

WEST VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL PROGRAMS

APPROVED

DEC 16 2011

Hearing Officer Decision Docket Sheet

DOCKET NUMBER	D11-013
LEA/ SCHOOL DISTRICT	[REDACTED]
LEA ATTORNEY	[REDACTED]
STUDENT	[REDACTED]
PARENT	[REDACTED]
STUDENT/PARENT ATTORNEY	Pro Se
INITIATING PARTY	Parent
DATE OF REQUEST	May 3, 2011 ¹
DATES OF HEARING	July 1, 2011; July 25, 2011; September 7-8, 2011; and October 10, 2011
POST-HEARING SUBMISSIONS	November 21, 2011
HEARING LOCATION	[REDACTED]
OPEN/CLOSED	Closed
STUDENT PRESENT	Yes
IMPARTIAL HEARING OFFICER	Anne Werum Lambright
DECISION DATE	December 15, 2011

¹This matter was originally assigned to Patrick Lane, Esq. as the hearing officer. On the first day of hearing, July 1, 2011, IHO Lane disclosed a potential conflict and Parent requested a new hearing officer. The above-referenced hearing officer was assigned the matter.

**WEST VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL PROGRAMS**

Due Process No. D11-013

Anne Werum Lambright, Due Process Hearing Officer

IMPARTIAL HEARING OFFICER DECISION

PROCEDURAL HISTORY

The request for hearing in this matter was filed on May 3, 2011, and assigned to Patrick Lane. On the first day of hearing (July 1, 2011) Hearing Officer Lane discovered and disclosed a possible conflict and Parent² requested a hearing officer reassignment. The undersigned hearing officer was reassigned by memorandum dated July 1, 2011. On July 7, 2011, the hearing officer sent a letter to the parties, outlining the new time-lines and requesting a new hearing date. The parties were directed to confer concerning joint exhibits to avoid duplication but the parties did not confer. Parent proffered two hundred twenty-seven (227) exhibits, including recordings of IEP Team Meetings and offered an additional exhibit on rebuttal. County Schools offered two exhibits before the July 1, 2011 hearing, two additional exhibits before the July 25, 2011 hearing, and four rebuttal exhibits. By agreement, the hearing commenced July 25, 2011 and, as it was not concluded, the parties agreed on a return date of August 8, 2011. Parent had family members experiencing various emergency medical problems and at the request of Parent, the hearing was continued until September 7, 2011. It was not concluded on that date and the parties returned to hearing on September 8, 2011. The hearing was not concluded and the parties agreed on a return date of October 10, 2011. The hearing was concluded on that date and the parties agreed to file post-hearing

²To protect the student's confidentiality, all personally identifying information has been removed from this decision with the exception of the docket sheet /cover page.

submissions on November 21, 2011, and the decision would be mailed December 15, 2011. The County Schools timely filed its post-hearing proposals; Parent chose not to file but sent an email dated December 6, 2011, to the hearing officer and counsel for the County Schools explaining some of the difficulties that she had experienced since the last day of hearing, including the crash of her computer, her landlord giving her 30 days notice to move and starting a new job. On December 14, 2011, counsel for County Schools notified the hearing officer and copying the Parent that Student was being placed by court order at George Junior in Pennsylvania, starting January 2, 2012. The decision was issued December 15, 2011.

ISSUES and REQUESTED REMEDIES

As determined at the June 2011 pre-hearing conference conducted by Hearing Officer Patrick Lane and affirmed by the Parent at the July 25, 2011, hearing conducted by Hearing Officer Anne Werum Lambright, the following issues were presented by Parent for determination:

1. Whether the County Schools failed to properly evaluate Student by failing to conduct learning disability evaluations in reading, writing and math, by failing to develop a functional behavior assessment and by ignoring recommendations made by evaluators?
2. Whether the County Schools improperly placed Student by socially promoting him even though he performs at a lower level and by failing to provide an appropriate level of services for Student's needs?
3. Whether the County Schools failed to provide FAPE to Student by the above failures, by failing to follow the IEP, by failing to provide an aide, by failing to add services

recommended by evaluators to accommodate student, by failing to develop an IEP which accommodates Student, by failing to develop and follow a proper behavior intervention plan (BIP), by instituting truancy actions against Student and Parent for missing school as a result of Student's disability, and by failing to follow a prior resolution session agreement?

