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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMUNITY CONSOLIDATED SCHOOL DISTRICT #93,	)	
Plaintiff,	)	
v.	)	No. 00 CV 1347
JOHN F., by his parents JAMES F. & MARY F., and ILLINOIS STATE BOARD OF EDUCATION,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff, Board of Education of Community Consolidated School District No. 93, County of DuPage ("the District"), filed a complaint under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., against defendants John F., a special education child, his parents, James F. and Mary F., and the Illinois State Board of Education.[1] The District appeals an Impartial Hearing Officer's decision requiring the District to reimburse Mary and James for the cost of private counseling John received during a homebound placement following a suspension from school for a disciplinary infraction. The District has filed a motion for summary judgment challenging the IHO's decision. John and his parents have filed a cross motion for summary judgment to affirm the decision. For the following reasons, this court DENIES the District's motion for summary judgment and GRANTS the parents' cross motion for summary judgment.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff School District provides special education to students enrolled in the public schools of District 93. Defendant John F. is a 15-year-old boy who attended Stratford Junior High School and was a special education student in District 93 for nine years. Defendants James F. and Mary F. are John's parents. This litigation arises out of John's suspension from school and subsequent homebound placement for the last 22 days of his eighth grade year.

John has a history of documented violent outbursts and aggressive and impulsive behavior at school. He was diagnosed at the age of four with Attention Deficit and Hyperactivity Disorder and Pervasive Development Disorder. Throughout his grammar and junior high school experiences, John was eligible for special education as a student with a behavior disorder. Despite his disorders, John was mainstreamed for all of his classes at Stratford with the exception of a special education study hall and earned nearly straight "A" grades. As a result of John's special education placement, the District created an Individualized Education Program ("IEP") team which regularly met and revised John's IEP, as required by the IDEA.

John had a strong dislike of school, which he documented in a journal he kept for English class in seventh grade. That journal contemplates the students revolting against the school, states that the school "should have been torn down 3 years ago," and that "school is jail." John also wrote a short story for that class about "Ryan," a child who is killed by another student and then comes back to take revenge on the school (the "Ryan" story). John received an "A" grade for the "Ryan" story. Also in the seventh grade, John designed a computer game entitled "101 Ways to Destroy the School." John's parents testified that the game was not modeled after Stratford, and that the project ended when John could not sell the game for commercial profit.

The last triennial evaluation of John prior to the events giving rise to this litigation was conducted in February and March of 1998. Contents of that evaluation included a psychological evaluation by the school psychologist and a social development study by the school social worker. The psychological report and the social development study state that many of John's issues center around strong dislike of school and difficulty with peer relationships. The reports relate John's hatred of school and desire to destroy it. John related feeling that forcing him to attend school was against his will and a violation of his rights. His dislike of school centered around it being unsafe and unsanitary. Among other things, he did not like walking in the halls and doing homework. The school psychologist concluded that "John may be challenged academically and socially due to high level of anxiety and low tolerance for frustration." To address those problems, the school psychologist recommended that counseling services continue to address John's self-esteem, coping skills, and social skills.

John's IEP was most recently revised on March 4, 1999 ("March 1999 IEP"). Mary participated in the March 1999 IEP annual review. John's social worker noted that John continued to find school a distressful and unsafe place and viewed school as indentured servitude or child labor. The school social worker reported that John had continued needs in the areas of peer relations, coping skills, and ability to express feelings, but that he appeared happier in school that year, smiled more, would greet staff members, and developed a relationship with another student. The social worker noted that John's self control had improved over the past two years, and that there had been no incidences of "agitated, disruptive, and non-compliant behaviors which were reported in previous years."

At the time of the 1999 annual review, John was receiving "A" grades, with the exception of a "B-" in physical education. His teachers reported excellent effort and academic progress, and some were recommending honors classes for high school. John was given and used early passing privileges to allow him to walk to his next class while the halls were empty and a special key lock on his locker instead of a combination lock. The IEP noted that John continued to have difficulty adapting to new situations, and would need continued assistance when adapting to his new high school routine within the much larger school setting.

The March 1999 IEP identified two of John's continued educational needs as maintaining self-control and improving coping skills when confronted with frustrating situations. The goals of the IEP included reducing stress, improving the ability to cope with frustrating situations, and expressing anger and frustration toward other students and the school in an appropriate constructive manner without threatening words. Out of school placement was not listed as an intervention for John's behaviors. Placement in a special education program for 113 minutes per week and direct social work services for 30 minutes per week were selected as the educational plan for the remainder of John's eighth grade year and for the following year in high school. A potential harmful effect of the social work was noted as "limited access with nondisabled peers." There was no concern that John may be prone to violence based on the "101 Ways to Destroy School" software, the "Ryan" story, or John's journal, noted anywhere in the March 1999 IEP.

The events giving rise to this litigation began on April 23, 1999, three days after the massacre at Columbine High School in Colorado. At approximately 12:30 p.m., John's English teacher told the assistant principal of Stratford (hereinafter "the principal") that an upset student had told her that John had approached the student and asked if the student would like to join a club dedicated to hating another student (the "I hate S____ club"). The principal then found John and questioned John and the other student about the incident in her office. The other student again explained that John had asked him to join the club, if "he thought Columbine was cool," and if he "knew anyone in the black market who could get guns." The student was shaken and upset. The principal called the student's mother to explain what had happened.

The principal, the school social worker, and the school liaison officer questioned John at various intervals throughout the day of April 23, 1999. John did not admit to making the statements or explain what he had meant by them. Instead, John responded to their questions regarding the incident by stating "why do you care?," "school is slavery," that the school was "ruining his life, causing depression," and that he wanted to die. However, John did not express any threat of violence against the school or any people during the April 23 interviews and allowed the liaison officer to go through his backpack.

Sometime before 2:45 p.m., the school social worker called defendant Mary F. and requested that she come pick John up. When she arrived, the principal explained to Mary what had happened, though the principal did not identify the other student involved in the incident. The principal explained that it was the school's policy to have John seen by a doctor to say that there was no risk of harm before he could return to school. Mary said that she would take him to a psychiatrist. The principal explained that John would be suspended out of school until a "relatedness MDC" ("Manifestation Determination Committee/Multi disciplinary Committee") could be held and a doctor cleared John with regard to his comments that he wanted to kill himself. The principal further explained that they would hold a relatedness MDC as soon as possible, and advised Mary to call as soon as John saw the doctor. The principal also gave Mary a two-

page document entitled "discipline report," which states that John was reported for "other" behavior described as "making/asking very inappropriate questions . . . [which] revolved around joining a 'hate S__ club,' types of weapons they would use to attack school, comment [sic] Colorado, and if he had a contact in the black market to purchase guns." The report further states that John had verbalized statements that caused the District to question whether he was at risk of harming himself or others. Finally, the report notes that the action taken in response to this behavior was to "suspend John out of school pending a discipline MDC, date to be determined."

After the discussion, Mary saw John for the first time and took him home. John was crying and withdrawn. Over the next two hours, John told Mary that he could not remember what he had said to the other boy. John explained that he needed someone to talk to because they had been discussing Columbine in class, and the boy he usually talked to was not there. His counselors had told John to talk about a current topic when he wants to talk to someone. Mary had John write letters of apology to the administration and the unknown student who had reported him. The letters were subsequently hand-delivered to the school administration. Mary, anxious to get John back in school, scheduled appointments with John's psychiatrist and therapist for Monday, April 26. Also that day, John's math teacher brought the previously described journal entries and the "Ryan" story to the principal's attention. The principal went through the journal and underlined passages out of concern that John was "thinking of acting on his feelings about school and the people in it." The passages included John's statement that he hated school and the bad effect he thinks it has on kids. They also refer to John's membership in an "Anti-School Republic" and an "Anti-Stress Club." The journal and the "Ryan" story contain no actual threats of harming the school or the people in it, however.

