

Case Number: 2008-0105

[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

Instructions: Complete this form and return it along with the decision. The information collected on this form will be used for the purpose of indexing the decision by subject matter as required by 23 Illinois Administrative Code 226-695

District Name [REDACTED]

Phone: [REDACTED]

Superintendent WILLIAM R JAMES

Address [REDACTED] IL [REDACTED]

Represented by [REDACTED]

Parent Name [REDACTED]

Address [REDACTED]

Represented by [REDACTED]

Date and Timelines

Date of Written Request: 09/27/2007

Date of Hearing: 01/15/2008 to 1/15/2008

Date of Pre-hearing Conf: 11/20/2007

Date of Decision: 01/25/08

Summary of Decision

Finding in favor of District where District requested a due process hearing to enforce an IEP placement from a previous district. The Student's prior IEP called for an instructional self-contained program. The requesting District did not have a self-contained instructional program and wished to implement the Student's IEP in the special education cooperative. The Parents wanted the Student educated in her neighborhood school. The District was granted leave to implement the IEP at its cooperative program.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) ISBE CASE NO. 2008-0105
)
) Sheana Hermann
) Impartial Due Process
) Hearing Officer

HEARING DECISION AND ORDER

This matter comes before this hearing officer on the Impartial Due Process Hearing Request of [REDACTED] ("District") against the above referenced Student. The District is represented by its attorney [REDACTED] of [REDACTED]. The Parent, [REDACTED] a non-attorney, represented the Student. 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, 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.

Procedural History

The District's request for an Impartial Due Process Hearing dated [REDACTED] was received by the Illinois State Board of Education (ISBE) on September 27, 2007. This hearing officer received the assignment on October 2, 2007 and immediately contacted the parties. This hearing officer was advised by the attorney for the District that the parties were engaging in settlement negotiations through a "resolution session." (SD Ex. Group A, p. 126). On October 29, 2007 the attorney for the District advised the hearing officer by email and letter that the parties were not able to resolve their differences. The District filed a motion to determine the stay-put placement (SD Ex. Group A, pp. 137-141). A pre-hearing conference was conducted on November 20, 2007 by telephone conference at which time the District requested clarification of the stay put placement, (SD Ex Group A, pp. 137-141). It was determined that the stay-put placement was the IEP conduct in April 19, 2007 which the Student brought with her when she transferred in the District. Upon hearing that determination, the Parent abruptly hung up the telephone, however most of the pre-hearing conference had been concluded. In the Pre-hearing Conference Report, the stay-put placement memorialized to be an instructional learning disabilities placement located within one of the [REDACTED] programs ("Cooperative"). (SD Ex. Group A, pp. 147-148). The hearing was originally scheduled for December 11, 2007 but was later continued to January 15, 2008 due to inclement weather. The Hearing was conducted on January 15, 2008 at the District Administrative Offices located at [REDACTED], Illinois. The District documents were admitted into evidence. The Parent chose not to present documents or call witnesses. The parties received their rights. The following witnesses testified on behalf of the District: [REDACTED] Superintendent of [REDACTED] School District; [REDACTED]

school psychologist; and [REDACTED] school social worker. The Parent testified on behalf of the Student.

Issue Presented

The District has brought forth this due process hearing request pursuant to the following issue:

Whether the placement in an LD instructional classroom offered by [REDACTED] is appropriate and meets the needs of the Student in the least restrictive environment?

Relief Sought

The District seeks the following remedy:

A placement at the LD instructional classroom at a [REDACTED] program is appropriate and meets the needs of the Student in the least restrictive environment.

Finding of Fact

The Student is a female 12 year old with a birth date of [REDACTED] and is presently in the 6th grade.

She transferred into the District prior to the start of the 2007-2008 school year. She previously attended [REDACTED] (SD Ex. B).