As determined at the June 2011 pre-hearing conference conducted by Hearing Officer Patrick Lane and affirmed by the Parent at the July 25, 2011, hearing conducted by Hearing Officer Anne Werum Lambright, the following remedies were requested by parent:

1. An order directing County Schools to train staff in the proper response to bipolar issues;
2. An order directing County Schools to follow IEPs;
3. An order directing County Schools to follow BIP; and
4. An order directing County Schools to properly develop an IEP to provide FAPE.

MOTIONS

All decisions rendered at the aforesaid hearings on motions filed in this action are hereby affirmed and all other motions filed in this action by either of the parties which were not previously ruled upon by the hearing examiner are hereby denied and rejected.

**CREDIBILITY OF WITNESSES, TESTIMONY,
AND EXHIBITS**

The hearing examiner was and is satisfied that all records and documents entered as exhibits are complete, authentic and valid and that they were entered with the proper evidentiary foundations except as noted below.

The hearing examiner was and is satisfied that the witnesses brought on by the parties were credible and truthful except as inconsistent with this decision. Neither the demeanor of the witnesses nor the substance of any testimony suggested any inconsistency, conflict, or ulterior motive except as noted below. No evidence suggested any personal gain to be achieved by any witness as a result of testifying except as noted below.

**RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

After reviewing the record and the exhibits admitted into evidence and matters of which the hearing examiner took judicial notice during the proceedings, assessing the credibility of the witnesses, and weighing the evidence in consideration of the same, this hearing examiner makes the following findings of fact and conclusions of law. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by the parties but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

FINDINGS OF FACT

1. Student is a seventeen (17) year old student who has attended County Schools for many years. Student had been enrolled at WI Middle for the beginning of the 2008-09³ school year, the Alternative Learning Center (ALC) (Out of School Environment) for the end of the 2008-09 and the beginning of the 2009-10 school year, returning to WI Middle in November 2009 and returning to the ALC in March 2010. At the ALC, pursuant to a February 1, 2009 IEP signed by Parent who was in attendance at the meeting, Student's placement was 100% general education and he was consistently attending group therapy provided by the Summit Center at the ALC and home-based one-on-one therapy through the Summit Center. At the end of the 2008-09 school year, Student had gone to a short school day with private tutoring provided by the County Schools to accommodate his short day schedule but by the start of the 2009-10 school year Student was back to attending full days at the ALC. TR (September 7) at 63, 69. TR (September 8) at 36, 6. *County Schools Ex. No. 1, Tabs 9 and 11; Parent Ex. Nos. 37, 152-3.*

2. The County Schools and Parent are in agreement that Student, in terms of ability, is an average to below-average student. *Parent Ex. No. 215.*

3. Student has been diagnosed with several medical conditions, including bipolar disorder and ADHD. On December 17, 2008, a re-evaluation Eligibility Committee Report was completed finding that Student's primary area of exceptionality is Other Health Impaired

³Although, generally, claims concerning events that occurred more than two years prior to the date the Due Process is filed are time-barred, the hearing officer allowed the Parent and the County Schools to reach back before the two years but only to show pattern and practice or a basis for later decisions. 20 USC 1415(b)(6)(B); 34 CFR 300.507(a)(2).