Mary went to the school on Monday, April 26, to pick up John's homework. At that time, the principal asked Mary to sign a waiver of the 10 day notice for a meeting which the principal told Mary was to discuss the "relatedness" of John's conduct to his disability. The principal prepared a notice dated April 26, 1999 which scheduled a conference for the following day, April 27. The notice described the only purpose of the meeting as "consider[ing] relatedness of disability to disciplinary code violations." Copies of John's psychiatrist's notes and report from the April 26 examinations were faxed to the District prior to the conference.

The scheduled MDC was actually held on April 28 at 3:00 p. m. It was attended by Mary, Mary's friend, the principal, the assistant superintendent for special education, a resource teacher, the school psychologist, and John's math teacher. The principal and superintendent facilitated, and the principal took notes. The notes state that the purpose of the meeting was to discuss "relatedness -- to look at whether the behavior disorder is why [John] made poor choices" and to "determine appropriate consequences." School district personnel expressed serious concerns that John might be dangerous to other students. At the conference, Mary was questioned about the game software John had developed in the seventh grade focused on destroying a school and about the family's leisure activities, including rocketry. Mary was made aware of John's journal entries for the first time, and the "Ryan" story and John's psychiatrist report were reviewed. The principal described the journal entries as appearing to "be stuck on the destruction of the school." The team also evaluated the reports of John's psychiatrist, who concluded that John was not "at risk at the present time toward himself or anyone else," but that "it is important that [John] take full responsibility for his statements."[2] Based on those observations, the psychiatrist advised that the school return John to school when it felt that he had been able to answer the school's questions to a satisfactory level. The school psychologist expressed "concerns" regarding John's psychiatrist's belief that John was not dangerous because she believed that John may have had access to guns or other dangerous items, based on her knowledge of the family's rocket -building and that John had thoughts about hurting the

school or people in it. The school social worker felt that it would be safe for John to come to school for counseling during his homebound placement, but did not express an opinion as to whether she believed John was a threat to other students.

The team reviewed John's March 1999 IEP, discussed if Stratford was therapeutic enough for John; the principal noted that "the school struggles with the ability to closely monitor John in a building of 1,100 students." The District determined that John could not return to Stratford because of his propensity for violence and the danger posed to other students. The team believed that an alternative placement would be more therapeutic setting for John. There was no discussion of additional supports or aids at Stratford for monitoring John, such as counseling, more resource time, or self-contained classrooms within the district. The team discussed alternative sites for John, but none of those sites were available at the time. Additionally, the team found that no alternative placement would be tenable because John would be placed at home for the remaining 22 days of school and further evaluation had to take place. According to Mary, it was made clear that John would not be allowed to return to Stratford and no other currently available placement options were tendered or discussed. With no other choice, Mary ultimately suggested and acceded to an interim homebound placement for the remaining 22 days until graduation because she wanted John to be able to complete eighth grade and graduate on time without attending summer school. No one present raised any concerns as to the possible harmful effects of a homebound placement. The superintendent advised Mary that the District could provide 7-10 hours of tutoring per week while the District worked with the high school district to find an "alternative setting for the 99-00 school year and/or the possibility of placement this year."

The principal recorded the results of the meeting on a form entitled "Team Meeting Regarding A Behavioral Issue." That form concluded that John's behavioral infraction was related to his disability. The form stated the following as "appropriate consequences for the child":

> (1) Be placed on homebound tutoring up to 10 hours weekly
> (2) Alternative placements will be explored
> (3) Social work therapy will be provided by school social worker for 30 minutes per week at their home, or at Stratford if John is comfortable
> (4) Out of school suspension for April 26, April 27, and April 28
> (5) Any violation of civil law would be considered by the police department

The IEP goals, related services, and the behavior plan were not changed. According to the principal, the behavior plan was not changed because "it was decided that he was going on homebound tutoring so there was nothing they could do." No new IEP was developed.

The principal also signed a notice to John's parents dated April 27, 1999. 3 That notice states that a "discipline MDC" had been held on April 28, 1999. The form advises the parents that the disciplinary infraction of April 23, 1999 had resulted in the following disciplinary actions:

> FOR VIOLATIONS RELATED TO WEAPONS, ILLEGAL DRUGS OR CONTROLLED SUBSTANCES
>
> Placement in an Interim Alternative Educational Setting for 45 Days or Less The interim alternative educational setting placement for 45 days will begin on 4/29/99 and end on 6/30/99 to be provided in the following setting:

> John will be on homebound tutoring for up to 10 hours weekly as appropriate as alternative placements are explored.

The District now admits that the reference to weapons and drugs was an error and that the principal was "trying to indicate homebound."

Mary signed an acknowledgment that she received the District's Explanation of Procedural Safeguards in writing on April 28, 1999. The rights were not explained to her, according to the school superintendent for special education, because John's parents had been involved in the special education system for many years and Mary declined her invitation to "walk her through it." Mary read the procedures provided by the District, but she understood it to mean that you were to ask for a due process hearing if you objected to a finding that the behavior was not related to the disability, and the District had found that John's conduct was related to his disability, so she did not think the rest applied to them. Neither Mary F. nor James F., John's father, were advised verbally or in writing at any time before or at the time of the "disciplinary" or "relatedness" MDC of April 28, 1999 what specific part of the school's policy or discipline code John allegedly violated when he voiced the alleged "inappropriate questions" to the other unidentified student on April 23, 1999.

On April 29, 1999, Mary hand-delivered a letter to the principal which was prepared by James and Mary asking that the suspension be lifted immediately because a terrible mistake had been made. The letter provided John's parents' explanation of why John had done the things he did on April 23, 1999. The letter expressed concern that John's suspension would be a traumatic experience, and wished that the suspension would be lifted immediately in order to minimize damage to John. The District did not respond by telephone, in writing, or otherwise.

On May 9, 1999, Mary and James received a letter from the principal dated May 5, 1999 informing them that "John has been involved in a discipline problem at school." The letter detailed the events of April 23, 1999, and summarized the April 28 MDC's team consensus that John would be placed in interim alternative educational setting, where he would be homebound tutored for up to 10 hours weekly, and that social work would be provided by the school social worker for 30 minutes per week. The letter noted that during suspension, John would not be allowed to participate in any school-sponsored events, including dances, sports, and skating parties. In addition, "due to the seriousness of John's behavior," he would not be allowed to participate in any eighth grade graduation festivities, including the dance. The letter also purported to inform John's parents of their rights:

> According to Illinois State Law, Senate Bill 694, I am required to outline all pertinent facts in a letter that is sent to the parents by certified mail. Among the facts to be reported are the reasons for the suspension, the rules violated by the conduct, and a statement explaining your right to request a review hearing to discuss the facts with a hearing officer appointed by the Board of School District 93. The hearing officer is required to provide the school board with a written summary of the hearing.

The letter included a request form to be completed by the parents by which they could request the type of hearing explained in the letter. Despite the quoted language, the letter did not inform the parents of what rules John had allegedly violated.

