

Case Number: 2008-0325

vs. [REDACTED]

Hearing Officer: Sheana Hermann

Illinois State Board of Education  
Special Education Services  
100 North First Street  
Springfield, Illinois 62762

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SPECIAL EDUCATION  
SERVICES

**Impartial Due Process Hearing Decision**  
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District Name [REDACTED] Phone: [REDACTED]  
Superintendent [REDACTED]  
Address [REDACTED], IL [REDACTED]  
Represented by [REDACTED]

Parent Name [REDACTED]  
Address [REDACTED]  
Represented by [REDACTED]

**Date and Timelines**

Date of Written Request: 08/19/2008  
Date of Pre-hearing Conf: 09/10/2008

Date of Hearing: 10/21/2008 to 11/4/2008  
12:00:00 AM  
Date of Decision: 11/14/2008

**Summary of Decision**

This case involves a pre-school child who has a significant medically based feeding disorder. The District states that the services the parents are seeking are medical in nature and thus not entitled to be provided under IDEA. Parents request a due process hearing to determine whether the District failed to identify their child as a special education student in July of 2007 when the child initially turned three and whether the District after finding the student eligible for special education services in June of 2008 failed to provide an appropriate placement and failed to provide the child with appropriate related services. Finding for the District, where the District appropriate found that the Student was not eligible for special education services as his disability did not impact his ability to learn in July of 2007 and Parents were seeking only related services. Furthermore, when the District did find the Student eligible for special education services under IDEA, the District's IEP is appropriate and parents are not entitled to receive nutrition or speech feeding therapy as it is outside of the scope of what is educationally required.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

**RECEIVED**

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)  
) ISBE CASE NO. 2008-0325 SPECIAL EDUCATION  
) SERVICES  
) Sheana Hermann  
) Impartial Due Process  
) Hearing Officer

NOV 19 2008

**HEARING DECISION AND ORDER**

This matter comes before this hearing officer on the Impartial Due Process Hearing Request of [REDACTED] ("Parents") on behalf on their son ("Student") against [REDACTED] ("District"). The Parents are represented by their attorney [REDACTED] and cocounsel [REDACTED] of [REDACTED]. The District is represented [REDACTED] with co-counsel [REDACTED] & [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 (IDEA) 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 Parents made their initial Due Process Hearing request dated January 31, 2008 disputing the District's finding of ineligibility for special education services and requesting that the District fund the services that the Student was receiving previously receiving through Early Intervention. The Request was received by the Illinois State Board of Education (ISBE) on February 4, 2008. The Parents filed an amended due process request on May 12, 2008 and after having independent evaluations conducted along with parties engaging in a IEP meeting on June 25, 2008. After the IEP meeting the Parents filed the remaining issues on August 19, 2008. The filing of these additional issues restarted the timeline. A pre-hearing conference was conducted by telephone conference on September 10, 2008. The Hearing was conducted on October 21, 22, and 23 at [REDACTED] Administrative Offices, [REDACTED] Illinois and on November 4, 2008 at [REDACTED], [REDACTED] Illinois. The Parents' and District's documents were admitted into evidence. The following witnesses testified: [REDACTED] Student's Nutritionist; The Student's Mother; [REDACTED] Student's occupational therapist; [REDACTED] the Student's Occupational Therapy Assitant; [REDACTED] the Student's Speech-Language Pathologist who provides speech feeding therapy; [REDACTED] clinical psychologist who provided an evaluation of the Student; [REDACTED] The Early Childhood Special Education Coordinator for the [REDACTED], Speech Language Pathologist at [REDACTED], [REDACTED] physical therapist at [REDACTED]; [REDACTED] occupational therapist at [REDACTED]

social worker at [REDACTED] Home School Principal; [REDACTED] speech pathologist at [REDACTED] blended special education teacher at District; and [REDACTED] Student's pediatric gastroenterologist.

