

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

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SPECIAL EDUCATION
SERVICES

[REDACTED]
Student,

v.

[REDACTED]
Local School District.

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CASE NO. 2008-0216

MARY SCHWARTZ
Impartial Hearing Officer

DECISION AND ORDER

Jurisdiction

This matter is before the undersigned hearing officer on the parents' request for a due process hearing. This hearing officer has jurisdiction pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400 *et. seq.*, 105 ILCS 5/14-8.02a *et. seq.*, and 23 Il. Adm. Code §226.600 *et. seq.* The parties have been fully advised of their rights pursuant to these statutes and regulations.

Procedural Background

The parents filed this due process request on September 15, 2008, through their attorney [REDACTED]. The district received the parents' request on September 16, 2008. The Illinois State Board of Education appointed the undersigned as hearing officer on September 23, 2008.¹ The undersigned issued a Preliminary Scheduling Order on September 25, 2008. The district, through [REDACTED] filed its response on October 3rd. An initial telephone status conference call was held on October 6th.

On September 29, 2008, the parents filed a Motion to Preserve Evidence, requesting an order directing the district to preserve an email that the case manager at [REDACTED] sent to [REDACTED]. According to the parents, the email was about the district's proposal to place the student at [REDACTED]. The district responded to the motion on October 9, 2008. The undersigned issued a Preliminary Order on October 13th, ordering the district to preserve the evidence while the parties briefed the issue of attorney-client privilege. After discussion between the parties and hearing officer, the parents withdrew their motion on October 29, 2008.

¹ For clarity in the record, this hearing officer was reappointed by the ISBE in this matter pursuant to Section 14-8.02a of the Illinois School Code, 105 ILCS 5/14-1.01, which requires re-appointment of a hearing officer where a parent has withdrawn a due process request and then re-initiated another due process request against the same party within on calendar year.

The parties participated in a resolution meeting on October 10th but were unable to resolve the issues raised in the parents' request. The parties jointly requested a continuance of the prehearing conference, originally set for October 28th, so that they could pursue settlement discussions. The joint request was granted, and the prehearing conference was held on November 6 and 7, 2008, via telephone conference call.

The due process hearing in this matter was held on November 21 and 24, 2008, and December 9, 2008. On the last day of the hearing, the parties agreed not to call [REDACTED], [REDACTED], and [REDACTED] as witnesses. [REDACTED] Court Reporters provided Court reporting services throughout the three day hearing. By agreement of the parties, the record was held open until December 12th so that they could submit written closing statements. All documents in the parties' evidence binders were entered into evidence at the hearing's conclusion, with the exception of Parents' Documents A, B, and C, each of which the parents withdrew at the start of the hearing. Following Parents' Document D is a document labeled D-1. During the hearing, the parties discovered there were two different versions of the district's observation report, so both are included in the record. For purposes of clarity in the record, the hearing officer has hand-numbered the pages in the parents' binder; all other markings on the documents were there when the binder was delivered to the hearing officer, e.g., purple markings on PD 27, 28.

In rendering this decision, the undersigned has reviewed all documents entered into evidence, case law provided by the parties, and the parties' written closing statements. As no transcript was provided to the hearing officer prior to rendering this decision, the undersigned has relied on her notes and memory for the testimony presented and discussed below. This decision is issued within 10 days of the close of the hearing, as required by Illinois law. 105 ILCS 5/4-8.02a(g-55)(h).

Issue Presented and Remedies Sought

The parents assert that the June 27, 2008, IEP developed by the district cannot be implemented at [REDACTED] or [REDACTED] Schools in a manner that would provide the student with a free appropriate public education ("FAPE"). The parents contend that the district's IEP was based on the [REDACTED] IEP and therefore requires a specific programmatic 4:3:1 student/aide/teacher ratio. As a remedy for this alleged violation, the parents ask that the district reimburse the parents for tuition for their unilateral placement of the student's placement at [REDACTED] School in [REDACTED] Illinois.

Burden of Proof

In an administrative hearing, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 126 S. Ct. 528, 539 (2005). Therefore, in this matter the parents have the burden of proof. Under Illinois law, the school district must provide evidence that it has appropriately identified the student's educational needs and that the special education and related services are adequate, appropriate, and available. 105 ILCS §14-

8.02a(g). This statutory provision requires the district to produce evidence but does not shift the burden of proof to the district. *Kerry M. v. Manhattan Sch. Dist. #14*, 106 LRP 5847 (N.D. Ill. 2006).

Stipulations Made at Hearing

The district stipulated that if the hearing officer determines that the parents are entitled to reimbursement of their unilateral placement of the student at a private day school, [REDACTED] is an appropriate school to address the student's needs.