(OHI). The Eligibility Committee did not find him eligible as a Specific Learning Disability student and explained both the Policy 2419 standards and their evaluations to the parent. *County Schools Ex. No. 1, Tab 17. Parent Ex. Nos. 142 and 215.*

4. Student was enrolled at RCB High School for the 2010-2011 school year. On September 8, 2010, the secretary at that school received a note from Student's doctor written on a prescription pad asking that Student be allowed to come to school two hours late each day for sixty (60) days, and have that delay be excused to allow for Student's adjustment to medication. This note was honored by the school and Student did not receive any unexcused absences for this period for arriving at school two hours after the start of school. TR (September 8) at 6, TR (October 10) at 5-6.

5. The County Schools sent to Parent an IEP Team notice scheduling a meeting for October 7, 2010, and Parent responded indicating she would attend. She also sent a letter with other information dated September 22, 2010. *Parent Ex No. 198. County Schools Ex. No. 1, Tab 6.*

6. The meeting convened on October 7, 2010, with Parent in attendance. An IEP was developed and reflected that Student would receive 15% special education/ 85% general education, that Student's attendance remained as an important annual goal, that his medical treatment by Dr. S. would continue, and that Matt D. would be employed by the County Schools to provide weekly counseling for Student at school. In addition, to address the Student's specific needs, and at the request of the Parent, Student was provided with a set of class books to keep at home, provided with adult supervision to get him from class to class and provided counseling and social skills instruction. *Parent Ex. No 139. County Schools Ex. No. 1, Tab 5.*

7. The County Schools sent to Parent an IEP Team notice scheduling a meeting for November 12, 2010, to follow up on some of the measures put into place for and with Student at the preceding IEP meeting in October. The record reflects that the meeting notice was sent to Parent several times but she did not respond to it and did not attend. *Parent Ex. No. 140. County Schools Ex. No. 1, Tabs 3, 8, and 12.*

8. The meeting convened on November 12, 2010, without the parent in attendance. The notes reflect that Student strongly disliked the adult supervision getting him from class to class and that Student had missed his first counseling session with Matt D. at school. *Parent Ex. No. 140. County Schools Ex. No. 1, Tabs 3, 8, and 12.*

9. Student continued to not attend his classes at RCB. As of November 18, 2010, Student had missed 36 school days that school year and by December 7, 2010, he was up to 39 absences. DHHR social worker J. V. G. updated the Circuit Court judge on that date by letter noting that Student had recently been hospitalized at Highland Hospital (November 30-December 6, 2010), his behavior in the school setting has been poor, including suspensions for fighting with another student, his grades are all failing and he continues to struggle with attendance. She recommended immediate placement at Pressley Ridge to address his educational, psychological and behavioral needs. *County Schools Ex. No. 1, Tab 4.*

10. In February 2011, Student was placed at Pressley Ridge by the Circuit Court. Student was represented by counsel. TR (September 7) at 110. TR (September 8) at 88. *Parent Ex No. 6. County Schools Ex. No. 2 (Attendance and Related Court Records).*

11. After placement, an Interdisciplinary Treatment Planning Meeting was held for Student on March 15, 2011. Parent did not respond to the invitation and did not attend the meeting. *County Schools Ex. No 1, Tab 1.*

12. Student continued at Pressley Ridge for the remainder of the 2011-12 school year and until at least October 10, 2011, of the 2010-2011 school year. Student testified that at Pressley Ridge, he was going to class on time, not having problems with sleeping in class or doing his work, not having problems with leaving the classroom, and generally doing well in his classes. TR (July 25) at 100, 108. *Parent Ex. No. 207-8.*

13. Parent filed a Complaint with the WV Dept. of Education on November 7, 2008. *Parent Ex. Nos. 179-80.* The department responded by letter dated November 13, 2008 *Parent Ex. No. 189.*

14. Parent filed a Complaint with the WV Dept. of Education on April 1, and again on April 26, 2010. *Parent Ex. Nos. 181 and 183, 184, 185 and 186.* County Schools responded on April 8, 2010; the department responded by letter dated April 23, 2010, and sent the Early Resolution agreement dated April 30, 2010. *Parent Ex. Nos 190-1 and 193.*

