Case Number: 2007-0075
[redacted] **vs.** [redacted]
Hearing Officer: Sheana Hermann

Illinois State Board of Education
Special Education Services
100 North First Street
Springfield, Illinois 62777

Impartial Due Process Hearing Decision
Cover Page

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District Name [redacted] **Phone: 8158753162**
Superintendent [redacted]
Address [redacted]
Represented by

Parent Name [redacted]
Address
Represented by

Date and Timelines
Date of Written Request: 10/18/2007
Date of Pre-hearing Conf: 01/29/2008
Date of Hearing: 02/25/2008 to 2/25/2008
Date of Decision: 03/06/08

Summary of Decision
District prevails in Due Process Hearing Request. Parent failed to sustain her burden of persuasion to show that the District's IEP did not provide the Student FAPE in the LRE.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF [redacted]	)	
	)	**ISBE CASE NO. 2007-0075**
	)	
v.	)	**Sheana Hermann**
	)	Impartial Due Process
[redacted]	)	Hearing Officer

HEARING DECISION AND ORDER

This matter comes before this hearing officer on the Impartial Due Process Hearing Request of the parent [redacted] ("Parent") on behalf of her son the above referenced Student against [redacted] ("District"). The District is represented by its attorney [redacted] of [redacted]. This Hearing Officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02(a) et. seq., 23 Illinois Administrative Code 226.600 et. seq., The Individuals with Disabilities Improvement Act 20 U.S.C. 1415 (IDEIA), and 300 C.F.R. 507 et. seq. The parties were informed of their rights according to 105 ILCS 5/14-8.02(a), 23 Ill. Admin. Code 226, subpart G, 300 C.F.R. 300.512 and acknowledged receiving their rights on the record.

Procedural History

The Parent's request for an Impartial Due Process Hearing was received by the Illinois State Board of Education (ISBE) on September 4, 2007. This hearing officer received the assignment on September 15, 2007 and immediately contacted the parties. When the Parent filed her complaint, the District was represented by the law firm of [redacted] The District filed a notice of insufficiency which was subsequently granted. (IHO Ex 1). The Parent filed her amended complaint on October 18, 2007. The District obtained new legal representation of [redacted] on October 25, 2007. The parties attempted resolution on November 5, 2007. At the resolution session the parties were able to come to an agreement with regards to the Parent's transportation issues. During the scheduled pre-hearing conference of November 26, 2007, the parties agreed to postpone the pre-hearing conference to allow the District to evaluate the Student (IHO Ex. 2). A status conference was conducted on December 3, 2007 in which the parties stated that the evaluations were to be conducted the first two weeks of December 2007. The parties conducted an individualized educational placement (IEP) meeting on January 16, 2008 to review the evaluation. During a status conference call on January 17, 2008, the Parent stated that she still wanted the Student returned to his local school, [redacted] while the District's IEP team determined that the Student needed a self-contained program such as the one at its special educational cooperative program at [redacted] The District is a

member of the [redacted]. A pre-hearing conference was conducted on January 29, 2008. The hearing was held on February 25, 2008 at [redacted] The District's documents were admitted into evidence. The Parent chose to use the District's documents. The Parent called [redacted], the Student's Youth Pastor: [redacted] (by telephone), the Student's Aunt; [redacted] Principal at Princeton Christian Academy; [redacted], District Superintendent; [redacted], [redacted] science teacher; [redacted] Principal of [redacted] and the Student. The Parent also testified. The District called the following witnesses: [redacted], school psychologist; [redacted], [redacted] special education teacher; [redacted], Student's special education teacher at [redacted], special education teacher at [redacted]; [redacted] school social worker at [redacted], special education teacher at [redacted]; [redacted] coordinator; [redacted], Principal at [redacted]

Issues Presented
The Parent believes the following to be at issue:

Whether the Student's current placement in [redacted] in a self contained program in the District's cooperative is appropriate and meets the needs of the Student in the least restrictive environment?

Relief Sought
The Parent seeks the following remedy:

The Student is returned to his neighborhood school of [redacted] and received his IEP services in regular education with special educational support.

Finding of Fact

The Student is a male 14 year old with a birth date of May 12, 1993 and is presently in the 8thth grade. His qualifying disability is other health impairment and specific learning disabilities. (SD Group 30 p. 1).

The Student has been found previously to qualify for IDEIA services as having an emotional disorder (SD Group 1).

The Student has attention deficit hyper activity disorder (ADHD) and is taking medication. (SD Group 30 p. 11).