### Issues Presented

- A. Was [REDACTED] entitled to an IEP in July of 2007.
  - B. If [REDACTED] was entitled to an IEP in July of 2007 would this include speech feeding and nutrition therapy of the type [REDACTED] has been receiving from [REDACTED] and [REDACTED]
  - C. If he was entitled to these speech feeding and nutritional therapies are [REDACTED] parents entitled to reimbursement for the cost of those therapies and if so how much?
  - D. If [REDACTED] was entitled to services in July of 2007 does that include occupational and physical therapy services and if so are the parents entitled to reimbursement for these services in 2007.
  - E. Are the parents entitled to speech feeding and nutrition therapy services for 2008 and if so are they entitled to reimbursement for the services they arranged at their own expense.
  - F. What is the current IEP and does it include the necessary occupational and physical therapy services he needs.
  - G. Has the District made all necessary accommodations for [REDACTED] disability in the program they have offered him and if not what additional services is he entitled to.
- In summary, the Parents seek a determination that [REDACTED] has been entitled to an IEP since July of 2007.

### The Parents Seek the Following Remedies:

The Parents seek a determination that [REDACTED] has been entitled to an IEP since July 20, 2007 when he reached the age of three and that his eligibility entitles him to speech feeding, nutrition and occupational therapy and that those services should have been provided beginning on July 20, 2007 continuously to date and that those services should be mandated by the Hearing Officer. In addition they seek reimbursement for all of their out of pocket expenses for these services to date, plus interest. They also seek reimbursement for any expert fees or witness fees they have incurred in presenting information at the various IEP meetings and in presenting their Due Process Case. In addition, the attorneys for [REDACTED] and the Parents seek an award of substantial attorneys' fees and costs commensurate with the substantial time required to represent their clients in this matter including appearances at multiple IEP meetings in 2007 and 2008, preparation for and motion practice in connection with the original Due Process Hearing set in June 2008, responding to the District's motions to exclude evidence, to continue those proceedings, and preparation and trial of the October, 2008 Due Process Hearing, case management and appearances before the Hearing Officer Hermann and participation in State Sponsored Mediation.

### Finding of Fact

The Student is a male 4 year old with a birth date of [REDACTED]. His qualifies for services under the Individuals with Disability Act as Amended in 2004 (IDEA) as having a developmental delay in social/emotional development and adaptive delay. Student was

born pre-mature at 30 weeks had received services under the Early Intervention Plan. As his third birthday approached, his Parents contacted the District to arrange for continuation of his therapies. The parties engaged in two IEP meetings, one on June 27, 2007 and the other on July 25, 2007 at which time the District advised the Parents that the Student did not qualify for services under IDEA. The Parents received a copy of the procedural rights at the July 25, 2007 meeting. Another IEP meeting was conducted on June 25, 2008 after the Parents obtained independent evaluations from [REDACTED] and [REDACTED]. At this meeting the team determined that the Student was eligible for IDEA services pursuant to a developmental delay. However the parties still had a dispute as to the therapies that the Parents were requesting.

[REDACTED] the Student's dietician testified. She first became involved with the Student through [REDACTED] early intervention program. When District first offered to place the Student in its "At Risk" program, she advised the Parents to not place the Student in a classroom due to his vomiting and spitting up. She testified that he was a smart child and eager to cooperate. He was always willing to interact touch and participate in their feeding sessions. In the past he had spit food out but did not do that any longer. She also testified to noticing that the Student was more interested in food after being prescribed in March of 2008 Zofran to ameliorate nausea. She stated that she was not seeing pocketing of food, he was taking more bites of food with mixed textures. His limiting factor is the volume of food. He is on formula which she described as like a medication. She was not involved in creating his formula feeding. She also stated that she had not seen vomiting in June of 2008. She no longer has the same reservations about the student going to pre-school. In order to go to school his feeding would need to be "tweaked" He has the cognitive ability to understand the importance of eating however that he does not enjoy eating. She testified that the Student is not involved in his own feeding. Student is able to follow directions and able to communicate his thoughts and needs during therapy sessions. She also stated that the Student is capable of picking up food and putting it into his mouth. There is not specific certification for feeding programs. She also stated that therapy was necessary to increase his nutritional needs and growth. He is currently in the 50<sup>th</sup> percentile for weight and 50<sup>th</sup> to 75<sup>th</sup> percent for age. ( D. Ex. Pp. B51-52). Goals of therapy were not educational in nature. (D. Ex. P. A107) . All sessions were conducted in the home; she made no observations in any other setting. Past notes indicate that the Student is capable of holding his bottle and feeding self (Ex. OLV 000159). In her June 6, 2007 report, she stated that it was best for the student to receive nutrition services without participating in a classroom setting as his feeding schedule does not allow for large pockets of time. His parents are actively working toward providing the student with positive social interaction with peers. ( P. Ex. P. OLV 175). In her report of March 23, 2007, Ms. [REDACTED] reported that the Student had thrown up twice in 6 months of sessions (P. Ex. OLV 170). She reported that the Parents have seen more levels of vomiting. His condition is complicated with not having a diagnosis or understanding as to the cause for the food aversion/vomiting (P. Ex. P. OLV 171) At the time of this report the Student was within the 50<sup>th</sup> percentile for weight for age (at 36 months – student at time was actually 32 months) and between the 25<sup>th</sup> to 50<sup>th</sup> percentile for weight for length. (P.Ex. OLV 171) She recommended that nutrition services continue to promote increased oral intake, a typical feeding patten and appropriate rate of growth. (P.Ex. OLV 172).