Findings of Fact

The student, who is eight years old, has multiple disabilities that affect all spheres of her functioning. She has a significant cognitive impairment. Her most recent psychological evaluation determined that she has a full scale IQ of 37. (PD 48; SD 48). She is able to say only a few clearly recognizable words and does so only with much prompting. Because she is essentially nonverbal, she uses a picture system and basic sign language to communicate. (PD 24, 32; SD 47). She has bilateral club feet, which affects her mobility. She has Dwayne Syndrome, which affects her eye muscles and Coffin Siris Syndrome, a rare genetic disorder that is characterized by frequent respiratory infections, hypotonia, craniofacial abnormalities, and mental retardation. (PD 23, 24; SD 47). She has not yet fully accomplished toilet training. (PD 32). She has limited use of her hands for independent motor tasks in school as well as for self care skills. (PD 18).

The student began receiving early intervention services when she was six months old. (Testimony of mother). She began attending school within the district in a pre-kindergarten program at [REDACTED] School. In kindergarten, the student began the year at [REDACTED] School, which is her home school. After several weeks, the district transferred her to [REDACTED] School and then, a short time later, transferred her again, this time to [REDACTED] School. (PD 61).

The parents placed the student at [REDACTED] Day School in March 2007. (SD 1). [REDACTED] is a private day school in [REDACTED] Illinois. Her initial [REDACTED] IEP notes both gross and fine motor coordination problems. She was able to perform some self-help skills with verbal cues. The IEP notes that she engaged in inappropriate touching and pulling. Her academic skills were far below expected levels of achievement. (SD 3). She was placed in a self-contained classroom and received 60 minutes per week ("mpw") of direct speech/language therapy, 45 mpw of direct occupational therapy, 45 mpw of direct social work services, and 30 mpw of direct physical therapy. Each related service also provided 15 mpw of consult services. The student also participated with her regular education peers in music, gym, lunch, recess, assemblies, religious instruction class, and field trips. (SD 13).

The student remained at [REDACTED] for school year 2007-08. She was in a cross-categorical classroom with five students. [REDACTED] conducted a psychological evaluation

of the student in April 2008. The evaluator, [REDACTED] observed the student in class, interviewed the classroom teacher and staff, and conducted informal assessments. She also administered the Kaufman Assessment Battery for Children-II ("K-ABC"), and the Kaufman Survey of Early Academic & Language Skills ("K-SEALS"). [REDACTED] noted that the student's attention was very limited in the testing situation, and she was easily distracted by outside noises. The student was unable to obtain a basal score on the K-ABC. She imitated the examiner's motions but could not complete items on her own. On the K-SEALS, the student was able to complete items that required a nonverbal response. She scored below the two year old level on the vocabulary subtest. [REDACTED] recommended visual instruction and a reading program that relies on iconic representation.

The student's May 1, 2008 IEP reports that she had progressed academically and was able to match colors, shapes, pictures, letters, and numbers from 1-10 with 95-100% accuracy. She could pick out her name in a field of three names. She was able to follow a picture schedule for 90% of her day. However, she was easily distracted, which interfered with her ability to complete tasks and activities and adversely impacted her performance. Her functional skills had also improved. She was able to use a fork and spoon and was starting to use a plastic knife. Toilet training was still inconsistent. She required moderate to maximum assistance in mainstreamed activities. (PD 9; SD 26).

[REDACTED] conducted a Functional Behavioral Assessment ("FBA") and developed a behavior intervention plan (BIP) for the student. The target behaviors identified on the FBA include: requiring numerous verbal, physical and visual prompts to participate in activities, especially mainstreamed activities; and, imitating inappropriate behaviors of classroom peers, including self-stimulatory behaviors. The BIP's non-restrictive interventions include: a picture schedule to help the student transition through daily activities; a brief 10-15 minute break activity following each non-preferred activity that she completes; a sensory diet throughout the day; gross motor activities throughout the day to help her release energy and gain physical input; and, a behavior modification program that includes positive incentives. The plan includes several restrictive interventions, on a continuum from telling her "no hitting, hands down" and then re-engaging her in the activity to a time out procedure. (PD 19-22; SD 34-37). The IEP maintains the same level of related services and mainstreamed participation as in the prior IEP. Her placement is a "self contained special education classroom – five full days cross categorical classroom – 4 students/3 assistants/1 teacher." (PD 25; SD 38).

The student received an Independent educational evaluation ("IEE") in May 2008. [REDACTED] observed the student both in her home and in school. He also administered a comprehensive assessment battery, which included the: Peabody Picture Vocabulary Test, 4th Edition ("PPVT-IV"); Leiter International Performance Scale, Revised Preschool Attainment Scale; Columbia Mental Maturity Scale, 3rd Edition; and, Woodcock Johnson Test of Cognitive Abilities Scales, 3rd Edition ("WJ-TCAS"). Additionally, [REDACTED] had the student's mother and teacher complete the Vineland II survey forms. [REDACTED] reported that the student has no awareness of safety behaviors. She reaches out toward strangers,

unaware of the potential danger in doing so. She does not understand the concepts of "hot" or "sharp." She takes off her seatbelt in a car and would walk into the street if unsupervised. (PD 31; SD 46). The student achieved a receptive language score on the PPVT-IV at the two year, fourth month level. She scored below the two year old level on the WJ-TCAS on the subtests administered. On the Leiter, a non-verbal test of intellectual functioning, her full scale IQ was 37. Both the mother and teacher reported adaptive behaviors that resulted in scores below the first percentile. Based on this assessment, ██████ recommended a highly structured and very individualized educational placement with a strong behavioral component. He also recommended that a fulltime staff person be assigned to the student due to "her very short attention span, poor coordination and disregard for her own safety." He opined that the student's grabbing and clinging behaviors posed a danger to other students and required constant monitoring by a staff person familiar with crisis intervention procedures. He recommended intensive speech/language therapy, occupational therapy, and social work services. (PD 31-39; SD 46-54).

