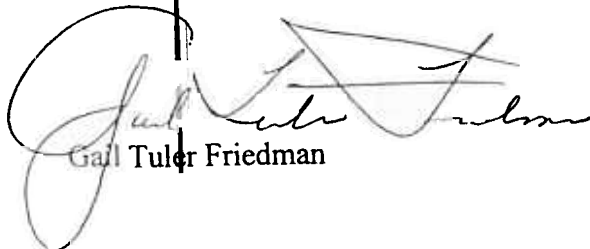


Gail Tuler Friedman  
Hearing Officer

Friedman & Friedman, Ltd.  
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Chicago, Illinois 60604  
(312) 922-8882

**CERTIFICATE OF SERVICE**

The undersigned hearing officer certifies that she served copies of the aforesaid Decision and Order upon parents' counsel, district's counsel, and the Illinois State Board of Education at their respective addresses by depositing same with the United States Postal Service at Chicago, Illinois, with proper postage prepaid and by certified U.S. mail, return receipt requested before 5:00 p.m. on August 29, 2002.



Gail Tuler Friedman

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