In September 16, 2008 report, 50<sup>th</sup>-75<sup>th</sup> percentile for weight for age, 50<sup>th</sup> to 75<sup>th</sup> percentile for stature for age and 75<sup>th</sup>-85<sup>th</sup> percentile weight for stature. (P. Ex. OLV 382). See also (P. Ex. P. OLV 383-386). She reported that he is showing improvement but only minor improvement (P. Ex. OLV 385). She noted in her report that sensory feeding is not part of a registered dieticians education or training; additional training in the area are optional and up to the individual to pursue (P. Ex. OLV 385). Less than 50 dieticians who work with sensory feeding in Illinois (P. Ex. OLV 385). She recommends continued nutrition and feeding therapies to assist in increasing food repertoire and volume while decreasing the dependence on individualized liquid formula to meet nutritional needs. (P. Ex. OLV 385). The Student would benefit from weekly nutrition and feeding services to promote quickest progress towards primary goal. (P. Ex. OLV 386).

Mother testified the Student was born at 30 weeks. He was experiencing reflux and his food aversion became more and more apparent. Dr. [REDACTED] first came on board in the fall of 2004. As a child being in the intensive care unit he qualified for the state of Illinois Early Intervention Program. He received early intervention services until he aged out. As his third birthday approached, she contacted the District to advise them of her child. She first came to district through [REDACTED]. In Student's initial referral form of April 2007, it was noted no developmental, language or physical delays, however under medical history, biliary dyskinesia, severe GERD, refusal to eat, eosinophilic esophagial comiting, impaired digestive dysmotility, volume intolerance were noted. (P. Ex. OLV 400). Under social development did not note any concerns regarding development outside of feeding, no speech or language concerns, or self help skills (P. Ex. OLV 403-407). The District's social worker met the family at their home and asked many questions and observed the family for 1 hour to two hours. Next she went to [REDACTED] where she brought the Student's most recent evaluation. She stated that she was not asked to follow the Student into the evaluations and the evaluation process lasted approximately 1 and ½ hours. At the first meeting she attended she stated that she had no understanding of the legal effect of the meeting. At the IEP meeting in June of 2007 Parents brought their attorney [REDACTED]. District refused to provide services stating the Student was ineligible. The Parents refused to sign the documents. The Parents made arrangements to work with nutritionist and speech feeding therapist. However the Parents cut out occupational therapy due to their tight budget and the nutritionist was coming to the home every other week. They first filed for due process in January of 2008 but agreed to postpone the hearing in order to have additional evaluations conducted and another IEP meeting on June 2008. Parent has stated Student is still vomiting but has seen significant improvement since March of 2008 when he started taking Zofran. He has an increased willingness to try different foods and more inquisitive about foods. He enjoys cooking and preparing food. Dr. [REDACTED] evaluated the Student in May of 2008. Another IEP meeting was held in June of 2008. District offered mixed pre-school class. District would provide OT, social work, nursing consult, speech language but District not willing to provide a nutritionist or speech feeding. Parents provided an addendum. Visited home school in late August and walked though a typical day. Parent was concerned about who would feed her child. District advised looking into training staff in [REDACTED]. The Parents are self insured.

She testified that the student had many friendships with neighborhood children and was in organized activities such as soccer and T-Ball.

Feeding the Student was very involved. A typical feeding day (OLV 333-334). Filling out for sensory history noted no concerns said to see reports regarding feeding issues (OLV 426).