Her parents voluntarily removed her from the District after the stay put placement was determined to be in the Cooperative Program. (SD Ex. Group A, pp. 147-148). Her mother testified that she has not attended school since November 24, 2007.

Her qualifying disability under the Individuals with Disabilities Education Improvement Act (IDEIA) is specific learning disability (SD Ex. Group B, p.102).

During the hearing, it became clear that the Parent does not dispute the amount of services that the Student requires; rather they dispute the location of where the services are to be implemented.

At her previous school, it was determined that the Student would require services in an instructional program (SD Ex. Group B, pp. 85-108).

Testimony and the record indicate that the Student's needs require a placement in a small self contained classroom. In this instance the District does not have such a program in the Student's neighboring school. However, there is a program in its Cooperative. (SD Ex. Group B, pp. 85-108)

In August 2007, prior to the Student's enrollment for the 2007-2008 school year, the Parents advised the District that they would not agree to send the Student to the Cooperative program. The parties had agreed to temporarily place the Student in the local junior high school with an individual aide and special education resource.

After the District filed its due process hearing request, the parties met in a "resolution" meeting, at which time the parties discussed the Student's current performance and the parties agreed to conduct a re-evaluation (SD Ex. Group A, pp. 124-125).

A psychological evaluation was conducted on October 11, 2007 by [REDACTED], the school psychologist (SD Ex. Group B, pp. 112-114).

In the Wechsler Intelligence Scale, the Student's overall ability falls in the mildly cognitively impaired range; her expectancy level would fall between the mid-first to beginning second grade level. (SD Ex. Group B, p. 113).

In the Woodcock-Johnson Psychoeducational Battery, the Student's reading recognition skills fall at the mid-second grade level. She has difficulty counting coins and telling time with a mid-first grade level. Her spelling falls at the beginning second grade level. Her comprehension skills fell at the end of the first grade level. (SD Ex. Group B, pp. 113-114).

The evaluation summary indicated that the Student's skills appear to be most like mildly, cognitively impaired peers and she would be best served in an instructional, life skills type setting. Her frustration level, which may be represented by her attendance issues in the past, may be reduced by this type of setting. (SD Ex. Group B, p. 114).

Ms. [REDACTED], the school social worker testified that her observations of the Student concur that the Student is in need of an instructional program and that the resource program at the school was too difficult. She exhibited signs of stress and frustration. She would benefit from the life skills and the vocational program offered at the instructional program at the coop. She was also not making academic progress. Her memory is not intact and she needed much prompting

Ms. [REDACTED] the special education teacher, testimony was particularly compelling. She testified that the Student was not benefiting from her placement in regular education even with her individual aide and significant special education resources. Her IEP goals were not met and her performance had in fact deteriorated (SD Ex. Group B, pp 115-117). She further testified that the student was frustrated and confused and was unable to complete assignments without significant modification and assistance. There was a vast difference in assignments done in school and ones coming from home (SD Ex. Group C, 5 -school, 6 - home). The Student spent a significant amount of time attempting to re-learn what was taught in class. She needed significant amounts of prompting and modification of the curriculum. She also testified to the appropriateness of the cooperative's program. It has a low student to teacher ratio with between 8-9 students. It has with good supplies, computers, VCR, hands on learning tools, and, an aide. The program is in a regular public school which would enable the Student to interact with non-disabled peers. The Student would benefit form being taught at her own level where she could work at her own pace.

The Parents voluntarily withdrew the Student from the District on November 24, 2007 when the District attempted to enforce the stay-put order. The record is clear that the District has been acting in good faith in attempting to accommodate the Student and has tried to resolve the matter with least restrictive measures. The District after determining

that the Student was not progressing in the temporary placement appropriately sought to enforce the stay-put placement in the more educationally appropriate placement for the Student. (SD Ex Group A, pp. 137-141, and Group C)

Conclusions of law

The crux of the dispute in this case is the determination of the appropriate placement for the Student and whether the District is obliged to provide special educational services to the Student in the neighborhood school. The Parent stated during the hearing that there was no dispute as to whether the Student needs services, rather the Parents do not agree to a placement in the District's Cooperative program. They want her to attend the neighborhood school.