15. Parent filed a Complaint with the WV Dept. of Education on September 23, 2010, amended October 15, 2010. The department issued its findings on December 14, 2010. The relevant issues and findings to this due process are: 1) Parent alleged that the IEP Team failed to consider Parent's request for an aide for the student; the investigation concluded that there was no violation, that there was no evidence except that the Parent had requested adult supervision for Student's transition from class to class which was written into the IEP and provided; 2) Parent alleged that the county schools changed the student's IEP after the IEP Team meeting concerning counseling sessions; the investigation concluded there was no violation, that the student is receiving counseling by a private agency paid for by the county schools and a side-by-side analysis of the October 7, 2010 draft and final IEPs reflected that they are identical. *Parent Ex. No 182 and 192.*

16. The record reflects that Student has had issues of truancy and discipline since at least 2008, culminating in three (3) juvenile matters in the Circuit Court (Case Nos. 08-JS-11-3, 09-JS-95-3 and 09-JD-148-3) *Parent Ex. Nos. 1-127. County Schools Ex. No. 2.*

CONCLUSIONS OF LAW

1. The Individuals with Disabilities Education Act (IDEA) 20 USC §1400 et seq. and the regulations found in 34 CFR §300.1 et seq. as well as West Virginia Code §18-20-1 et seq. and the regulations for the Education of Students with Exceptionalities (*Policy 2419*) are the relevant provisions of law applicable to this due process.

2. These provisions allow a parent or school district to request a due process hearing on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation or educational placement of a student or the provision of a free appropriate public education (FAPE).

3. FAPE is defined as educational instruction designed to meet the unique needs of the student and supported by such services as are necessary to permit the child to benefit from the instruction. Bd. of Educ. v. Rowley ex rel. Rowley, 458 US 176, 188-9 (1982).

4. An IEP documents the team's plan for the individual student's education and is sufficient if it is reasonably calculated to enable the student to receive educational benefit. Rowley, 458 US at 207.

5. Educational benefit for the specific student is not to be confused with the best possible education for the student. IDEA does not require that the school provide every special service necessary to maximize each disabled student's potential. MM ex rel. DM v. School Dist., 303 F.3d 523, 526-7 (4th Cir. 2002).

6. The burden of proof in an administrative hearing challenging an IEP is placed upon the party seeking relief. In this case, it is on the student represented by his mother. Schaffer v. Weast, 546 US 49, 62 (2005)

7. A student receiving special education is required to be placed in the least restrictive environment (LRE) which means that he is to be educated with the general education students in the general education classroom to the maximum extent appropriate. An eligible student is not to be removed from age-appropriate general education classrooms solely because of needed accommodations and modifications to the general education curriculum. *Policy 2419 at 52.*

8. A student is not considered eligible for special education learning disability services unless he meets certain criteria. At the relevant time, this involved a comparison of the student's intellectual ability with the student's achievement. *Policy 2419 at 36.*

DISCUSSION

1. Whether the County Schools failed to properly evaluate Student by failing to conduct learning disability evaluations in reading, writing and math, by failing to develop a functional behavior assessment and by ignoring recommendations made by evaluators?

A. Learning Disability Evaluations and Eligibility

Parent testified that until recently she was not aware that Student was not at or near his grade level, particularly in reading, writing and math. The County Schools and Parent are in agreement that Student, in terms of ability, is an average to below-average student.

The eligibility standards at the relevant times for learning disability evaluations of Student were contained in Policy 2419 in the section labeled Specific Learning Disabilities (SLD) and involved a comparison of the intellectual ability with the student's achievement. The evaluations looked at the student's oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematical calculation and/or mathematics problem solving. If, by a comparison to age-based standard scores of achievement and ability, a severe discrepancy (formerly defined as a minimum of 1.75 standard deviation differences using a regression formula) is found in one or more of the listed areas, the student can be found eligible for the SLD exceptionality by the Eligibility Committee.