██████████ testified. She was hired by the Parents to conduct an occupational therapy evaluation. Her testimony was not persuasive as one of her tests she conducted for the child was a test was 5 to 10 year olds and she made no noted compensations for conducting the test on a three year and nine month old. She evaluated the Student on April 20, 2008. She conducted the Peabody and Sensory Profile. She stated she observed that his grasp was delayed. She stated he did not like movement.

██████████ testified. She is a speech and language pathologist and works part-time at ██████████. She provides the Student with speech feeding services. She initially started seeing the Student in the Early Intervention Program. She stated that the Student has a feeding disorder. She stated the primary goal of her services is to increase nutritional intake for growth and strength. She stated she had no concerns with the Student's expressive or receptive language skills. She acknowledged that the Student was dismissed from his speech and language services in March of 2007. He was able to interact and able to display normal social skills. She brought in a peer to model eating however said it was no longer necessary since the Student was less resistant to food. She had not seen vomiting. In her report dated June 6, 2007, she states that during non-food related activities he demonstrates appropriate strength and mobility of the oral musculature. He uses a rotary chew pattern with proper tongue lateralization. When he takes a bite of solid food, however, he does not demonstrate a proper chewing and swallowing sequence so he often chokes and gags. This is a skill he has not mastered due to his medical history (P. Ex. OLV 176). The Student's treatment goals are to expand oral intake for nutritional status (P. Ex. OLV 410-422).

██████████ clinical psychologist provided an evaluation dated May 14, 2008. She observed the Student on three dates. She made an observation of a home feeding, she interviewed the parents with the Student and met the parents alone. She utilized observation and the Vineland Adaptive Scales which is done through the interview with the parent. She diagnosed the student with an anxiety disorder due to general medical condition. She was present at the June 2008 IEP meeting. She read her portion of her report regarding his social and daily living skill deficits and was found to be eligible for special education services. She stated that she was not able to provide an opinion as to the appropriateness of the classroom as that was the expertise of the District. She again met with mom and teacher in August 2008 and discussed the different classes, the feeding schedule. She stated that she had no professional opinion as to how he should be fed. She stated that she herself had tried to find protocols regarding feeding for students and training for staff and was not able to find such guidelines. She stated she had talked to the mom and mom wanted the person who was feeding the Student trained. She stated that she recalled at the IEP meeting that the District stated it would accommodate the already established protocols for feeding the Student. She stated that at the meeting with the teacher no decisions had been made, rather ideas were given so that the Student could attend. On cross exam the ██████████ stated that she had not personally observed the

Student having any difficulty. She stated the Student had no delays in language or creative play she also noted at home that the Student used markers and stickers.

██████████ the early childhood program coordinator with ██████████ testified. She ran the IEP meeting had prior experience as an early childhood psychologist. She has conducted over 100 evaluations and appropriately 300 a year. In the Student's meeting she chaired the meeting and shared taking notes with ██████████. Testified that the District performed a play based evaluation. Vol 1 of 4 Psychologist Report The team, after reviewing their own evaluations and the Parents' did not identify any need which would impact his educational performance. She stated the District did offer the Parents the at risk program along with a shortened school day. She stated that the Student's feeding issues were not impacting the Student's learning. She also stated that the Vineland used by the Parents psychologist was not the updated version. She is familiar with the Early Childhood Curriculum and the Early Learning Standards of ISBE and is involved in the training for "Creative Curriculum." The District's program is aligned with this. Self feeding is not one of the goals in self help. Self feeding is not discussed in an early childhood program or is it addressed in the classroom. Self-feeding is not related to education or learning or the ability to learn. It is not an IEP goal to increase caloric intake for growth or nutritional needs for growth. However, the District could accommodate the Student's feeding schedule. She stated that in 2007 Student was found to be ineligible but in 2008 he was found eligible. The Student did not regress rather his development has changed. The District looked at things that would affect his ability to be educated. In 2008 there was an outside evaluation which identified special education needs in developing coping skills. (D. Ex. A003-005). During the 2007 evaluations, the Student did not demonstrate needs which would affect his learning or educational performance. The District has had other children with feeding and eating problems and the District has not provided feeding or nutrition therapy.