The district convened an IEP meeting on June 27, 2008, to consider the IEE, develop an IEP for the student, and determine her educational placement. (PD 40; SD 55). The mother, her attorney, and ██████ attended the meeting, as did the district's attorney. (PD 40; SD 56). The IEP team found the student eligible for special education and related services under the categories of mild cognitive impairment, physical impairment, and speech/language impairment. Because the mother disagreed with this determination, the IEP team agreed to further evaluate and determine the student's disabilities once she began attending a district school. (PD 40, 41; SD 57). The IEP also states that "(t)his IEP is being developed on information from the IEP from ██████" (SD 56A). The team developed a FBA/BIP that incorporates the information in the ██████ FBA/BIP. The BIP adds that per mother's report, the student views music, one-to-one attention, deep pressure, and watching peers and siblings as positive reinforcement, but notes that no one thing is consistently rewarding for the student. (PD 42; SD 58). The IEP requires a voice output device and pictures for communication as well as a picture schedule. (PD 44; SD 60). It also requires paraprofessional support "throughout the school day" for supervision and assistance for all academic tasks and transitions away from the classroom, diapering/toileting, dressing, and meal supervision. (PD 44; SD 60). Required modifications and accommodations include: breaking tasks into parts; providing verbal, physical, and visual cues; simplifying and repeating directions; using manipulatives when necessary; using a multisensory approach as needed; using hand over hand assistance as needed; sensory breaks as needed; and, breaks after non-preferred tasks. Specific accommodation are identified for speech/language and physical education, fine arts, computer, and library. The IEP team agreed to consider an augmentative communication evaluation, a re-evaluation of the student's independent functioning within the school and the need for occupational therapy services, and a special evaluation with possible IEP revision once the student enrolled in public school. (PD 45; SD 61). The IEP team developed goals for language arts, math, science, social studies, independent functioning, speech/language, and social work services. (PD 46-52; SD 62-68). The student's special education program consists of placement in a separate classroom for 1315 mpw, with mainstreaming for

physical education, art, music, library, and computer as available. Related services include speech/language for 60 mpw, occupational therapy for 45 mpw, physical therapy for 30 mpw, and social work for 45 mpw. Each related service provider is also to provide consult services for 15 mpw. (PD 53; SD 69). The student's placement is to be a small – or low - teacher pupil ratio classroom to provide supervision, necessary support, and structure. (PD 54; SD 70). Transportation and an aide on the bus are required. (SD 72A). The IEP requires an accessible school. (PD 45; SD 61). The parents were given a copy of the IEP on June 30, 2008. (SD 72A).

The parents enrolled the student in the district on August 11, 2008. The enrollment form indicates that she was transferring from [REDACTED] (SD 76, 77). The district issued a letter to the parents dated August 18, 2008, which identifies the student's placement as [REDACTED] School. The letter instructs the parents to enroll the student within 10 days of the date of the letter. It also warns that if the student is not enrolled before September 2nd, which is the first day of school, the student will be disenrolled and "an alternative school location may be necessary." (PD 59; SD 78). The district issued a second placement letter, dated August 28, 2008, that identifies the student's placement as [REDACTED] School. The letter contains the same statements regarding enrollment/disenrollment as did the August 18th letter. (PD 60; SD 78).

On September 4, 2008, the parents sent a letter to the district's superintendent, informing him that they had placed the student at [REDACTED] because the district had not offered the student a free appropriate public education. They requested reimbursement for tuition and expenses. In their letter, the parents state that they received the letter placing the student at [REDACTED] on August 20th. The father visited [REDACTED] on August 28th, within ten days of the date of the letter, and was informed by [REDACTED] administrators that the school posed a safety threat to the student and that the school could not implement the student's IEP. (PD 61, 62). Based on that information, the parents declined enrolling the student at [REDACTED] and instead enrolled her back at [REDACTED] (PD 60; SD 82, 83).

Conclusions of Law

Free Appropriate Public Education

The parents claim that the June 27th IEP requires implementation in a particular environment that has a student /teacher ratio of 4:3:1. The analysis of this issue requires a close look both at the placements offered by the district and the language of the IEP itself. An IEP must be reasonably calculated to enable the student to receive educational benefit. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). A student must receive more than a *de minimis* benefit. *Doe v. Smith*, 879 F.2d 1340 (6th Cir. 1989).