The testimony by the Parent and the Student indicated that the Student does not take his medication on a consistent basis and that the Parent does not truly have a system to ensure that the Student takes his medication. However when the

Student takes his medication his inappropriate behavior subsides. He has "bad days" when he forgets to take his medication (SD. Group 30 p. 12 and 13).

The Student was first enrolled at the District in 7th grade at [redacted] he was subsequently moved to the ED program at [redacted] due to behavior issues (SD Group 6). He attended [redacted] for approximately two months. However he finished 7th grade at [redacted] and was dropped from the District program in March 8, 2007 (SD Group 11). The Parent re-enrolled the Student at the District program in the late summer of 2007. (SD Group 30 p.13-14).

[redacted] advised the Parent that it would not allow the Student to enroll for the 2007-2008 school year (SD Group 14).

The Parent re-enrolled the Student at the District for the 2007-2008 school year, The District conducted an IEP meeting on September 4, 2007. At that time the District found that the most appropriate placement for the Student was in the cooperative's self contained class at [redacted] the last placement that the Student was in prior to the Parent removing him. (SD Group 15, Group 17).

The Parent filed a due process hearing request and refused to allow the Student to attend school, however, she also refused to dis-enroll him to allow him to receive home school instruction. (SD Group 19). The Student has had significant attendance issues.

The Parent subsequently filed an amended complaint on October 18, 2007 to dispute the District's recommended placement and stated that her son has a medical condition, ADHD, not a behavior issue, he will not have "local" friends in the [redacted]program, that being in a behavior disorder program will make him act like "them," and will hurt him socially, emotionally, mentally and physically. She also stated he is entitled to FAPE in his "home" school under Section 504, IDEA and Section 1983 and that the District is not allowed to change his placement due to his behavior. She also stated that he has been on medication that he "out grew" last year, and that they were working on finding a new one that "works." (SD Group 26, p. 2-3). The Parent also expressed concern with the Student's transportation; however, this matter was resolved through resolution.

When the District's special education teachers completed a questionnaire for the Student's evaluation on 12/3/07, the Student had attended school for only 5 weeks. (SD Group 30, p. 12).

The program at [redacted] has a tiered step approach in which the students are in a small structured class setting in which they are gradually transitioned back to the regular education setting. In order to transition to the regular education program, the students must exhibited appropriate behavior for a period of nine weeks (in the Student's case the District agreed to accelerate the program to every six weeks). The Student is currently at level 4 with 2 more levels to go.

He has made good progress, but has yet to complete the program. (SD Group 30).

At the hearing, the Parent did not provide any expert testimony.

Both the Student's youth minister, [redacted] testified that the Student appeared calmer after taking his medication and admitted that the Student struggles with his behavior, however, he has not observed the Student acting violently.

The Student's aunt testified that she was the Student's guardian when he was in 6th grade and that she recognized that the Student needed medication and an IEP. Although she currently lives 2 and half hours from the Student, she testified that the Student wants to achieve and wants to be mainstreamed and that he does not have friends at [redacted]

[redacted] the principal at [redacted] testified that the Student intimidated and threatened other classmates and engaged in bullying behavior. After conferencing with the teachers and the school board, the school determined that it was unable to allow the Student to return, (SD. Ex. 14).

[redacted], the principal at [redacted] testified that [redacted] does not have a program such as the one in [redacted] He also stated that the Student's ADHD is but one element of many issues that have caused the Student to be placed at [redacted] He also stated that a return to [redacted] will be premature for the Student in light of the fact that he has yet to complete the steps at [redacted] He testified to the Student's long history of significant behavior issues.

[redacted], the school psychologist, testified that even when the Student is on medication, he still exhibits inappropriate behavior, He stated that the Student needs to complete the program; he needs to work on something and achieve it and the program is working for the Student. [redacted] is a traditional junior high school, without the same supports as the [redacted] program.

[redacted], the Student's special education teacher, testified that even with medication the Student still exhibits inappropriate behavior that goes beyond the bounds of what is appropriate for a typical 8th grader. He has difficulty relating to his peers.

[redacted], the Student's special education teacher, testified that the Student's social skills have improved but he still has issues. He likes to initiate conflict, make inappropriate comments; he makes poor choices. She also testified that taking medication is not a cure all for the Student.

A reevaluation was conducted on the Student in December of 2007. (SD Group 30 p. 11-15).

At the IEP meeting of January 16, 2008, the team determined that the Student was doing well within the program at [redacted] his work ethic has improved, he is showing great progress in his program (SD. Group 30 p. 23).