Mary and James completed and returned the hearing request form on May 9, 1999, along with a letter to the principal in which Mary and James again objected to the manner in which the disciplinary MDC had

been conducted and John's suspension. They also requested that the District advise them of the rules John had allegedly violated. James was not familiar with the IDEA, and could not find anything called Senate Bill 694. In writing the letter, James intended to bring about a hearing regarding the April 28 MDC and to get a final determination of John's placement at Stratford, believing that the District had ignored their concerns and John's psychiatrist's opinion at the MDC.

In response to the parents' request for a hearing, the principal contacted Virginia Tabbert, the assistant superintendent of special services in another school district, to act as hearing officer. A hearing was held on May 17, 1999. The principal, school superintendent for special education, Mary, and James were all present. Mary and James presented their questions and concerns, including questioning what rules were violated, why John was suspended until the end of the year for making inappropriate questions, and the effect the suspension was having on John.

The school considered the hearing to be a non-IDEA suspension hearing. Mary and James, on the other hand, believed that the hearing was the correct forum to present their case against suspension under the IDEA. Tabbert also understood that she was being brought in by the District for a non-IDEA dispute. Tabbert is not a special education hearing officer appointed by the State Board of Education. She thought that the hearing was to discuss a suspension and that she was to help mediate a disagreement about whether John could return to school.

Tabbert later testified that the issue "got a little muddy" when she asked the District Superintendent why they were not doing a due process hearing. Tabbert testified that when the group began talking about placement, they were talking about IDEA, and, in retrospect, feels that she should have said "this is an IDEA issue," and that she had no business there. Tabbert did not review the District's discipline policy, nor articulate what rule was violated, though she did understand John's comment to be a threat to the other student involved.[4] Mary and James had not been informed in writing of the nature of the alleged rule violation. Nevertheless, Tabbert prepared a memo to the District that evening, stating that it was "her professional opinion that the Interim Alternative Placement should remain in effect," and encouraged the parties to come up with a plan to allow John to attend graduation.[5] Mary and James were never informed that Tabbert was not an authorized hearing officer under the IDEA. Mary and James did not properly request a due process hearing under the IDEA until July 13, 1999.

During John's homebound placement, he was provided with a total of nine and one-half hours of tutoring during the 22-day period. The school tutor was available for up to five hours per week. She brought John worksheets and tests from his teachers. She did not provide instruction and could not help him with his algebra. She had trouble in social studies, and the worksheets were "sketchy." She brought work in only math, language, social studies, and science. She was not involved in physical education, art, music, tech, or health. John's grades remained well above average during the placement, but his algebra grade fell from an "A-" to a "B+" and his science grade fell from an "A+" to a "B." His grades remained the same in health, music, art, tech, and physical education, even though he received no tutoring on those subjects during his homebound placement.

The school social worker also visited John three times for one-half hour at a time during the 22-day placement. She did not come during the last week. John and the social worker discussed the events which led to his suspension extensively. John was very sad and wanted to return to school. He made no progress in the counseling goal of improved peer interactions or the ability to share feelings, and regressed in the area of coping skills. John received no other academic, social, or psychological assistance from the

District during those 22 days. After his suspension, John was upset, depressed, withdrawn, and afraid that he had lost all of his friends.

John's parents paid for and obtained private counseling for John during the homebound placement to supplement the school services. In therapy, John and the therapist worked on transitioning into high school, peer relationships, and appropriate conversations. John had been visiting a therapist and psychiatrist independent of his IEP and before the events of April, 1999. Ordinarily, John would have had only one counseling visit per month, and two to three visits total over the summer months. Mary and James spent an additional $1,310 for John's therapy during the homebound placement. John had not received any therapeutic services from the school before the homebound placement, and the IEP team at the April MDC did not determine that he needed any "therapeutic services" thereafter.

At the District's request, Mary and James took John to see an independent psychiatrist, Dr. Heredia, on July 8 and July 14, 1999. Dr. Heredia spent one hour talking to Mary and James, and 30 minutes with John. He also considered all of John's past records, including psychological test s done in preparation for his 1998 IEP. Dr. Heredia prepared a report which summarized his conclusions regarding John's condition. He opined that John had developed some "maladaptive methods of dealing with others," but that he was not experiencing psychosis. The doctor did, however, find that John's tendency toward poor judgment warranted grave concern. In regard to the April incident of questioning the other student about Columbine and weapons, he found that "it does appear that [John] does not really have the means to carry out any such harm." He concluded that the incident was an example of the type of poor judgment John had the propensity for, and that it was relevant to a discussion of the best educational environment for John. Dr. Heredia stated that John's difficulties with social interactions should be addressed in individual therapy, and that his "social interactions are relevant to his school environment." He recommended that John continue individual therapy and individual supportive services at school, such as meeting with a social worker, and that John's academic needs be addressed in an alternative placement that would better address John's emotional needs.

HEARING OFFICER ORDER AND DECISION

A proper IDEA Due Process Hearing was finally held over three days between October 26 and November 2, 1999. The Independent hearing Officer ("IHO") heard three days of testimony and considered the exhibits discussed above. The IHO rendered her decision on November 9, 1999, finding in favor of John's parents and awarding $1,310 to reimburse them for the counseling services "related to John's education" during his homebound placement.

The IHO reasoned that John had not been deprived of a Free Appropriate Public Education ("FAPE") during the 1998-99 school year due to the failure of the District to develop and implement a behavior modification plan based on John's needs. The District did have such a plan in place throughout the school year targeting two of the behaviors the District was attempting to modify, and there was no evidence that anyone disputed the plan at the time of the IEP annual review on March 3, 1999.

However, the IHO found that the District had failed to prove that it had provided a free, appropriate public education in the least restrictive environment after removing John from school on April 23, 1999, and providing him with only nine and one-half hours of tutoring in the form of the tutor bringing worksheets and tests and three visits from the school social worker.

The IHO reasoned that the following procedural errors were sufficient to constitute a deprivation of a FAPE under the law: (1) Mary and James were entitled to notice that the District would consider a change in John's placement at the April "Relatedness" or "Disciplinary" MDC so that they could prepare for and effectively participate in that meeting; (2) once the District determined that John's infraction was related to his disability, it should have revised the IEP and behavior plan accordingly; (3) if the District determined that it could not meet John's needs in his current placement, it should have considered a range of available placement options; and (4) homebound tutoring was not a legal placement under the law and Mary's "agreement" to it was not truly an agreement because she was presented with no options, such that there was no "consensus" on a legal placement decision.

The IHO further found that the District had no right to remove John as a disciplinary consequence of offenses involving drugs and weapons. The IHO found that the procedure the District followed after Mary and James objected to John's placement on April 29, 1999 was confusing, and that the District failed to clearly explain the parents' procedural rights to a special education due process hearing. Finally, the IHO found that the District had failed to show that either the school tutor or school social worker worked on the goals and objectives of John's IEP during his homebound placement.

STANDARD OF REVIEW

Although the parties have filed motions for summary judgment, the standard of review under which this court considers the District's challenge differs from that governing the typical review of summary judgment.[6] The IDEA dictates that the district court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). When neither party has requested that the district court hear additional evidence, as was the situation this case, "[t]he motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record." *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997). Despite being termed summary judgment, the district court's decision is based on the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(B)(iii); *Heather S.*, 125 F.3d at 1052. The District, as the party challenging the outcome of the state administrative decision, bears the burden of proof. *Board of Educ. of Community Consol. Sch. Dist. No. 21 v. Illinois State Bd. of Educ.*, 938 F.2d 712, 716 (7th Cir. 1991).