The process for this SLD evaluation was told to Parent at an IEP meeting recorded by Parent. The County School staff also explained that he had been evaluated and his ability and his achievement were both well within the below average to average range so he did not have the severe discrepancy required to be found eligible for an SLD exceptionality. The record reflects that the County Schools conducted a psycho-educational evaluation of Student, and then retested him at the request of Parent as Student had hurt his hand. There was no evidence introduced that the evaluations were inappropriate or inaccurate.

Not classifying Student as eligible for SLD services under these circumstances is not a denial of FAPE by the County Schools.

B. Functional Behavior Assessment (FBA)

It is generally accepted that FBAs need to occur in the actual physical environment and location in which the student is attending school. Student had been evaluated on January 10, 2008 by an FBA by the county schools (Parent Ex. No. 132). The record reflects that Pressley Ridge has done an FBA of the student but RCB High has not because the student has not returned to school at that location. County Schools indicated by letter dated June 2, 2011, (County School Ex. No. 3) and again on July 11, 2011, (County School Ex. No. 4) to Parent both following the due process resolution meeting that it will conduct an FBA upon the student's return to RCB, and no evidence introduced at the hearing rescinded that statement. TR (October 10) at 203-5.

As to whether the FBA should have occurred last year at RCB High last year, before he went to Pressley Ridge, the evidence is more problematic. It is generally accepted that it takes some time to properly assess a student in the actual physical environment; some FBAs require multiple weeks of watching the student in class to obtain useful data. Unfortunately, Student only attended part days during most of September, all of October and most of November, was hospitalized at Highland for the beginning of December and in addition he was absent from school for thirty-nine days as of December 7, 2011. For the second semester, Student was placed at Pressley Ridge. No evidence was introduced that a relevant FBA could be completed at RCB High for school year 2010-2011 and his non-attendance appears to suggest that it couldn't have been completed. Therefore, the County Schools's failure to do an FBA under these circumstances is not a denial of FAPE.

C. Ignoring recommendations made by evaluators

This is discussed below at 3.C.

2. Whether the County Schools improperly placed Student by socially promoting him even though he performs at a lower level and by failing to provide an appropriate level of services for Student's needs?

Student is seventeen (17) years old. Student is academically struggling and does not demonstrate achievement at the average level of other seventeen (17) year old students. The school system attributes this to his failure to attend school regularly; Parent believes it is due to an undiagnosed SLD (see above) or promotion of Student when it was not warranted and/or other reasons (see below).

A. Social Promotion

At the middle school level, academic achievement or performance is only one of the things considered in determining whether to retain a student or not. This school system uses the *Light Retention Scale* that includes twenty categories that should be assessed and academics is only one of the twenty. Others include student's age and physical size, gender, previous grade retention, immature behaviors, emotional disorders, history of conduct disorder or defiance, parents' participation in school activities, school attendance, siblings, and student's attitude about retention. TR (October 10) at 199. The older the student, the less likely it is that retention will be an effective tool to catch up the student academically. TR (October 10) at 201.

No evidence was introduced that Student's promotions from grade to grade have been carried out without proper evaluation of the necessary factors. Student appears normal sized for seventeen years of age and physically mature, has been retained earlier in his academic career and would not properly be retained in middle school.

There was sufficient evidence to demonstrate that Student is academically struggling but no evidence to show that it is because he was improperly promoted from grade to grade. Promotion of Student by County Schools under these circumstances is not a denial of FAPE.

B. Failure to provide appropriate level of services

Parent alleged that County Schools failed to provide tutoring and counseling to Student at RCB High. The evidence reflects that Student was encouraged to attend extra-help sessions with his teachers but he generally chose not to attend. The record also reflects that County Schools hired and paid therapist Matt D. To provide counseling sessions at school for Student but Student did not always attend.