While the Student is not extremely violent, the testimony from the District's personnel and the Parent's witnesses indicate that the Student does have behavior issues. The Parent has expressed that these issues go away with medication, however, the District's personnel, in particular, Mr. [redacted], Ms. [redacted] and Mr. [redacted] have stated that the Student still exhibits significant inappropriate behavior that is not typical.

The Student and Parent testified to the Student's popularity and that he indeed has friendships outside of school and is active in sports and a youth ministry group.

Conclusions of law

Although the Parent's concerns are understandable, she has clearly failed to sustain her burden of persuasion in this matter as required by law. Furthermore, the evidence as presented exemplifies that the District has acted appropriately with the Student and has provided the Student an education as required by IDEIA.

Burden of Proof

The Supreme Court in *Schaffer v. Weast,* 44 IDELR 150 (U.S. 2005). determined that the party challenging the IEP bears the burden of persuasion in a due process hearing. In this instance it is the Parent who bears such burden. The Parent initially filed a due process complaint disputing the placement from the September 4, 2007 IEP; another IEP was conducted January 16, 2008. Both IEP's determined that the Student's appropriate placement was in a self-contained instructional program. The District utilized its special education cooperatives program at [redacted] Although it is very clear that the Parent has a strong desire to have the Student placed in his neighborhood, the Parent did not meet her burden of persuasion. She did not offer any compelling evidence to indicate that the District's IEP was not appropriate. The Parent failed to provide any outside expert testimony or evaluations which contradicted the District's witnesses and evaluations which indicate that the Student is in need of a more restrictive setting. The Parent has made several statements of her own opinion that have "excused" the Student's behavior, however, she has failed to provide any substantive evidence. Furthermore, her own witnesses testified that the Student has behavior issues. In fact the testimony and evidence indicate that the Student is doing well under his current IEP and has begun attending regular education classes with an aide. The Student is also showing more motivation in his school work. The Student is close to completion of the program and it would be detrimental to pull him from the program prior to his completion.

Least Restrictive Environment

The Parent also contends that the placement at [redacted] is not the least restrictive environment (LRE) for the Student. She has stated that she wants his IEP to be implemented at [redacted] due to among other things its close proximity and his friendships with other students.

The Parent stated that [redacted] has other Student's with ADHD that are not placed at [redacted] Not all disabling conditions are to the same magnitude. Not all students who have one of the disabling conditions listed in 34 CFR 300.8 (c) require special education as a result of their disability. A student with a disabling condition must require special education by reason of such disability in order to receive related services under the IDEA. 20 USC 1401 (3)(A). It is clear that in this case, the Student's OHI and learning disabilities requires that he receive special education. The Parent has also stated that ADHD is a medical condition, and therefore the Student should not be placed in an ED program, however, the issue here is what is appropriate for the Student and not the labeling of the program. The Student has exhibited inappropriate behavior even when he is taking his medication, the program that he is in is in a small structured setting; a setting that the Student needs and in fact is progressing.

IDEIA through its regulations 34 CRF Section 300.114 (2006) provides:

> (2) Each public agency must ensure that –
> (i) To the maximum extent appropriate, children with disabilities including children in public or private institutions or other care facilities are educated with children who are nondisabled; and
> (ii) Special classes, separate schooling, or other removal of children with disabilities from regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

IDEIA shows a preference for placements to be made in the LRE, the appropriateness of the placement overrides placing a child in his "neighborhood" school. The Parent argues that the District should have this program in [redacted] However, a placement decision is not and does not need to be a determination of the specific classroom within the designated school or other facility or specific teachers assigned to those classrooms. While the child's multidisciplinary (placement) team may make such decisions, IDEIA also permits districts to treat these matters as administrative decisions to be made by school personnel. *Letter to Wessels*, 16 IDELR 735 (OSEP 1990). Placements are to be based upon the child's unique and individual needs. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994), *Notice of Interpretation*, Appendix A to 34 CFR Part 300, Question 1 (*1999 regulations*). Again, in this instance the Student requires a small self contained program, such as the one in [redacted]

The Department of Education observed in the 2006 regulations that: "Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement." *Analysis of Comments and Changes to 2006 IDEA Part B regulations*, 71 Fed. Reg. 46576 (August 14, 2006).