In reviewing the administrative record, the district court is required to give "due weight" to the results of the administrative proceedings and not "substitute [its] own notions of sound educational policy for those of the school authorities," whose decision it is reviewing. *Board of Educ. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 3051 (1982). "[T]he 'due weight' which the court must give to the hearings below is not to the testimony of witnesses or to the evidence--both of which the court must independently evaluate--but to the decisions of the hearing officers." *Heather S.*, 125 F.3d at 1053. Due weight implies "some sort of deference" to the agency's decision, and thus to the decisions of the hearing officers. Id. Perhaps the best way to conceptualize the court's task is to view the motion as the court would a bench trial on the papers. *Tripp v. May*, 189 F.2d 198, 200 (7th Cir. 1951) (holding that it is proper for trial court to decide factual issues and to enter judgment when facts have been fully developed by papers on cross motions for summary judgment).

ANALYSIS

To receive financial assistance under the IDEA, states must assure that "a free appropriate public education ["FAPE"] will be available for all children with disabilities." 20 U.S.C. § 1412(a)(1)(A). Courts engage in a two-step inquiry in suits brought under the IDEA. First, the court asks whether the state has complied with the procedures set forth in the Act. Second, the court asks whether the individualized educational program ("IEP") developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits. If the state has met both of these requirements, then it has complied with the obligations imposed by Congress. *Rowley*, 458 U.S. at 206-07, 102 S.Ct. at 3051. The Supreme Court has warned that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." *Id*. at 207, 102 S.Ct. at 3051. The educational methods are left up to the states; they are obligated only to comply with the requirements of the IDEA which requires certain procedures set out in the Act, and that an IEP be developed for each disabled student "that is reasonably calculated to enable the child to receive educational benefits." *Board of Educ. of Murphysboro v. Illinois State Bd. of Educ*., 41 F.3d 1162, 1166 (7th Cir. 1994). "Once the school district has met these two requirements, the courts cannot require more." *Rowley*, 458 U.S. at 206-07, 102 S.Ct. at 3051.

Here, the District contends that the IHO erred in the following manners: (1) determining that the procedural violations were more than de minimus because Mary was given notice of John's April MDC and consented to the homebound placement; (2) finding that the requirements of the March 1999 IEP and the IDEA were not met by the homebound tutoring and counseling; (3) awarding damages in the form of compensation for additional counseling which was not based upon any of the alleged procedural violations and was not necessary for educational purposes; (4) considering John's initial three-day suspension hearing in the context of a special education due process hearing; and (5) pre-judging the case, thereby denying the District of a fair and impartial hearing.

A. Procedural Violations

This court's first inquiry under Rowley is whether the District has complied with IDEA's prescribed procedures. See *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051. "Procedural flaws do not automatically require a finding of a denial of a [free appropriate public education]. However, procedural inadequacies that result in the loss of educational opportunity . . . clearly result in the denial of a [free appropriate public education]." *Heather S.*, 125 F.3d at 1059 (citing *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992)). Parents are entitled to reimbursement for the cost of a unilateral placement when the school district has violated the IDEA by failing to follow the procedures set forth in the Act, which in turn results in a denial of a FAPE. *Murphysboro*, 41 F.3d.20 at 1168.

The IHO found that the "District's procedural errors in this case are of such nature and severity that they alone would constitute a deprivation of FAPE under the *Rowley* analysis." Those errors included failure to give Mary and James notice that the District was considering a change of John's placement, failing to give proper notice of the content of the April 1999 MDC, and failing to revise John's IEP and consider available options based upon the need for a changed placement. The District argues that any procedural violations did not compromise John's right to an appropriate education because John's parents knew of and approved the change in placement (and because the placement did not result in the loss of an educational benefit, a point this court addresses in Part B of this opinion). John and his parents respond that the violations did compromise John's right to a FAPE by limiting their ability to participate meaningfully in the process and that Mary and James did not actually consent to the change in placement.

This court agrees with the IHO and the parents that the District 's numerous procedural errors, alone and in the aggregate, resulted in the denial of John's right to a FAPE.

1. Improper Notice of IDEA Actions

As the IHO found, the District failed to provide James and Mary with proper notice of the IDEA actions it was considering. The District did not provide the parents notice that it was considering a change in John's placement. The IDEA and its regulations require that, prior to changing the placement of a child or a provision of FAPE, proper notice of the action be given to the parents. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 503(a)(1)(i). The prescribed "prior notice" must contain seven distinct provisions, including a description of the action, the rationale for the action, other options considered, and a description of the reasons underlying the decision. 20 U.S.C. §.21 1415(c); 34 C.F.R. § 300.503(b).

The District did not provide such any notice prior to placing John on homebound, but justifies that action by arguing that it had not decided to change John's placement until during the April MDC, when Mary was present. Indeed, the sole stated purpose of that MDC was to discuss whether John's conduct was related to his disability. However, the manner in which the April 1999 MDC was carried out makes it quite clear that the District was at least considering changing John's placement prior to the conference. First, the regulation provides for "manifestation determination" meetings (the type of meeting called for by the District on April 26) in the following circumstances: "regarding behavior described in § § 300.520(a)(2) [concerning weapons and drugs violations] or 500.521 [concerning expedited due process hearings to remove children who are "substantially likely to result in injury to the child or others"], or involving a removal that constitutes a change of placement under § 300.519 [removal for 10 days or more] for a child with a disability who has engaged in other behavior that violated any rule or code of conduct . . . that applies to all children." 34 C.F.R. § 300.523(a).

The District has conceded that its reference to weapons and drug offences in the meeting notice was an error and neither the District nor the parents ever requested an expedited due process hearing. As such, the District's only basis for calling a manifestation review meeting was that it was contemplating removing John for more than 10 days. In addition, John had already been suspended and the IEP team never discussed in-school services which would have allowed John to return to school, such as additional counseling or monitoring. In light of these facts, it seems quite clear that the District had decided to keep John out of Stratford, and that the sole purpose of the MDC was to accomplish that goal.

Because the District was contemplating a change in John's placement, it was required to provide Mary and James with notice of that anticipated change. Instead, the District provided notice only of the April 1999 MDC, which stated that the purpose of the meeting was to make a manifestation ("relatedness") determination -- to determine whether John's conduct was related to his disability. The notice did not mention any additional suspensions or that a change in placement was being considered. Because the District failed to give Mary and James proper notice of what would be discussed at the MDC, they were deprived of any meaningful ability to participate in the conference with regard to the issue of changing John's placement and what services should be provided. Had Mary known that the issue of John's placement was going to be discussed at the April MDC, she might have garnered evidence to support his continued placement in school or demanded that John be provided with adequate tutoring and social services. Had Mary been aware of her rights with regard to a change of placement, she likely would have objected to, rather than suggest, the homebound placement.

2. Content of the MDC

The District committed numerous other procedural errors not mentioned by the IHO. First, upon determining that John's behavior was related to his disability, the District was bound to follow certain procedures. Only if the manifestation review concludes that the child's behavior was not a manifestation of the child's disability may a district employ disciplinary procedures applicable to children without disabilities. 34 C.F.R. § 300.524(a).

Having found that John's behavior was related to his disability, the District was bound to address that behavior within the framework of the IDEA. Once the District determined at the MDC that John's conduct was related to his disability, it also thereby concluded that John's present placement was deficient by not addressing the behavior. 34 C.F.R. § 300.523(c)(2)(i) (in order to find that conduct was not a manifestation of a disability, the IEP team must determine that the child's IEP and placement were appropriate and the services provided were consistent with the IEP). As such, the District was required under the IDEA and its regulations to "take immediate steps to remedy those deficiencies." 34 C.F.R. § 300.523(f). The regulations further provide that if the IEP team believes that modifications of the IEP are needed, they shall meet to modify the plan and its implementation to the extent necessary. 34 C.F.R. § 300.520(c)(1). Here, the team clearly concluded that a change in a provision of John's FAPE was required, but did not modify his IEP, discuss ways to address his behavioral problems, or consider ways in which in-school devices and services could address his behavior problems. Instead, the District chose to remove John from school with limited support for 22 days without considering realistic alternatives.