██████████ testified. She is the speech and language pathologist at ██████████. She has many years of experience. In her evaluation she reviewed the Parents' reports. She noted that expressive and receptive a strength. Student was dismissed for prior speech and language therapy. She stated the Student was great at following directions, he was smart. He was age appropriate in educational concerns. She noted no school based language services were indicated at the time of her report (D Ex. A016-A017). In the 2008 IEP, she reviewed ██████████ report and noted language appropriate, no concerns with voice, fluency or pragmatic skills. The Student had good muscle strength, only identified areas of feeding and nutrition. In the IEP his goals where to communicate feelings to cope with feelings, this was a weakness in ██████████ report. Not offer direct feeding service as this is not an educational concern. She stated that she attempted to contact ██████████ and had difficulty due to ██████████ being in the office only on Wednesdays

██████████ the occupational therapist at ██████████ presented as a very credible witness. She had a very professional demeanor and was very honest. She has been an occupation therapist for over 30 years. When she first met the Student he was three she described him as cute friendly, happy, lively and engaging. She conducted a play based assessment in an informal setting, a school based setting. She stated he was able to follow directions and played with a variety of toys. She stated that children can have sensory needs but not necessarily need special education in that it does not affect the student's ability to learn.

(SD Ex. A019). She stated that there are no IEP goals for sensory issues since it is not an educational concern and in fact sensory issues are changing and ongoing. She observed the Student's grasp and found it to be age appropriate. She did not observe any tactile system concerns, such as not wanting to touch certain textures. She did not see any educational needs. She also testified to the Parents' private therapist who used the sensory profile which is meant for children age 5 to 10 years. She stated the judgment is based on a parental questionnaire. She also stated that fine motor and visual should not be scored as they are not meant to be addresses at this age (not developmentally appropriate). She stated that the District was to provide occupational therapy due to the outside evaluator's findings. The School would provide 20 minutes direct services for grasp and 10 minutes for consult in sensory processing. He would also receive a flexible schedule to accommodate his feeding schedule. The group would meet monthly to consult with the OT to determine whether the Student could access his learning environment.

██████████ the ██████████ social worker testified. She has been a social worker for 25 years. She first visited the Parents in their home on June 19, 2007. She stated she reviewed the questionnaire with the mom and explained her procedural safeguards. Mom's main concern was the Student's feeding issues. She stated the Student's current delays are all based on the Parent's report of delays mainly with regard to his feeding. Based upon her observations and the Parent's questionnaire the student appeared emotionally ready for pre-school, he was comfortable at home he played, he had good pre-academic skills, he was able to play by himself with one toy for over 15 minutes, he likes a variety of play, he had skills of a child who could do well in pre-school. She stated that she did not believe frequency of vomiting to be an issue of concern. The social worker Mrs. ██████████ interviewed the Parents at length and observed the Student. The Parents did not report any significant concerns in the area of social or emotional development, and upon evaluating the Student, she found that the Student exhibited age appropriate skills in cognitive, speech and language, adaptive and fine motor areas (D. Ex. A0006-008).

██████████ The Principal of ██████████ School. She is the initial contact with children coming out of Early Intervention. Prior she was a director of special education for 12 years.. She first met the student at his home in April 2007. She stated that the student was very positive, displayed many pre-school skills, very social, engaging and able to entertain himself. She first learned about the Student when the early intervention coordinator sent in the package, She agreed to meet at the Student's home. She gave the Parents the referral form which they filled on site. She stated she arranged for ██████████ meeting. She did not discuss the case with ██████████ She was not part of the evaluation team. First met at IEP meeting on June 27, 2007. She stated the team did not find the Student eligible. The team met again on July 25, 2007, to explain why student was not eligible. She stated that the District offered the "At Risk" program to the Parents at Lincoln School and that the District would reduce the school day to accommodate the Student's feeding and that the District was willing to monitor the Student's progress to determine whether he need to be reevaluated.

██████████ testified. She is a speech pathologist with ██████████. She testified that she is trained in SOS technique of food training. She stated that she was willing to consult with the Parents and the Student's therapists to determine what feeding

techniques to use, when to feed. She stated that entire team could be able to feed him his formula. She stated he would benefit for the pre-school program. He could gain peer modeling he would have social opportunities

██████████ the classroom teacher testified . She was the classroom teacher in the blended program which the District recommended. She described a typical day. The children arrive at school put back pack away, then have opportunity to engage in a table activity for 10 to 25 minutes then they have circle time. She stated that feeding was not taught. She stated she met with mom and discussed where to fit in feeding. Nothing was set in stone she stated that she was willing to go to the Student's home to observe a feeding. She stated that she had a student in her summer program who had a feeding issue and the District was able to accommodate her. On August 29, 2008 she met with Mrs. ██████████

Dr. ██████████ testified. He is the Student's pediatric gastroenterologist. He stated that the Student's case is most unusual. He also stated that a "G" tube could be considered as a feeding method except that the Parents are very opposed to it. He also stated that he could not give an opinion as to education as he is not an educational expert.