There was no evidence that County Schools failed to provide the appropriate level of services to Student but there was extensive evidence that Student chose not to take advantage of those services. This is not a denial of FAPE by County Schools.

3. Whether the County Schools failed to provide FAPE to Student by the above failures, by failing to follow the IEP, by failing to provide an aide, by failing to add services recommended by evaluators to accommodate Student, by failing to develop an IEP which accommodates Student, by failing to develop and follow a proper behavior intervention plan, by instituting truancy actions against Student and Parent for missing school as a result of Student's disability, and by failing to follow a prior resolution session agreement?

A. Failing to follow the IEP

Parent's primary concern as discussed at the hearing concerned County School's failure to bring in a mental health expert to a training session for appropriate RCB staff regarding Student and bi-polar characteristics, and the County's failure to recognize that the student's medications or other health issues were causing his problems with attendance and sleepiness in class and therefore related to his disability. Parent also believed that County Schools failed to follow his IEP correctly in placing the adult to get Student from class to class at RCB High. The mental health training is addressed below.

The IEP dated October 7, 2010, contained, among other provisions, and at the request of Parent, a service of adult supervision to get Student from class to class. Parent had in mind someone who would "shadow" Student from some distance and intervene only if Student decided to go elsewhere. An adult was present for Student between classes but apparently stood too close and prevented Student from talking to his friends and Student disliked this provision in the IEP. Parent wanted it to remain but be implemented differently. The IEP team sent notices to Parent to discuss this at an IEP meeting scheduled for November 12, 2010. Parent did not attend but the IEP notes from that meeting reflect Student's dislike of this adult supervision and also that Student had missed his first scheduled counseling session with the counselor requested by Parent. This does not constitute failure to follow an IEP or a denial of FAPE by County Schools.

Student's medications were the subject of inconsistent testimony. Parent had initially and repeatedly stated that many of Student's absences and his sleepiness in class were due to his medications, and had even brought a doctor's excuse to school in September 2010 to allow Student to be two (2) hours late each morning for sixty (60) days for medication adjustments. However, after Student was placed at Pressley Ridge by the Court and managed to regularly

attend his early morning classes while on the same or similar medication, Parent testified that now she thinks the Student's inability to get to school on time is not related to the medicines he is taking. TR (October 11, 2011) at 27-8. Parent stated that Student suffered an exposure to carbon monoxide poisoning when he was little and also suffered a head injury but she does not believe these are related to his inability to get out of bed to go to school or his sleepiness in class problems (Parent Exhibit No. 215). Under the circumstances, without more credible evidence, there is no denial of FAPE.

B. Failing to provide an aide

Parent had filed a state complaint alleging this same failure and the State Department investigation found there was no violation as there was no evidence that Parent had requested an aide, that the IEP reflected the adult supervision to transition Student from class to class, and that County Schools had provided this transition service.

In this due process, Parent again failed to demonstrate that she had ever requested a full-time aide for Student prior to the due process request. County Schools denied that Parent had requested a full-time aide and a review of the IEPs and recordings do not demonstrate a Parent request.

The record does not reflect any necessity for a full-time aide. Most of Student's time at the County Schools is regular education; he has a duplicate set of school books at home to do his school work, he is receiving social skills training at school and the West Virginia DHHR has provided parent services to Parent to assist her in helping student get to school regularly. TR (July 25, 2011) at 29-30.

Failing to provide an aide when there is no demonstrated need by the Student and/or request by the Parent is not a denial of FAPE.

C. Failing to add services recommended by evaluators to accommodate Student

Parent failed to offer any evidence to demonstrate services that were recommended to accommodate Student that weren't added. Student chose not to take advantage of some services that were offered, e.g. in-school counseling, quiet room, additional tutoring, but that does not reflect the school's failure to add services recommended by evaluators to accommodate Student. There was no evidence that County Schools failed provide FAPE concerning this allegation.