It appears that the District attempted to remove John from Stratford via "an appropriate interim alternative educational setting . . . for not more than 45 days." The words "interim placement" appear throughout the District 's notices, particularly in the notice provided at the end of the MDC which stated that John was facing an interim educational setting for weapons and drug violations, and the principal's May 9, 1999 letter informing Mary and James that John had been placed in "an interim alternative educational setting." However, a 45-day interim placement is only authorized for offences involving weapons and drugs. 34 C.F.R. § 300.520(a)(2)(i). The District itself acknowledged that its reference to weapons/drugs violations regarding the homebound placement was an error. As such, the District had no basis under the law to impose an "interim" change of placement which lasted more than 10 days. In addition, even if the District were authorized to place John in an interim alternative setting, such a setting must ensure that the child is able to continue to receive the services and modifications, including those described in the IEP, that will enable the child to meet the goals of the IEP and the placement must address the behavior which led to the placement. 34 C.F.R. § 300.522(b). John's "interim placement" did neither of those things, as this court explains later in this opinion.

3. Proper Procedure: Expedited Due Process Hearing

The District was not without the ability to legally place John in an interim homebound educational setting if it was truly concerned that John posed a threat to himself or others. The District could and should have requested an expedited due process hearing under 20 U.S.C. § 1415(k) for the violation of any other (not drug or weapon related) school rule by a child it considered to pose a threat to himself or others. The statute provides that a school may request an expedited hearing if school personnel maintain that it is dangerous for the child to be in the current placement. 20 U.S.C. § 1415(k)(7)(C)(i). Expedited due process hearings ensure that an independent hearing officer (not only the school district) determines whether the child is "substantially likely to result in injury to the child or others" before he or she is

removed from school on that basis. See 20 U.S.C. § 1415(k)(7)(C)(i), § 1415(k)(2); 34 C.F.R. 300.521(e) ("substantial evidence means "beyond a preponderance of the evidence"). Had the District followed the proper procedures, an independent hearing officer would have been required by the statute to consider the appropriateness of John's current placement, whether the District had made reasonable efforts to minimize the risk of harm in John's current placement, and whether an interim homebound placement would allow John to continue to participate in the general curriculum, to continue receiving the services and modifications, including those described in his IEP (which would allow him to meet the goals set out in the IEP), and to receive services and modifications designed to address the dangerous or threatening behavior. 20 U.S.C. § 1415(k)(2), §1415(k)(3)(B); 34 C.F.R. § 300.521. Because the District did not do so, this court cannot fairly judge whether John was a threat and whether the placement was the least restrictive environment available at the time.

Finally, the District further committed procedural violations by confusing Mary and James and by mis-stating their rights under the IDEA, which ultimately resulted in the delay of the due process hearing. The principal's letter of May 5, 1999, stated the conclusion of the MDC and informed the parents of their right to "request a review" of the decision. That letter led James to believe that returning the request for a hearing was the proper vehicle by which to challenge John's special education homebound placement. Any reasonable parent would have understood the letter in the same way. The letter refers to the "MDC" and the "interim placement," concepts only relevant to IDEA students. Furthermore, the regulations provide that parents may request an expedited hearing if they disagree with a decision regarding a child's placement. 34 C.F.R. § 300.525(a)(1).

Given the language of the principal's letter, it was natural for Mary and James to assume that by requesting a "review hearing," they were requesting a special education expedited due process hearing under the regulations, the proper forum to voice their disagreement with John's placement. If a § 300.525 hearing had been provided to hear the parents' appeal, a proper independent hearing officer (see 34 C.F.R. § 300.528(b)(2)) would have been required to determine whether the District had met the burdens applicable to expedited due process hearings for a child believed to be dangerous. 34 C.F.R. § 300.525. Instead, the District provided a non-IDEA suspension hearing over which even the hearing officer later conceded she had no authority. The District never informed Mary and James that the hearing officer was not a proper independent hearing officer under the IDEA. Nor did the District ever provide Mary and James with a form to properly request a special education due process hearing. As a result, Mary and James did not request the due process hearing to which they were statutorily entitled until well after the homebound placement had ended, thereby forfeiting any possibility that a proper independent hearing officer would evaluate the case and recognize the District's errors before the end of John's school year, by which time the damage had been done.

It also bears noting that the District never informed Mary and James of the school disciplinary rule John was alleged to have violated, despite acknowledging their responsibility to do so. Ms. Tabbert, the non-special education suspension hearing officer, did not mention what rule John had violated in upholding his suspension, and believed that John's comment had threatened the other student. Even in this litigation, the District still has not cited a single school rule it believes John violated.

Instead of following the proper procedure for removing a child believed to be dangerous from the school, the District chose to provide John only a "relatedness/manifestation" MDC, and then removed him from school after presenting Mary with no options other than removal. None of the procedural and substantive guarantees of expedited due process hearings were provided at John's ad hoc "relatedness" MDC. In addition providing the parents improper notice of the meeting, the District went on to confuse Mary and

James of their rights under the IDEA and to delay the due process hearing. The result was a combination of a disciplinary action and special education procedures with limited attention to special education rights, which was far more focused on getting John out of school than on protecting his rights under the IDEA.

4. Parental Consent to Change of Placement

Contrary to the District's contention, Mary and James' participation in and approval of the decision to place John in homebound tutoring did not result in "undoing" the procedural violations. When parents participate in and approve of decisions regarding changes in placement, the failure to adhere to technical procedural requirements in the development and revision of IEP placement will not amount to an IDEA violation. *Doe v. Board of Education*, 115 F.3d 1273, 1282 n.6 (7th Cir. 1997). However, that rule presumes meaningful participation and knowing and voluntary parental approval. Here, as the IHO found, Mary agreed to the homebound tutoring only because the District presented no other way in which John could graduate from eighth grade on schedule. The District had provided Mary improper notice of the purpose the meeting so as to render her unprepared to discuss John's placement, and did not consider or offer any other available placements. As such, Mary was forced into agreeing to John's homebound placement, and expressed her opposition to it in writing, along with James, the next day. It cannot be said that Mary agreed to the placement such that the District's procedural violations did not result in the denial of John's right to a FAPE.

B. Substantive Requirements of the IDEA

As noted above, only those procedural violations which result in the loss of an educational opportunity will entitle parents to reimbursement for the cost of a unilateral alternative placement. *Heather S. v. Wisconsin*, 125 F.3d 1045, 1059 (7th Cir. 1997). As such, Mary and James are only entitled to reimbursement for John's additional counseling if the procedural errors outlined above resulted in the denial of his right to a free, appropriate education.

In order to be entitled to assistance under the IDEA, states must ensure that a "free appropriate education is available to all children with disabilities living in that state between the ages of 3 and 21, including students who have been suspended or expelled from school." 20 U.S.C. §1412(a)(1)(A).

The statute defines "free appropriate education" as "special education and related services that -- (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program ["IEP"] required under section 1414(d) of this title." 20 U.S.C. §1401(8).