In Parents' documents it include a report for Developmental-Behavior Pediatrics (P. Ex. OLV 13-24). The report notes parental concern regarding poor, limited feeding, lack of willingness to eat, no hunger cues, projectile vomiting and no self-feeding. ( P. Ex. OLV 13). No concerns with behavior; play appropriate, no concerns with social, gross motor, walks fast not clumsy (P. Ex. OLV 14). His fine and gross motor movement patterns were normal (P.Ex. OLV 18)

The Student was receiving speech language services for his expressive language and speech intelligibility but was dismissed as meeting his goals and demonstrating age appropriate expressive language and phonological skills. He demonstrates above average auditory comprehension and age appropriate expressive language skills and speech intelligibility skills (P. Ex. OLV 180).

School willing to be trained and develop a feeding protocol (P. Ex. OLV 367). The District was willing to discuss with Ms. ██████████ feeding requirements. In a August 11, 2008 letter the District attempted to set up meeting (P. Ex. OLV 379-380).

In their evidence packet there is evidence that the Parents had experience filing out other questionnaire's in the past such as the Vineland (P. Ex. OLV 20).

The Parents attempted to introduce evidence of ██████████, however, her testing was invalid due to it being modeled for older children and she did not compensate for the age discrepancy.

The District's IEP as established in June 25, 2008 provided significant services which would meet the Student's needs and would accommodate his feeding schedule. The District also provided feeding goals for the Student.

## Conclusions of law

The Supreme Court in *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005), determined that the party challenging an IEP bears the burden of persuasion in a due process hearing brought under IDEA. In this instant case, the Parents bear such burden. Upon review of the evidence presented at hearing, the Parents have failed to sustain that burden. The witnesses which were provided by the District represented a significant breath of experience and knowledge. The Parent's witnesses such as Dr. [REDACTED] and Dr. [REDACTED] specifically stated that they could not testify to educational opinions.

Of particular interest in this case is the fact that the Student is of pre-school age which in and of itself differs from a child who is engaged in a school curriculum. In that the day is shorter, two and one half hours and the curriculum revolve around pre-readiness skills for school. In Illinois, schools are not required to have "regular" pre-school programs. However, the District has both an "At Risk" program and a blended special education program and a self-contained program. The District did not initially fail to identify the Student as one in need of services pursuant to IDEA in June of 2007, nor did the District fail to provide the Student with an IEP which would provide the Student with a free appropriate education in July of 2008.

### District's Ineligibility Determination in June of 2007

Under the Individual's with Disabilities Act as amended in 2004 (IDEA) qualifies a child if the child is found with:

- 1) With mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; and
- 2) Who, by reason thereof, needs special education and related services.

20 U.S.C. Section 1401(3)(i)(ii); 34 CFR Section 300.8(a)(1).

In plain and simple language, in order for a student to qualify for IDEA services, the student's disability must affect his ability to learn. It appears perhaps that based on the Student's significant medical history and the fact that the Student was receiving care under Part C of IDEA and under the Illinois Early Intervention Service System Act, 325 ILCS 20/3, the Parents were under the belief that the District should continue the services that the Student was receiving from Early Intervention. However, Part C and Part B differ in that Part B encompasses a student's ability to learn. The two statutes have different qualifiers. Not all children having a disabling condition qualify for special educational services. Not all children who qualified for services under Part C qualify for services under Part B. In order to meet the requirements of IDEA, a student needs to require special education services. However, students who do not meet the qualifications under IDEA may still be eligible to receive services under Section 504 or the ADA. Under section 504 an individual is disabled if he has or has a record of having or is regarded as having a physical or mental impairment that significantly interferes with one