The June 27th IEP does not identify the specific school at which the student is to be placed. The evidence shows that the parents were informed that she was placed at [REDACTED] on or about August 19th, when they received the August 18th placement

notification letter. The mother testified that she contacted [REDACTED] as soon as she received the letter to arrange a school visit. She was instructed to call back because the school was under construction. The father testified that he visited [REDACTED] on August 28th. He met with the school's case manager, who gave him a tour of the school and described the class in which the student would be placed. The father testified that the case manager told him that the school was not appropriate for the student because it has stairs, which would present a safety issue for the student. The father stated that when the school's principal joined the conversation, she expressed similar concerns regarding the stairs and also raised a concern about fire drills.

The case manager's testimony confirmed that that he had told the father that he was concerned about the stairs. The case manager knew the student because he had been at [REDACTED] when she attended kindergarten there. He testified that he was concerned because the student is easily fatigued and would have to travel via the stairs several times a day to reach her classroom, the library and lunchroom. There are 18 stairs to the school's first level and 36 stairs to each of the second and third floors. The case manager testified the student's IEP requires an accessible school and that [REDACTED] is not accessible. He informed the district of his concerns about accessibility in mid-August, when he learned via email that the student had been placed at [REDACTED]. He also testified that he had not received the August 18th placement letter, even though he usually receives a copy of the placement letters that are sent to parents. The testimony of [REDACTED] principal corroborated that given by the father and case manager. The principal also testified that she had told the father that she was concerned about fire drills. She too knew the student from her kindergarten days at [REDACTED].

Based on the concerns expressed by the case manager and principal, the parents decided not to enroll the student in [REDACTED]. Although the district contends in its closing statement that the [REDACTED] placement was reasonable, the hearing officer finds it was not. The student's IEP specifically requires an accessible building. (SD 61). The district administrator who made the placement decision, [REDACTED] testified that she did not know that the student needed an accessible building, even though she had reviewed the June 27th IEP prior to making her placement decision. She determined that [REDACTED] was an appropriate placement because it is close to the student's home, has both primary and intermediate Trainable Mentally Handicapped ("TMH") programs, and could provide the related services required in the student's IEP. These factors, while important, ignore an important unique factor about the student that is stated in her IEP: she requires an accessible building. The concerns expressed by the case manager and principal are serious, particularly for a student who, in addition to mobility problems, has numerous other impairments including a severe communication deficit, a significant cognitive impairment, and no sense of danger. It is not reasonable to assign this student to a school where she would be required to travel at least 54 stairs one way daily and possibly multiple times a day. For the foregoing reasons, the undersigned finds that [REDACTED] could not offer the student a free appropriate public education.

The mother testified that the student began attending [REDACTED] at the end of

August because [REDACTED] - the only placement offered by the district - was not an appropriate placement. The district contends that this proves that the parents had rejected the June 27th IEP prior to August 28th. (Dist. Closing, p. 4). While this evidence raises an important question, it does not require a finding that the parents had rejected the IEP prior to August 28th. The mother testified that she had registered the student at [REDACTED] before the end of August but did not have to pay tuition until mid-September. It was apparent from the parents' testimony that they felt it necessary to keep their private school option open in case the district did not come through with an appropriate placement. The mother testified that when she had tried to register the student in the district in July she had been told that registration at [REDACTED] School did not begin until August 11th. She went back to [REDACTED] on August 11th and registered the student. (SD 76, 77). The district does not dispute this fact and offers no explanation to why she would have registered the student if the parents did not intend to place her in an appropriate district school. The testimony of both parents was credible. There was nothing in their testimony or the mother's demeanor suggesting that they were trying to pull a hoax on the district.²

The district next placed the student at [REDACTED] School. The facts around this placement offer are murky. The evidence admitted at hearing includes a placement letter dated August 28, 2008, which states that the student's placement is [REDACTED]. The mother testified that the parents did not receive the August 28th letter from the district. She further testified that she was not aware of the letter until early October, when her attorney gave her a copy of the letter.³

The testimony of the [REDACTED] principal shows that the mother had registered the student in the district on August 11th. The principal testified that the transfer form found at [REDACTED] indicates that the student was transferred from [REDACTED] to [REDACTED] on September 2nd. She said the system does not allow information to be backdated. Although the student's name does not appear anywhere on the form, the principal testified that the student is the only student who has ever transferred from [REDACTED] to [REDACTED]. She said that [REDACTED] received the letter regarding [REDACTED] on September 2nd and made the transfer that same day.

[REDACTED] is one of the administrators responsible for placement decisions in the district. She determined both the [REDACTED] and [REDACTED] placements. She testified that that she had personally mailed the [REDACTED] placement letter to the parents on August 28th, the same day that it was prepared. She also said that she sent a copy of the letter to [REDACTED] through the district's internal mail run. The clarity with which [REDACTED] described mailing the August 28th letter to the student's home is striking in several ways. First, she has no personal knowledge of the student yet claimed to remember having

² By agreement of the parties, the father testified by telephone due to job constraints; thus, the hearing officer was not able to assess his demeanor. However, his testimony was straightforward and the undersigned finds it credible.