The Supreme Court has elaborated on this definition, finding that "[I]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Board of Educ. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 3048 (1982). The statutory definition of "free appropriate public education," in addition to requiring that states provide each child with "specially designed instruction," also requires the provision of "related services," § 1410(8), "as may be required to assist a handicapped child to benefit from special education. " § 1401(22). Therefore, the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. *Rowley*, 458 U.S. at 20, 102 S. Ct. at 3048.

The issue in considering an IDEA claim is whether the child's placement was appropriate, not whether another placement would also be appropriate, or even better. *Heather S.*, 125 F.3d at 1057. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education or the placement the parents prefer. *Id*. (internal citations omitted). Courts are to defer to trained educators on issues of educational policy. *Rowley*, 458 U.S. at 207, 102 S. Ct. at 3051.

1. The IEP

Educators are to tailor the FAPE required by the Act to the unique needs of the disabled child through an "individualized educational program" ("IEP"). *Rowley*, 458 U.S. at 181, 102 S.Ct. at 3038. The IEP is the "primary vehicle" of the IDEA's implementation. *Honig v. Doe*, 484 U.S. 305,29 311, 108 S.Ct. 592, 597 (1988). The IEP, mandated for each disabled child, is an educational plan developed specifically for the child by the local school district, the child's teachers, the parents or guardians, and, when appropriate, the child. 20 U.S.C. § 1414(d). "[T]he IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Honig*, 484 U.S. at 311, 108 S.Ct. at 598. The IEP must be annually reviewed and revised when necessary. 20 U.S.C. § 1414(d)(4)(i). The IEP is the "centerpiece" of the IDEA, and "Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessment of its effectiveness." *Honig*, 484 U.S. at 311, 108 S.Ct. at 598.

Under the regulations, school districts must provide special education and related services to a child with a disability in accordance with the child's IEP and make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP. 34 C.F.R. § 300.350(a). The Act does not require that school district s be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or objectives, however. 34 C.F.R. § 300.350(b).

Here, the District argues that any procedural errors leading to John's 22-day home placement did not have the effect of undermining a provision of his IEP or depriving him of a FAPE and that the placement was the least restrictive environment ("LRE") possible under the circumstances. The District reasons that the placement provided John with "some educational benefit" because his grades surpassed those of other non-disabled students during the period, and the school social worker visited him three times to discuss the April incident. The District argues that the IHO erred by focusing excessively on the social services (or lack thereof) provided to John and ignoring his academic performance. Finally, the District argues that the social counseling was adequate in any event because the District was "working on the IEP goals and objectives," and that the District does not need to prove that those objectives were actually obtained.

This court cannot accept the District's view of the facts or the law applicable to this case and finds that the District's procedural errors resulted in the denial of an educational benefit to John. First, while evidence that a child is advancing from grade to grade and achieving passing grades is an "important factor in determining educational benefit," *Rowley*, 458 U.S. at 207, 102 S. Ct. 3049, that presumption only applies went the child is mainstreamed. See *id*. at 202-03, 102 S. Ct. at 3049. ("When that "mainstreaming" preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child . . . The grading and advancement system thus constitutes an important factor in determining educational benefit."). Moreover, the fact that a child is advancing from grade to grade in a regular public school

system does not automatically lead to the result that the child is receiving a "free appropriate public education." See *id*. at 203, 102 S. Ct. at 3049, n.25.

This court finds the District's suggestion that the fact that a child's grades were well above average ipso facto means that the child was receiving an appropriate education, as applied to a student who has always received a near-"straight A" grades and whose grades actually fell during the time of the placement in question, to be ludicrous. As is made abundantly clear in the statute, its legislative history, and the case law interpreting it, the IDEA is concerned with ensuring that individual children receive appropriate educations, "specifically designed" to their needs. While satisfactory grades may very well be an indication that one child is receiving an adequate education, those same grades may be an indication that something is wrong wit h another child's program, or an indication of nothing at all. Here, satisfactory grades do not show that John was receiving an academic benefit. First, John was not mainstreamed during the challenged placement, such that the presumption that good grades reflect an appropriate education does not apply. Second, his grades in fact fell during the homebound placement, though they did remain above average. Third, some of John's grades remained the same despite the fact that he received no instruction in those subjects for the last month of school. It is difficult for this court to conclude that a child could obtain an educational benefit over 22 days in any class in which he received no instruction, even if his report card states that he received an "A" grade.

More importantly, John's most recent IEP was not concerned with improving or even maintaining his grades. In fact, the IEP states that "John's study skills are excellent." Instead, the listed needs were to "maintain self-control," "improve interrelationships with peers," and improve on "expressing feelings." The listed goals are to "improve peer relationships" and to "express anger or frustration toward peers or school policies in an appropriate, constructive manner without threatening words." While 9.5 hours of tutoring over a 22 day period consisting of bringing John worksheets and tests with no instruction may have been better than no tutoring at all, this court must conclude that the so-called homebound tutoring program was not "specifically designed to meet [John's] unique needs," nor "supported by such services as [we]re necessary to permit [John] to benefit from the instruction." See *Rowley*, 458 U.S. at 188, 102 S. Ct. at 3042.

Rowley does not mean that any benefit, even a de minimus one, is sufficient. *Board of Educ. Dist. No . 200 v. Kelly E*., 21 F.Supp. 2d 862, 876 (N.D. Ill. 1998) (citing *M.C. v. Central Regional Sch. Dist*., 81 F.3d 389, 393.[7] This case is one of two cases which the District cited without indicating that the judgment had been vacated, the other being *Board of Educ. of Downers Grove v. Steven L*., 898 F.Supp. 1252 (N.D. Ill. 1995), vacated by 89 F.3d 464 (7th Cir. 1996). Though in each case the basis for the vacation of the judgment does not concern the proposition for which the District cited the case, this court suggests that the District be more careful in the future in ensuring that the cases it cites as authority are properly and completely cited. 32 (3d Cir. 1996), judgment against state vacated on other grounds, 207 F.3d 931(7th Cir. 2000).[7]

The homebound placement also failed to address John's social and emotional needs. As noted, the IEP listed maintaining self-control, improving coping skills, improving peer relationships, and expressing feelings as "educational needs." Similarly, improving peer relationships and expressing anger in an appropriate manner are listed as "special education goals." The April 1999 incident clearly indicated that John was having difficulty meeting those goals. While the school social worker addressed the April incident with John during the homebound placement, she did not specifically address those goals. Moreover, she met with John only three times for approximately 30 minutes each time over the 22-day period during which John was understandably depressed and confused. Given that John had no

opportunity to practice interacting with peers and to work on his communication skills because he was not allowed to attend school, ninety minutes of counseling was not sufficient to be considered "a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP." See 34 C.F.R. § 300.350(a).

In short, there is no question that the homebound program was not specifically designed to meet John's unique needs, as required by Rowley. There was no discussion at the April 1999 MDC of how the homebound placement would meet John's needs. Rather, the homebound placement's sole purpose was to get John out of Stratford and allow him to graduate on time. Even if the program of seven to ten hours per week of tutoring was designed to meet John's educational needs, the program actually provided was insufficient to allow John to benefit from them, thus failing the *Rowley* test for a FAPE. See *Rowley*, 458 U.S. at 201, 102 S. Ct. at 3047. First, only nine and one-half hours of tutoring over 3 weeks was actually provided (about three hours per week), and the parents testified to the poor quality of that tutoring. As for social needs, the school social worker herself found that John made no progress on peer interactions or the ability to share feelings during the homebound placement, and that he regressed in the area of coping skills. Moreover, an independent psychiatrist, Dr. Heredia, opined after the homebound placement was completed in July 1999, that John needed individual and family therapy to meet his educational needs.