of life's major activities. 34 CFR 104.3(j). Major life activities are 'functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing. Learning and working.' 34 CFR 104.3(j)(2)(ii). These cannot be used a basis to trigger IDEA, *OCR Staff Memorandum*, 19 IDELR 894 (OCR 1992). While Part B requires coordination to assure continuity of services, it does not compel provision of all the same services. Districts are free to conduct an initial evaluation of the child and convene an IEP meeting to design the IEP from scratch, provided the district adheres to the generally applicable time frames for evaluation, holding IEP meetings, and implementing IEPs. *OSEP Memorandum 14*, 19 IDELR 1130 (OSEP 1993). See also *Boyertown Area Dist.*, 2 ECLPR 47 (SEA PA 1994) (even assuming the services were part of the IFSP, the district had no obligation to continue to provide them); accord *Chester County Intermediate Unit*, 23 IDELR 723 (SEA PA 1995) (refusing to recognize the equivalent of a stay-put concept when a child is transitioning from Part C to Part B and holding that the IU was not obligated to continue the services in the Part C IFSP, pending the parent's due process challenge to the proposed IEP).

When the Parents initially approached the District in April 2007, the Parents' main concern for the Student was in the areas relating to his feeding disorder. The Mother prepared a statement evidencing this and in fact the reports supplied to the District by the Parents concurred that the main areas of deficit for the Student related to his feeding issues. In fact his evaluators generally described the Student as cooperative, smart, engaging. The District upon review, also found this to be the case. At the time of the eligibility meeting in June and July of 2007, there were no reports on record that would indicate that the Student required specialized instruction due to his disability. A very similar case to this is found in *Department of Education, State of Hawaii, Hawaii State Educational Agency*, 47 IDELR 277 (January 3, 2007). In that case parents were seeking special education services for their pre-schooler who has serious health impairment but was otherwise functioning at age level with regards to his academic, cognitive, behavioral and adaptive areas. The parents in that case were concerned that the student may miss school due to his illness but the hearing officer found that the special education rules are written for students in the present tense and should not consider alleged future consequences. In this case despite the students required medical needs he was not found to be eligible for special education services.

When the Parents first engaged the District, it was to continue with the services that the Student was receiving under the Early Intervention Program. Under IDEA, related services are those services provided to a student with a disability which allow him to benefit from special education. 34 CFR 300.34. The statute explicitly states that those students who are seeking only related services and not special education are not eligible for services under IDEA. 34 CFR Section 300.8(a)(2)(i). After conducting a full evaluation of the Student, reviewing the documents supplied by the Parents and convening an IEP meeting, the District correctly determined that the Student was not in need of special education services. The evaluations support this conclusion.

During the hearing, the Parents attempted to present evidence through witness testimony that since the District subsequently found the Student eligible in July of 2008 for services, it should have found the Student eligible in June and July of 2007. However, the testimony indicates that the levels of expectation for a three year old are

different than those of a four year old. Furthermore, case law supports that an IEP team can only be accountable for evaluations it has at the time of meeting.

### **Must the District Provide Nutrition and Speech Feeding Services**

The District in this case states that the services that the Parents are requesting for the Student are medical in nature or otherwise not educationally required. In IDEA, the regulations specifically limited the coverage of medical services as related services where they are "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 CFR 300.34(c)(5).

The problem lies in the services that fall in between those which are performed by a physician and those which are clearly performed by staff at a school.

The particular service the Parents are requesting are nutrition and speech feeding. The Supreme Court in *Irving independent School District v. Tatro*, 555 IDELR 511 9EHLR 555:511 (U.S. 1984) and affirmed in 1999 in *Cedar Rapids Community School District v. Garret F. by Charlene F.*, 29 IDELR 966 (U.S. 1999) determined what health related supportive services were the responsibility of a school district. Since *Tatro*, as more health related cases have evolved, the lower courts have applied a case by case scenario taking into account several factors such as whether the care was required on a continuous basis, existing school personnel could perform the service or additional personnel are needed to be hired, whether the cost of the service is significant, whether failure to perform the service properly could have severe, even fatal consequences.

In this case, it is clear that feeding is not part of the pre-school program, and is to be supplied to the Student as an accommodation. As Ms. [REDACTED] stated, his feeding is like taking medication. However she also testified that the schedule could be tweaked. Furthermore, the goals of the feeding therapies are not education goals.