D. Failing to develop an IEP which accommodates Student

In September 2008, Parent and ██████████, the Special Education Coordinator had a conference. Parent claimed that many accommodations were discussed at Student's May 2008 IEP Meeting but were not included in the final IEP. She gave the county people the draft IEP for comparison. Ms. ██████ noted on the Memorandum of Conference, that a comparison of the draft provided by Parent was identical to the final IEP. Parent Ex. No. 150.

Parent filed a state complaint alleging this same failure and the State Department investigation found there was no violation.

At the hearing, Parent failed to offer any other evidence to demonstrate that the IEP Team failed to develop an IEP that accommodates Student. Parent initially believed that the

school system should offer Student his morning classes that he was missing by the doctor-excused late start to his day after school at a homebound placement. She mistakenly believed that a homebound placement could be added to an in-school placement and during the hearing withdrew her request for both shorter school days and homebound since Student has done so well most days at Pressley Ridge. TR (October 10, 2011) at 171-4.

E. Failing to develop and follow a proper behavior intervention plan

Student's IEP has contained a Behavior Intervention Plan (BIP) for quite some time. The February 2, 2009 IEP contained an updated BIP which was reviewed at the IEP annual review meeting at which Parent was present. The April 21, 2010 IEP contained a BIP plan that was updated at the April 21, 2010 IEP meeting which Parent attended. These BIPs appear to contain relevant interventions but it is the County School's position that they are still relatively untested BIPs because of Student's chronic absences.

BIPS generally address a student's behaviors at school that adversely affect his educational performance. These are usually behaviors that are exhibited by the student over a long period of time and to a very marked degree. Parent subpoenaed sixteen (16) teachers and principals and without exception, each testified that he or she had little if any behavior problems with Student except for sleeping in class or being absent often. The evidence reflected that the Student's behavior interventions included a quiet room/space at each of the county schools he attended (although Parent did not feel it was sufficiently quiet) and Student testified that he had at least one adult to whom he could go to talk to when he was at school. TR (July 25) at 103-4.

The IEP teams included the Parent, developed adequate BIPs and the County Schools followed the BIPs when student was at school. Thus there is no violation of FAPE.

F. By instituting truancy actions against Student and Parent for missing school as a result of Student's disability

West Virginia Board of Education Policy 4110 requires students to attend school. If a student has excessive unexcused absences or tardies from school, the policy requires the County School's Attendance Director to report those unexcused absences and tardies to the relevant authorities, in this case the Circuit Court of this county. This is apparently the second time Student has been reported to the Circuit Court for excessive unexcused absences and the documents reflect three juvenile cases in the Circuit Court concerning Student and his chronic absences and discipline issues. This time, although he was represented by counsel in the Circuit Court proceedings who brought Student's disability to the attention of the Court, the Judge determined that Student would benefit from placement at a residential facility, as recommended by the WV DHHR social worker. The Judge had kept him at Pressley Ridge from February 2011 through at least October 10, 2011⁴ and Student reported he is not having trouble getting up and going to class each day and is doing well there.

Excused absences such as the two hour delay each school day requested by Student's doctor and documented are not counted towards excessive unexcused absences. Neither are doctor's appointments or other medical or dental appointments if they are properly documented by the professional and placed in the school's records. Other absences without proper documentation are counted as unexcused absences and are required, when they reach a certain level, to be reported as truancy. Other unexcused absences include suspensions for

⁴ After the hearing, counsel for County Schools notified the hearing officer by email on December 14, 2011, that Student's residential placement was changed by judicial order to George Junior in Pennsylvania beginning in January 2012.

behavior that is not found to a manifestation of the disability and skipping classes. After a complete review of the relevant exhibits, there are a few absences that could be either excused or unexcused and it appears they were uniformly given excused status and not counted towards the truancy total.