2. Least Restrictive Environment

In addition to providing no greater than a *de minimus* benefit, John's homebound placement was not the least restrictive environment ("LRE") for John available to the District. The regulations promulgated under IDEA state that inherent in a free appropriate education is the policy of providing that education in the least restrictive environment. 34 C.F.R. §§ 300.550-300.556. The IDEA states a specific and general preference for mainstreaming special needs students whenever possible. 20 U.S.C. § 1412(5)(A); *Board of Educ. of Murphysboro v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1168 (7th Cir. 1994). However, mainstreaming was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums. See *id*. As such, mainstreaming is not required in every case. See *id*.

The District argues that, given John's propensity for threats and violence, the short homebound placement offered John a FAPE in the least restrictive environment possible. The District believes that keeping John at Stratford was "not feasible" and that monitoring him would be "inordinately difficult."

While the District argues that it harbored serious concerns that John was a threat to himself and others at the school, the evidence of that dangerousness was far from clear. Many of the materials the District relied upon in concluding that John was a threat, including the "Ryan" story and journal entries, were available to school personnel for more than a year before the April 1999 incident, but there is no indication that the school personnel ever viewed them as cause for concern, and John received an "A" grade for the "Ryan" story. Moreover, the materials were available to the IEP "team" at the time of John's 1998 triennial evaluation, but there is no mention in either the 1998 or the 1999 IEP of a concern that John posed a threat of violence to himself or others. The school social worker noted the journal entries and short story with regard to John's dislike of school and problems with peer relations and communication, but did not note any concern for a propensity for violence. The school social worker had also noted in March 1999 that John's self control and disruptive behavior had improved. Even so, the District relied upon the same materials less than two months after John's most recent IEP revision to conclude, with little investigation, that John posed a threat to the school.

The District may have been correct in their assessment that John was a threat to other students and school personnel, but the proper procedure to determine whether John was dangerous to himself or others, as noted above, would have been to request an expedited due process hearing. That type of hearing would have given an independent hearing officer the chance to determine whether John was "substantially likely to result in injury to the child or others" and to consider the appropriateness of John's current placement. 20 U.S.C. § 1415(k)(2). Because the District did not follow the statutorily prescribed process, there was never a fair opportunity to flesh out the facts concerning John's possible propensity for violence before he was removed from the school for the 22 days of his grade school education.

However, even if this court were to accept that John was dangerous to himself or others, the homebound placement provided to John still was not the LRE. As stated above, this court finds that nine and-one-half hours of tutoring and three one-half hour sessions of social work provided John with virtually no educational benefit. Moreover, although John was not removed pursuant to an expedited due process hearing for students who are believed to be a danger to themselves or others, the statute providing for such hearings makes clear that interim placements for dangerous children are to provide the services and modifications which allow students to meet the goals of their IEPs and which address the inappropriate behavior. 20 U.S.C. §1415(k)(3)(B). John's homebound placement did neither of those things. While the school social worker discussed the April incident with John, as noted above, she did not specifically work on the IEP goals. An in-school monitoring program likely would have come far closer to providing John with a FAPE fairly balanced with non-IDEA goals. However, even if this court were to accept that only a homebound placement would properly protect the school, the District could and should have provided more tutoring, including actual instruction, and additional counseling in order to ensure that John receive an educational benefit from the homebound placement, that the goals of his IEP were met, and that John's inappropriate behavior was addressed.

C. Reimbursement for Private Counseling

The District argues that James and Mary are not entitled to reimbursement for the counseling services they privately obtained for John because the counseling was not related to the procedural violations and was not necessary for an educational purpose. This court has already found that the procedural violations resulted in the denial of a FAPE by, among other things, limiting the social services required to ensure that John received an educational benefit from the IEP. As such, this court has already determined that the necessity for counseling services during the faulty homebound placement was the result of the District's procedural violations. However, James and Mary are still not entitled to reimbursement for John's additional counseling unless it was necessary for educational purposes.

Having found that District's homebound placement violated IDEA, this Court is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B)(iii). Costs incurred for educational purposes are recoverable. Those services rendered in response to medical, social, or emotional problems apart from the learning process are not. *Board of Educ. Dist. No. 200 v. Illinois State Bd. of Educ*., 21 F.Supp. 2d 862, 878 (N.D. Ill. 1998), judgment against state vacated on other grounds, 207 F.3d 931 (7th Cir. 2000) (citing *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990)). The Seventh Circuit has held that courts should defer to the factual decisions of the hearing officer as to whether the service is a "related service." *Morton Comm. Unit Sch. Dist. No. 709 v. J.M*., 152 F.3d 583, 587 (7th Cir. 1998).

Here, the IHO found that Mary and James are entitled to reimbursement for the $1,310 they spent for counseling services "related to [John's] educational needs following [his] removal from school." Despite

that conclusion, the District argues that the services were not related to John's educational needs because he was visiting a therapist and psychiatrist independent of the District before the alleged April 1999 disciplinary violation. Prior to John's homebound placement, those counselors addressed many of the same issues addressed in John's IEP, including peer interaction and depression. After the homebound placement, they also addressed the placement and the reasons for it. The District argues that the therapy services were the result of John's ongoing psychological problems which existed long before the homebound placement.

This court finds that the evidence strongly supports the IHO's conclusion that the counseling services were related to John's educational needs. The privately retained therapist worked with John on transitioning into high school, peer relationships, and appropriate conversations, all social/emotional needs which John's most recent IEP listed as "educational." This court finds the District's claim that those needs were purely "psychological" and not "educational," when the school itself had listed the needs as educational, to be disingenuous at best.

The District is correct that the private therapy addressed John's psychological issues which predated the homebound placement, but that argument misses the mark. The District's own IEP for John identifies those "psychological problems" as "educational needs." The fact that the needs predate the District's violation of the IDEA is irrelevant. Under the IDEA, the District was obligated by law to work on those needs, and committed to doing so in John's IEP. The District also argues that the "therapy services were not delivered as a result of any IEP and no school official ever posited such services were required in order to provide [John] with a FAPE." To the contrary, the March 1999 IEP lists social work as a "placement recommendation" after reciting a litany of social/psychological issues, including the need to improve coping skills and deal with stress in an appropriate manner. While not termed "therapy services," the IEP clearly states that services were required to address those needs in order to provide John with a FAPE.

The District is also correct that the services were not "delivered as a result of any IEP," but that is precisely why John's parents are entitled to relief -- because the District failed revise the IEP in April to provide John with an appropriate education. The District is far from correct, however, when it argues that the services were not required to provide John with a FAPE. The IEP itself states that 30 minutes of counseling each week were needed while John was in school to provide him with an FAPE, a goal the District failed to fulfill for the last week of John's homebound placement. In addition, the evidence suggests that more than 30 minutes a week in counseling was required while John was on the homebound placement. Mary and James testified to the amount of therapy John normally received and that $1,310 was the amount attributable to John's additional needs after the homebound placement. In addition, the privately-retained therapist worked on issues which John otherwise would have worked on in the classroom, such as transitioning into high school, peer relationships, and appropriate conversations. The March 1999 IEP even listed "limited access with non-disabled peers" as a possible harmful effect of having John spend 30 minutes a week with the school social worker. It is obvious that this potential "harmful effect" was multiplied exponentially when John was completely cut off from his peers for the final 22 days of the school year. As such, additional counseling was necessary to lessen the potential for that harm and to compensate for the time John did not spend practicing communication and coping skills in the classroom and at school.