The Seventh Circuit has yet to apply a test in determining the LRE, *Beth B. v. Van Clay,* 282 F.3d 493 (7th Cir. 2002). However it has found appropriate placement overrides the least restrictive environment where the student will require so much modification in the curriculum that the regular program has to be altered beyond recognition, resulting in limited education value to the student *Id. See also Lachman ex rel. Lachman v. Illinois State Bd. of Educ.*, 441 IDELR 156 , 852 F.2d 290 (7th Cir. 1988). In *Beth B.,* the court determined that the district's proposed placement at an educational life skills program was appropriate and that the neighborhood school did not have such a program. However, one was provided at a neighboring district school within an hours drive. *Id.*

Other courts have ruled that an appropriate placement overrides the requirements of the least restrictive environment. In *Greer v. Rome City School District,* 950 F.2d 688 (11th Cir. 1991), the court determined that there are five factors in determining if the Congressional preference for mainstreaming a disabled student may be overridden.

The first factor is whether steps were taken by the school system to accommodate the child in regular education. In this matter, the District attempted to maintain the Student in the regular educational setting with an aide and special education for the beginning of the 2006-2007 school year and the Student was not allowed to return to the private school he attended for the remainder of the 2007 school year due to behavioral issues. However it became clear that the Student needed a small structured classroom setting.

The second factor is whether the local education agency used supplemental aids and services in an effort to assist the child in the regular education setting. The District in this case provided an aide, and the Student received significant special educational services and modifications in the regular educational environment.

The third factor is whether the child was receiving educational benefit in his or her regular education program. The Student was not receiving an educational benefit in his previous program.

The fourth factor is the effect the child is having on the education of her fellow students. In this case, the Student was bulling other students and constantly disruptive.

See also *Pachl v. Seagren*, 46 IDELR 1 (8th Cir. 2006) and *Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167 (4th Cir. 1997), 118 F.3d 996 (4th Cir. 1997) *cert. denied*, 522 U.S. 1046 (1998) and *Daniel R.R. v. State Bd. of Educ.*, 441 IDELR 433 , 874 F.2d 1036 (5th Cir. 1989), where the courts found that placement in a regular educational setting is not appropriate when the student will not receive a sufficient educational benefit in a regular classroom, even with the provision of supplementary aides.

In this case the Student is receiving services in a very systematic approach at [redacted] The District does not have such a program, and it would require significant altering and modifications of the District to establish and implement such a program. It is clear from the evidence that the Student has had a significant history of behavior issues and is still exhibiting inappropriate behavior that is exasperated when he fails to take his medication. It is also clear that he is benefiting from this program and has made significant strides towards being in regular education. He should be allowed to finish the program.

Neighborhood School Placement

The Parent wants the Student in his neighborhood school. While IDEIA through its regulations makes a preference to providing services as close as possible to the child's home, it does not require such placement.

Case law does not support disabled students' absolute right to placement in their neighborhood school. *Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 18 IDELR 16 (8th Cir. 1991); *White ex rel. White v. Ascension Parish Sch. Bd.*, 39 IDELR 182 (5th Cir. 2003). At most, IDEIA creates a preference for the neighborhood school. *Murray v. Montrose County Sch. Dist. RE-IJ*, 22 IDELR 558 (10th Cir. 1995). Accord *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996); *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 24 IDELR 673 (5th Cir. 1996). Districts have latitude to determine placement among alternative school locations.

Districts are granted discretion when determining the program, whether the program is appropriate and would offer the student an opportunity to interact with non-disabled peers; whether the location is within a reasonable distance, and whether the other location benefits and advantages that the local school does not, *Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 18 IDELR 16 (8th Cir. 1991); *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 24 IDELR 673 (5th Cir. 1996).

In this case [redacted] provides the intensive services that the Student needs and is within a 30 minute drive. The Student is currently in three regular education classes with the assistance of an aide and has the opportunity to interact with non-disabled peers. See also *Beth v. Van Clay.* The Student is also very engaged in sports and his youth ministry group, where he has an opportunity to spend time with the children he considers his true friends.

Conclusion

The Parent's concerns are understandable, however, the Parent has simply failed to sustain her burden in showing that the District's IEPs of September 4, 2007 and January 16, 2008 are inappropriate. In fact after weighing the evidence and reviewing the case law, it is clear that the self-contained program is providing the Student a free appropriate placement in the least restrictive environment. The District is entitled to utilize the program of its cooperative, and that the program is in fact benefiting the Student. The law supports that educational benefits outweigh friendship issues. The Parent has provided her own opinions, however, those opinions are not sufficient to overcome her burden of persuasion.

IT IS HEREBY ORDERED:

1. The Placement at [redacted] is appropriate for the Student;
2. The District has acted appropriately with the Student in this matter; and
3. The District need not take any further action.

ENTERED THIS 6th DAY OF MARCH, 2008

Sheana Hermann
Impartial Due Process Hearing Officer