³ The existence of this letter came up during a telephone conference meeting conducted by the hearing officer on October 6, 2008. During that call, the district's attorney agreed to send the letter to parents' counsel.

mailed this one particular letter on August 28th. Next, she did not sign the letter; it bears the electronic signature of [REDACTED] supervisor. (PD 60). The letter is a standard form letter. She testified that she mailed many other placement letters at the same time as this one, yet she was able to specifically recall mailing this particular letter. This same witness had testified that she did not know that the student required an accessible building even though she had reviewed the student's IEP prior to placing her at [REDACTED] yet she was able to clearly recall having mailed the letter three months later to people whom she had never met. This does not ring true. The undersigned finds this testimony not credible. While the district may well have mailed the letter, there is no proof as to when it was mailed, that it was mailed to the correct address, or that it was delivered. The undersigned finds that mother's testimony that the family did not receive the letter in the mail credible.

Assuming *arguendo* that the district did offer [REDACTED] as a placement, the question remains whether it was an appropriate placement for this student. [REDACTED] testified that she had selected [REDACTED] because it is accessible, had an opening, has both primary and intermediate TMH programs, and could provide the related services in the student's IEP. Although she had considered proximity to home when deciding to place the student at [REDACTED], [REDACTED] did not include that factor in her decision to place the student at [REDACTED]. That the school had an opening does not mean that it was an appropriate placement for this student.

The mother visited [REDACTED] on October 8th, even though the parents had filed their due process request by that time. The mother testified that she met with [REDACTED] case manager, who told her that the distance between the student's home and the school "seemed far" and would require at least an 80 minute bus ride both to and from school. She said that he told her that the length of the ride "seemed like a lot." She further testified that he told her that there were two students in the classroom who were waiting for 1:1 aides. She said that he explained that that when an aide is requested, the district must advertise the position and then wait for applicants. The mother visited the prospective classroom, which is located on the school's lower level. The lower level is six to eight stairs down from the main level. She said there were ten students in the class and one teacher. The parents did not enroll the student in [REDACTED] because they did not feel it would provide her a FAPE.

The [REDACTED] case manager is a special education inclusion teacher and also the case manager at [REDACTED]. He has been at [REDACTED] for ten years. Although he has no personal knowledge of the student, he had reviewed her file before meeting with the mother. The file contained the student's IEPs and evaluations. His testimony corroborated that of the mother. He testified that he had told the mother that he was concerned about the lengthy bus ride, which he estimated at 80 minutes each way. He said a bus ride of that length is long for any student "let alone a special education student." The school day at [REDACTED] runs from 9:00 to 2:30. He also testified that one student in the class is currently waiting for an aide, and that it usually takes about three weeks to hire an aide. He said the building is accessible, and the students can use an elevator to access the library, art, and music classes that are on either the second or

third floors.

The parents contend that the lengthy travel time makes the [REDACTED] placement inappropriate for this student. Illinois law requires a district to make "every effort" to limit a student's total travel time to not more than one hour each way. 23 Ill. Adm. Code §226.750(b)(2). [REDACTED] did not consider bus travel time and the impact that would have on this student in her decision to place the student at [REDACTED]. That this factor was not even considered, particularly when it seemed foremost in the case manager's mind, is a serious omission. While Illinois law does not require bus rides to be less than one hour, the very fact that there is a regulatory provision on travel time shows that the state considers this an important factor to consider in placing a student.

Based on the foregoing evidence, the undersigned finds that at the time the student began attending [REDACTED] in August 2008, the parents only knew of the [REDACTED] placement offer, which did not provide the student a FAPE because it was not accessible, as her IEP required. As to [REDACTED], the undersigned finds that because of the lengthy bus ride – 2 hours and 40 minutes/ day and likely more in inclement weather – placement at that school would not provide the student a FAPE.

During the October 10th resolution meeting, the district offered two additional schools as appropriate placements - [REDACTED] and [REDACTED]. In their closing argument, the parents contend that the resolution meeting did not comply with the IDEA requirements. (Parents' Closing, pp. 23, 24). Therefore, they argue, equitable factors require that these schools not be considered in this decision. The problem with this argument is that the parents did not identify these alleged irregularities as an issue until their closing statement. Thus, they have waived this issue. The question that remains is whether either [REDACTED] or [REDACTED] could provide the student a free appropriate public education.

The parents retained [REDACTED] as an educational expert in early October 2008. The district asserts that [REDACTED] testimony is not relevant and should be given no weight because the IEP team never had the opportunity to review his recommendations, which were developed shortly before the hearing. Having considered the district's objection in light of this witness's actual testimony, the undersigned finds that his observations of the student at school are quite similar to those made by [REDACTED] who did attend the IEP meeting. The district is not prejudiced by the hearing officer considering his testimony.