Parent apparently believes that most if not all of Student's absences are related to his disability but the record does not reflect this. Parent also believes that the Attendance Director of County Schools threatened Parent with jail if Student didn't come to school. The CD of the IEP Meeting which the Attendance Director attended and which was recorded by Parent did not offer any threats to Parent about jail time. The Director is heard explaining to Parent and the rest of the IEP Team West Virginia law on chronic absenteeism which does include fines and jail time.

The attendance director for County Schools was properly performing his job duties in reporting the unexcused absences to the Circuit Court and his actions were not a denial of FAPE.

G. Failing to follow a prior resolution session agreement

Parent had filed a state complaint last year before filing this due process. It was resolved by a resolution meeting agreement that among other matters, required the County Schools to bring in a mental health care professional to educate Student's teachers and school staff and administration about bipolar disorder as it manifests itself in Student. The agreement did not specify whether this was to occur at the middle school or the high school and it did not happen, at least at the high school in the 2010-11 school year. The County Schools indicated by letter dated June 2, 2011 (County School Ex. No. 3) and again on July 11, 2011 (County School Ex. No. 4) to Parent following the due process resolution meeting that it will provide

a training session for appropriate RCB staff regarding Student and bi-polar characteristics, and no evidence introduced at the hearing rescinded that statement.

ORDER

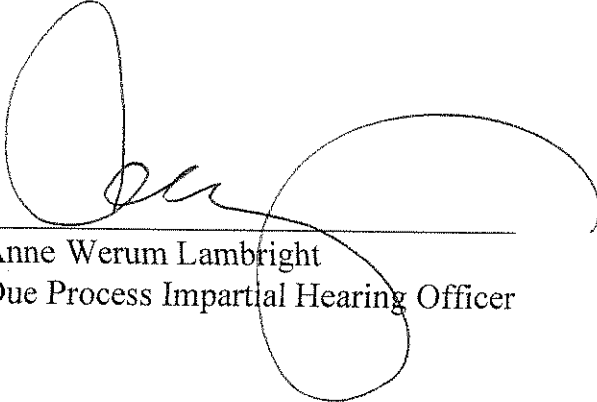
Based on the foregoing, the Parent's requested relief is DENIED with the exception of the functional behavior assessment (FBA) at RCB High and the mental health education presentation to the faculty and staff at RCB High if Student returns to RCB High.

1. Within ten (10) school days of notice that Student will return to RCB High, County Schools will arrange for the presentation of the mental health education concerning bipolar disorder and Student to RCB faculty and staff. This education presentation must be completed within thirty (30) school days of Student's return to RCB High; and
2. The county schools are directed to conduct an FBA upon Student's return to RCB High which should be completed within thirty (30) days of his return if the student attends at least twenty (20) full days of school. If the student returns to his chronic truancy pattern at RCB High, County Schools may delay the FBA completion until Student has attended thirty (30) full days of school after his return.

APPEAL RIGHTS

Any party who does not agree with this decision has the right to bring a civil action with respect to the matter that was the subject of this due process. The action may be brought in a West Virginia state court of competent jurisdiction within ninety (90) calendar days from the date of this decision or in a federal court without regard to the amount in dispute.

DATED: December 15, 2011



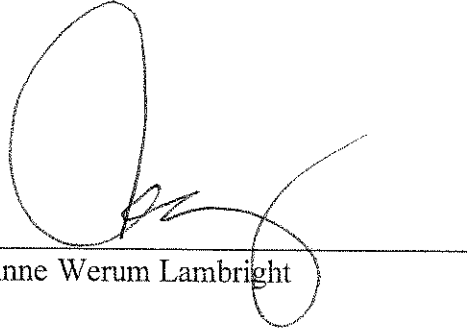
Anne Werum Lambright
Due Process Impartial Hearing Officer

Certificate: A true copy was sent by US Mail on December 15, 2011 to:

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