D. The Three-Day Suspension

The District argues that the IHO considered evidence of John's initial three-day suspension in the context

of a special education due process hearing, and that in so doing, she exceeded the authority IHOs are afforded in special education due process hearings. The IDEA regulations provide that a due process hearing may be initiated on matters relating to various factors affecting a child's special education, including a suggested change of placement. 34 C.F.R. § 300.525. However, a "change in placement" does not occur if the removal from school is for ten consecutive school days or less, 34 C.F.R. § 300.519, and school officials are authorized to remove a child for up to ten consecutive days when a child with a disability commits a violation of school rules, 34 C.F.R. § 39 300.520(a)(1)(i). As such, a special education due process hearing is not a proper forum for challenging suspensions of ten days or less.

The District argues that the IHO considered and reviewed the District's three-day disciplinary suspension of John. However, it is clear from the IHO's decision that she did not consider the three-day suspension in determining that the District violated the IDEA. The IHO did find that the District failed to provide John with a FAPE "after removing him from school on April 23" (the first day of the three-day suspension), and discussed the procedural errors in the context of the initial suspension. However, her decision makes clear that the denial of John's FAPE occurred at the April 28, 1999 MDC and the tutoring and counseling (or lack thereof) which followed. Even if the IHO did not limit her consideration to the homebound placement which began April 29, this court, independently weighing the facts, as it is required to do, finds that the procedural violations and resulting homebound program from April 29 until the end of the school year, independent of any problems in the April 23 three-day suspension, deprived John of a FAPE and thereby violated the IDEA. Accordingly, any possible errors of the IHO's decision regarding the three-day suspension are moot because this court independently has determined, that, even if there were no problems with the manner in which the District handled John's initial suspension, the District nevertheless violated the IDEA and Mary and James are entitled to reimbursement for costs they incurred in an attempt to provide John with an appropriate education.

E. Hearing Officer's Ex Parte Comments

As its last point, the District contends that the IHO prejudged the facts of this case before hearing the District's witnesses. The District claims that the IHO's act of calling the District's counsel ex parte, telling counsel that she had heard enough testimony, and suggesting that the District settle the case shows that the IHO had pre-judged the case, thereby denying the District of a fair and impartial hearing. In support, the District points to *Migliorini v. Director*, 898 F.2d 1292, 1294 n.9 (7th Cir. 1990) (citing *Pearce v. Sullivan*, 871 F.2d 61, 63-64 (7th Cir. 1989)), where the court stated that, in order to show prejudice of a hearing officer, a party must point to something outside the record indicating prejudgment.

The District's argument fails for several reasons. First, encouraging parties to settle a case does not indicate prejudgment of the case. The IHO also contacted counsel for the parents in order to encourage settlement and both sides knew that the other side had spoken to the IHO. The IHO made clear to counsel for the parents that she had not judged the case, but strongly encouraged them to settle. Second, there is no evidence that the alleged "prejudgement" prejudiced the District. The District was permitted to present its remaining witnesses, and the District does not point to any instance following the ex parte conversation in which the IHO indicated that she was prejudiced to the District's position. Finally, unlike the cases cited by the District, this court reviews the IHO's decision, including her finding of facts, de novo. Having thoroughly reviewed the entire record in this case without having prejudged the case, this court is of the opinion that the record strongly supports the IHO's finding that the District violated the IDEA and that Mary and James are entitled to compensation. As such, even if the IHO had prejudged the case, the District has suffered no prejudice because this court has re-weighed the evidence and made independent findings of fact and law.

F. Attorney's Fees

Pursuant to 20 U.S.C. § 1415(i)(3)(B), a court may, in its discretion, award reasonable attorney's fees as a part of the costs to the parents of a child with a disability who is the prevailing party. This court believes that, given the strong case in favor of the parents' position and the relative weakness of the District 's case, Mary and James should be awarded attorney's fees for this action. As such, they will be entitled to receive reasonable attorney's fees, in addition to the ordinary costs recoverable under 28 U.S.C. § 1920 and Federal Rule of Procedure 54(d). Under 20 U.S.C. § 1415(i)(3)(C), the fees recoverable shall be based on "rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished," and no bonus or multiplier shall be used in calculating the award. See also 34 C.F.R. § 300.513(c)(1). The parents are advised to submit a petition for such fees, along with their bill of costs.

CONCLUSION

For the reasons stated above, this court affirms the IHO's finding that plaintiff School District violated the IDEA. Judgment is entered in favor of Mary F. and James F. in the amount of $1,310 as reimbursement for private counseling. Defendant Illinois State Board of Education is dismissed.

This court further finds that Defendants Mary F. and James F. are entitled to reasonable attorneys' fees and as the prevailing party in this action. This case is dismissed in its entirety.

ENTER:

_____

JAMES F. HOLDERMAN
United States District Judge
DATE: October 19, 2000

1 The District has only addressed its arguments to John, James, and Mary, and only those parties responded to the District 's motion for summary judgment. The District has not indicated whether it intends to seek contribution from the state for any damages it is forced to pay to the parents. However, the Seventh Circuit recently held that the IDEA does not authorize awards of financial relief in favor of state educational officials, and that courts are not empowered to reallocate loss between school districts and states. See Board of Educ. Dist. No. 200 v. Kelly E., 207 F.3d 931, 935-36 (7th Cir. 2000). Accordingly, any relief the District seeks from Illinois under the IDEA is barred and the Illinois State Board of Education is therefore dismissed as a defendant.

2 In its list of facts concerning the MDC, the District notes that: "An independent psychiatrist evaluated [John] and had grave concerns that [John] was dangerous to others." (Pl.'s 56.1(a) Statement of Uncontested Facts at ¶ 25.) The District supports this "fact" by citing a report prepared by Dr. Heredia. This court finds the District's recitation and placement of this "fact" to be disingenuous for two reasons. First, Dr. Heredia did not expressly state a concern that John was dangerous to others. Rather, Dr. Heredia expressed "grave" concern for John's poor judgment, which he believed John's comments reflected; he did not believe the John had the means to carry out harm to the school. Second, Dr. Heredia did not even evaluate John until July 1999, more than two months after the April MDC. Despite this, the District inserted a statement of Dr. Heredia's "concern" between paragraphs which discuss the MDC without mentioning the date Dr. Heredia rendered the opinion. (Pl.'s 56.1(a) Statement of Uncontested Facts at ¶ 25.) The District's placement of this "fact " within the discussion of the MDC suggests that the school personnel considered an independent psychologist's concern that John was dangerous at the MDC, which would have bolstered the District's argument that John was a substantial threat in April 1999. This court assumed such was the

case until reviewing to Dr. Heredia's report and noticing that it is dated July 1999. This court finds the District's characterization and placement of this "fact" to be troubling.

3 The date was presumably an error, as the notice records that the MDC had been held on April 28, 1999. This court thus presumes that the notice was actually signed on April 28, 1999.

4 The principal, on the other hand, described the incident as "gross misconduct."

5 The principal eventually agreed to allow John to attend graduation. However, John discussed it with his private therapist and decided that he would not attend because it would be too difficult for him to explain to the other kids why he had not been in school.

6 Although counsel for the parties submitted statements of uncontested facts and responses thereto under Local General Rules 56.1(a) and 56.1(b), this court found that those documents did not serve to facilitate the resolution of this case. Those rules are intended to assist the court in determining whether material questions of fact exist under the usual summary judgment format. In the future, this court advises counsel in these types of cases that the better means of making a determination of the facts is to submit proposed findings of fact, with citations to the record, and proposed conclusions of law in lieu of the customary 56.1 statements of uncontested facts.

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