The mother and [REDACTED] visited [REDACTED] shortly after November 4th. The mother reported that the teacher said there were 12 to 14 students in the class and room for a few more. There was one teacher and one other adult in the classroom when the mother visited. The mother testified that during the time she talked with the teacher, the students sat at the table doing a reading exercise. When the students got restless, the teacher told them to "wait" or "read." The mother said that her daughter would not be able to do that. Although she liked the teacher, the mother said the class size was not appropriate for the student.

The mother testified that she had made an appointment to visit [REDACTED] but the case manager there cancelled the appointment. The mother said that she and [REDACTED] went to the school anyway but were not allowed to observe a classroom. The district, in its closing argument, stated that it had withdrawn its offer to let the parent visit when "it became clear that the Parents were interested in litigating and building their case" that the district's programs were not appropriate for the student. (Dist. Closing, p.1). The district asserts that parents do not have a right to observe programs.

[REDACTED] was the district's placement manager in October 2008. She testified that she had reviewed the student's IEP before recommending [REDACTED] and [REDACTED] as placements. She considered the number of aides in the classrooms when she recommended these schools. She said that the TMH classes at both [REDACTED] and [REDACTED] have two aides. She testified that there are ten students in the [REDACTED] TMH classroom. She stated that the student's IEP does not identify a specific student/teacher ratio.

The parents presented several witnesses who testified about the student's educational needs. The first, [REDACTED] had worked for the district for 34 years prior to his retirement four years ago. During his employment with the district, [REDACTED] had worked in a variety of capacities ranging from special education teacher to manager of programs for students with severe cognitive disabilities. He currently consults with the district, although not on any of the schools named in this matter. He also consults with parents. [REDACTED] observed the student both in her home and at [REDACTED]. He also has reviewed her records.

[REDACTED] testified that the student knows some simple signs and can respond to one step directions. He described her as very distractible. Although he observed the student engaging in some aggressive behavior in the classroom, [REDACTED] opined that the behavior was a form of communication rather than a hostile action. He said that she looked for affirmation from the school staff, who gave her immediate reinforcement for everything she did. He testified that the student was constantly supervised, particularly during transitions. He said there were three adults in the classroom at all times. His educational recommendations include a hands-on, highly structured program with lots of modifications and a strongly structured curriculum. He opined that the student needs tasks broken down into manageable parts, lots of reinforcement, minimal classroom distractions, and 1:1 assistance.

[REDACTED] is a consultant at [REDACTED]. She has known the student since 2006. She conducted a psychological evaluation of the student and developed the BIP in the [REDACTED] IEP. [REDACTED] testified that the student has made significant improvements since she began at [REDACTED]. She attributed the student's progress to the program's structure and its 1:1 nature. She said the student is unable to focus when there is noise nearby and requires a 1:1 aide to help her maintain focus and attention. The aide uses physical and verbal prompts to redirect the student.

Dr. A testified regarding his IEE evaluation and educational recommendations for

the student. [REDACTED] is both a clinical and school psychologist. He described the student as easily distracted by both internal and external stimuli but stated that she can be re-engaged by verbal and physical cues. She is able to engage for longer periods of time when there are no distractions. [REDACTED] recommended a highly structured and very individualized program with a clear, definitive, and repetitive structure and clear expectations. He testified that the student must be safe and engaged to receive "any" educational benefit from the classroom. Although [REDACTED] opined that the student would not receive educational benefit in a classroom of 10 students, he testified that he had not mentioned class size in his evaluation report.

The district presented [REDACTED] who had observed the student in September 2007 at [REDACTED]. [REDACTED] has been employed by the district for 30 years. She currently oversees 37 schools and guides staff in ensuring that students are educated in the least restrictive environment. She said the student was able to follow one-step directions and could be engaged for 5 to 10 minutes. Her individual aide kept her on task with prompts. Although the student had no direct interaction with her classmates, she was aware of other students and watched them respond to the teacher. She did not observe the student demonstrating any maladaptive or self-stimulatory behaviors. She said the student was very compliant. She recommended placement in a cognitively delayed class. She testified that the student needed a 1:1 aide. She also recommended inclusion in with the general education program and opined that the student would benefit socially from being with other students.

The picture of the student that emerges from the above testimony is of a student with severe disabilities who is aware of and responsive to her environment. She clearly requires a 1:1 aide, both to help her focus and attend to the learning environment and also for safety. The June 27th IEP requires a 1:1 aide. (SD 60). She has particular communication and behavioral needs. The parents' experts stressed the need for a highly structured program with clear expectations. The June 27th IEP addresses these needs in a number of ways. A behavioral intervention plan is provided to address task compliance and aggressive behaviors. The plan also indicates that goals will be developed after the student attends school and baseline data is collected. (SD 59). The IEP requires the following accommodations: break tasks into parts; provide verbal, physical, visual cues; simplify and repeat directions; use manipulatives when necessary; use a multisensory approach as needed; hand over hand assistance as needed; sensory breaks as needed; and, breaks after non-preferred tasks. (SD 61). Some of the accommodations recommended by [REDACTED] are included in this list. Related services include intensive physical and occupational therapies, social work services, and speech/language services. (SD 69). Placement is to be in a "low student-teacher ration instructional setting." (SD 70). She also is to participate with non-disabled peers in a variety of settings. (SD 69).