In order to determine placement it is necessary to review what the law requires as to the least restrictive environment (LRE) and whether the District is obliged to provide services in the "neighborhood" school.

Least Restrictive Environment

Prior to moving to the District, the Student was in a self contained instructional learning disabilities program at her previous school. However, the District did not have such a program and had informed the Parents that the services would need to be provided in its Cooperative program. In an effort to accommodate the Parents' wishes, the District agreed to attempt maintaining the Student in her neighborhood school pending the due process hearing and stay-put determination. During that time the District provided the Student with significant support including an individual aide and special education services in co-taught classes and study-hall. However it was very clear that she was not progressing or benefiting for the regular education curriculum with the aide and special educational services. It is clear that her disability is significant enough that she is unable to keep with the pace of the sixth grade curriculum even with significant supports and modifications.

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.

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 2007-2008 school year. At a certain point it became clear to the District that the Student was not doing well and they appropriately sought to enforce the stay-put placement.

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. Again, the Student in this case has not been receiving an educational benefit as demonstrated by the preponderance of evidence.

The fourth factor is the effect the child is having on the education of her fellow students. In this case, the Student was not disruptive and in fact was well liked; however her needs were so extensive that she requires a significant amount of teacher attention.

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.

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.*

In this case, it is clear that the Student's needs require significant services and that a placement in a self contained instructional program is necessary. The District does not offer such a program but rather relies on the special education cooperative to provide it.

Neighborhood School Placement

The Parents in particular take issue with the program being provided in the 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.

IDEIA through its regulations 34 CRF Sec. 300.116 provides:

Placements

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118;

(b) The child's placement--

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

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 the Cooperative Program provides the intensive services that the Student needs and is within a 45 minute drive and would allow the Student the opportunity to interact with non-disabled peers. See also *Beth v. Van Clay*.


Conclusion

The Parents' concerns are understandable; however, neither the facts of the case or the law support the Parents' position. The Student's needs are significant, and the educational benefit she will reap from attending the Cooperative program outweighs the benefits of being in a neighborhood school.

IT IS HEREBY ORDERED:

1. The Student is in need of special educational services to receive an appropriate education;
2. The IEP of April 19, 2007 is proper;
3. The District properly adopted the April 19, 2007 IEP;
4. A placement at the LD instructional classroom at a [REDACTED] program is appropriate and meets the needs of the Student in the least restrictive environment;
5. The Student shall be placed immediately at the LD instructional classroom at a [REDACTED] program;
6. The District and staff of the chosen [REDACTED] program shall convene an IEP meeting no later than February 22, 2008 to review the Student's IEP and re-draft it to incorporate the placement; and
7. In the event the Parents refuse to place the Student in the [REDACTED] program, the District shall consult with its attorneys to determine its legal obligations.
8. The District shall provide a compliance report to ISBE no later than February 29, 2008.

ENTERED THIS 25th DAY OF JANUARY, 2008


Sheana Hermann
Impartial Due Process Hearing Officer

Finality of Decision:

This decision shall be binding upon all parties.

Right to File Civil Action:

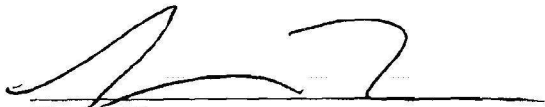
Any party to this hearing aggrieved by the final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS 5/14-8.02(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was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

Right To Request Clarification

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

CERTIFICATE OF SERVICE

The undersigned hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parents, District's counsel, and the Illinois State Board of Education at their respective addresses by depositing same with the United States Postal Service in Lake Forest, Illinois with proper certified postage paid before 5:00 p.m. on January 25, 2008.



Sheana Hermann
Impartial Due Process Hearing Officer