The question that remains is two-fold: do to specific terms of the IEP require implementation in a 4:3:1 environments; and, is a 4:3:1 program required for the student to receive a free appropriate public education? [REDACTED] who knew the student when she was in pre-kindergarten at [REDACTED] School, served as facilitator of the IEP meeting. She

testified that the district's IEP was developed from information in the student's [REDACTED] IEP, the IEE evaluation, and the [REDACTED] Service Plan. She said that the parent, her attorney, and [REDACTED] had raised safety concerns, during the meeting. [REDACTED] also discussed the student's high level of distractibility. [REDACTED] testified that the district had considered the [REDACTED] student/teacher ratio and determined that the student requires a classroom with a small pupil/teacher ratio. In the district, this means a classroom with 12 students or less. She testified that the mother had not requested a specific student/teacher ratio. [REDACTED] testified that because the IEP team had not reached consensus on eligibility, the district agreed to re-evaluate the student after she began attending a district school. [REDACTED] testified that although the mother had not been given a copy of the IEP at the end of the very lengthy meeting, she agreed to receive a copy later. The evidence shows that the parents were given a copy of the IEP on June 30th. (SD 72A). The mother testified that she had reviewed her copy of the IEP and that "other issues" were raised by her review. However, there is no evidence showing that she ever informed the district of these "other issues."

The parents insist that the June 27th IEP is "based on" the [REDACTED] IEP and therefore incorporates the 4:3:1 [REDACTED] structure. A review of the IEP does not support this reading. The IEP states that it was "*developed on information* from the IEP from [REDACTED]" (SD 56A) (emphasis added). That it was developed from an earlier document does not mean that it incorporated all the terms of the earlier document. The IEP identifies the specific [REDACTED] information that the team used to develop the June 27th IEP. The FBA/BIP states that the plan is "transferred from data from the team at [REDACTED]" and notes specific statements are "per [REDACTED] 5-1-08 IEP." (SD 58, 59). The independent functioning goals specify that the goal information is "per IEP 4-15-08 from [REDACTED]" (SD 66, 67). Neither the academic goals nor the speech/language goals contain such a notation. (SD 62-65, 68). The IEP page that describes the student's placement makes no reference to [REDACTED] or the [REDACTED] IEP. (SD 70). The specific 4:3:1 structure does not appear anywhere in the four corners of the IEP. Given the lack of a specific 4:3:1 statement and the fact that the IEP clearly references the specific information that was taken from the [REDACTED] IEP, the undersigned finds that the parents' reading of this document is incorrect. The June 27th IEP neither states that a 4:3:1 environment is required nor does a careful and reasonable reading of the document require such an interpretation.

Moreover, neither the parents nor their attorney filed a dissent to the IEP after they reviewed it nor did they ever inform the district of their concern about class size. Even the parents' due process complaint does not mention class size; rather, it alleges that the district "failed to consider any information provided by (IEE evaluator), retained the old and incorrect diagnosis of (the student), and otherwise ignored all of our concerns about (the student) being placed in a safe and academically and socially appropriate environment in which a FAPE would be offered." (PD 61). The evidence also shows that neither the mother, her attorney, nor [REDACTED] raised the [REDACTED] ratio during the IEP meeting. [REDACTED] testified that he had not mentioned class size in his evaluation report but yet had assumed that the student would be placed in a classroom of five to seven students. The district cannot be held accountable for information that it

had not been given, particularly in this instance where the parents had accepted the IEP and the student had not attended a district school for several years.

Additionally, the parents' experts testified that the student could benefit from the programs offered at [REDACTED] or [REDACTED]. [REDACTED] testified that if the student were placed at [REDACTED] she would not learn at the pace as she would in a smaller environment and said that the program was "not optimal." He did not, however, testify that she would not benefit from the district's programs. He further testified that he would respond the same regarding the [REDACTED] program. [REDACTED] said that the student needs 1:1 attention and structure to benefit educationally. She testified that the student could receive some benefit in a room of 10-15 students, although she noted that it is hard to keep her on task in even the most positive setting when there are distractions. [REDACTED] also testified that the [REDACTED] 4:3:1 structure is for all students – it was not designed for this student's individual needs. The district is required to provide a program from which the student will benefit; it is not required to provide an "optimal" program. *Rowley*, 458 U.S. 176 (1982). The parents have not shown by a preponderance of the evidence that the district was required to implement a 4:3:1 program for the student or that she required such a program to receive educational benefit. The district has shown that either [REDACTED] or [REDACTED] could provide the student a free appropriate public education.

The parents argue in their closing statement that the June 27th IEP was deficient because it did not identify a specific location, i.e., name of a school, where the student would be placed. (Parents' Closing, p. 23). They did not, however, raise this as an issue before the hearing; thus, they have waived this issue. 34 C.F.R. §300.511(d). However, because the district responded to this issue in its closing statement without agreeing to accept it as an issue, the undersigned will address it. (Dist. Closing, p. 6). There is a split in the Courts of Appeal as to whether a specific school must be named in a student's IEP. The Fifth Circuit has held that "educational placement" refers to a student's educational program rather than the specific school at which that program would be carried out. The court also found that the regulation requiring that the IEP name a location is an administrative requirement that did not substantively affect the IEP. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003). On the other hand, the Fourth Circuit recently held that as a matter of law, the student's IEP was not reasonably calculated to enable him to receive educational benefits because the IEP failed to identify a particular school. *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4th Cir. 2007). The court narrowed its holding by stating that "we do not hold today that a school district could never offer a FAPE without identifying a particular location... (b)ut, certainly in a case in which the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP provides, the IEP must identify such a school to offer a FAPE." *Id.* The case before this hearing officer is distinguishable from *A.K.* on its facts. The evidence herein shows that unlike the parents in *A.K.*, the parents agreed to the June 27th IEP. They did not dissent to the IEP nor did they raise questions or doubts with the district after the IEP meeting. Clearly, they never told the district that they believed it did not have a school that could meet the student's needs.

Reimbursement

The district argues that the parents are not entitled to reimbursement for their unilateral placement for two reasons. First, the district contends that the parents did not provide the required notice to the district and that such notice is jurisdictional. A district may be required to reimburse parents who have unilaterally placed a student in a private school because the district did not provide a FAPE to the student. *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359 (1985). Pursuant to the current federal regulations, reimbursement "may be reduced or denied" if the parents did not inform the IEP team at the most recent IEP meeting that they were rejecting the placement proposed by the district or did not so notify the district at least 10 business days prior to removing the student from public school. 34 C.F.R. §300.148(d)(1). While the parents clearly must give notice to the district, the decision to reduce or deny reimbursement because of late notice is discretionary. The parents could not give notice before August 28th because they had not visited [REDACTED] until that date and thus had not decided the placement was inappropriate the student. The IEP states that the parents can visit the school prior to placing the student. (PD 45). The parents provided the required notice on September 4th. (PD 61). The undersigned finds that the parents provided notice as soon as they reasonably could given the date on which they were informed of the placement.

The district next argues that a student must have received special education and related services in a public school prior to the unilateral placement in order for the reimbursement provision to apply. 20 U.S.C. §1412(a)(10)(C); 34 C.F.R. §300.148.⁴ This interpretation ignores recent decisions holding that conditioning reimbursement on a student's receipt of special education services would lead to absurd results and that reimbursement is a necessary component of a district's FAPE obligation. *Tom F. ex rel. Gilbert F. v. City Sch. Dist. of the City of New York*, 128 S.Ct. 1 (2007); *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008) *petition for cert. filed* (U.S. Sept. 3, 2008) (No. 08-305); *Anthony G. v. Bd. of Educ. of Hyde Park, Central Sch. Dist.*, 459 F.3d 356, cert. denied 2007 U.S. LEXIS 11520 (U.S., Oct. 15, 2007). The undersigned finds this reasoning applicable to this matter as independent research has not found Seventh Circuit decisions to the contrary. Thus, the parents can request tuition reimbursement even though the student did not attend a district school prior to the unilateral placement at [REDACTED]

Based on all the foregoing reasons, the undersigned finds that the district denied the student a free appropriate public education by placing her at [REDACTED] School and [REDACTED] School. Therefore, the district must reimburse the parents for tuition they

⁴ "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C. §1412(a)(10)(C).

have paid to [REDACTED] for the time period of September 14, 2008, and the date of this decision. The undersigned also finds that the placement offers of [REDACTED] and [REDACTED] do provide the student a free appropriate public education; thus, the district's obligation for tuition reimbursement ends upon issuance of this decision.

IT IS ORDERED THAT:

The district is to reimburse the parents for tuition they paid to Keshet Day School for the student's attendance between September 14, 2008, which is ten days after they notified the district of the unilateral placement, and December 22, 2008, the date on which this decision is issued.

Order

Within forty-five (45) days of receipt of this Order, School District shall submit proof of compliance to:

Illinois State Board of Education
Program Compliance Division
100 North First Street
Springfield, Illinois 62777-0001

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 the Illinois State Board of Education. After a decision is issued, the hearing officer may not make substantive changes to the decision. The right to request such 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.

Right to File Civil Action

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

DATED: December 22, 2008


Mary Schwartz
Impartial Hearing Officer


CERTIFICATE OF DELIVERY BY MAIL

The undersigned hereby certifies that a true and correct copy of the Decision and Order was sent by certified mail from Chicago, Illinois, and directed to:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Mr. Andrew Eulass
Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

before 6:00 p.m. on December 22, 2008



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