### **Free Appropriate Education**

The Supreme Court in its landmark decision in *Board of Education of the Hendrick Hudson School District v. Rowley*, 428 U.S. 176 (1982), established a two prong test to determine whether FAPE has been provided to a qualifying student, *Id.* at 200. The first prong is whether the school has complied with procedures as set forth in IDEA. The second prong in *Rowley* is whether the IEP sets forth a placement and services which address the unique needs of the child and is reasonably calculated to enable the child to receive an educational benefit.

The Parents have not stated that the District has failed to comply with procedures.

## Does The IEP Confer an Educational Benefit

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (*Rowley*, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (*Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 [2d Cir. 1998]; see *Rowley*, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (*Walczak*, 142 F.3d at 132, quoting *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see *Grim*, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (*Rowley*, 458 U.S. at 189, 199; *Grim*, 346 F.3d at 379; *Walczak*, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and ... affords the student with an opportunity greater than mere 'trivial advancement'" (*Cerra*, 427 F.3d at 195, quoting *Walczak*, 142 F.3d at 130 [citations omitted]; see *Perricelli*, 2007 WL 465211). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (*Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 [2d Cir. 1997]; see *Rowley*, 458 U.S. at 192).

The Parents contend that the District must have an individual who is trained in the SOS feeding method and just one individual feeder. The District has stated that it is willing to be trained however they need more than one feeder. The 8<sup>th</sup> Circuit found "IDEA mandates individualized appropriate education for disabled children, it does not require a school district to provide a child with the specific educational placement that [his] parents prefer." *School District of St. Louis County: Missouri Department of Elementary and Secondary Education*, 449 F.3d 816 (8<sup>th</sup> Cir. 2006) citing *Blackman v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, at 658 (8<sup>th</sup> Cir. 1999). Parents, no matter how well motivated, do not have a right under [the IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child," *cert. denied Rowley* 488 U.S. 925, 109 S.Ct. 308, 102 L.Ed.2d 327 (1988).

Furthermore IDEA requires that the IEP meet certain requirements:  
Sec. 300.320 Definition of individualized education program.

(a) General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with Sec. Sec. 300.320 through 300.324, and that must include--

(1) A statement of the child's present levels of academic achievement and functional performance, including--

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or

(ii) For preschool children, as appropriate, how the disability

affects the child's participation in appropriate activities;

The evidence and testimony indicate that the IEP does state the specific educational needs of the Student and can meet those needs.

The courts have left it up to the educational team to determine what is educationally appropriate, not medical doctors. In *Alvin ISD v. A.D.*, 48 IDELR 240 (5th Cir. 2007), a court determined that a student's ADHD diagnosis did not automatically entitle him to special education services under the IDEA. In that case the student was functioning well academically. The court in *Alvin* reasoned that doctors are a good source to determine a medical condition but are typically not educational experts, nor do they have a real clear understanding of the distinction between specially designed instruction that a school district offers for students of the federal law versus standard accommodations and assistance that any school district would provide.

The District has stated some of the goals will need to be refined as the year goes on; the Student has not been in school. The goals and objectives set forth in the proposed IEP provide a framework for further refinement by the classroom personnel responsible for overseeing the child's program including her one to one discrete trial instruction. The short term objectives as written provide the requisite specificity to enable the Student's teachers and Parents to understand the District's expectations with respect to each annual goal and what the Student would be working on over the course of the school year (*see W.S. ex rel. C.S. v. Rye City Sch. Dist.*, 2006 WL 2771867 [S.D.N.Y. 2006]; Application of the Bd. of Educ., Appeal No. 04-031; Application of a Child with a Disability, Appeal No. 03-102; Application of the Bd. of Educ., Appeal No. 02-025; Application of a Child with a Disability, Appeal No. 99-92).

### **Least Restrictive Environment**

Then Parents had made a statement regarding having the Student attend his home school which is not where the District program is presented and a program with mainstreamed students.

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.

The Seventh Circuit has not established a legal standard regarding LRE but has stated "[w]e find it unnecessary at this point in time to adopt a formal test for district courts

uniformly to apply when deciding LRE cases. The Act itself provides enough of a framework for our discussion." *Beth B.*, 282 F.3d at 499. The IDEIA requires mainstreaming to the maximum extent appropriate not the maximum extent possible. See *Heather S. ex rel. Mark S. v. Niles Tp. High School Dist. No. 219*, 1999 WL 1100931 (N.D. Ill. 1999), *aff'd* *Heather S. v. State of Wis.*, 125 F.3d 1045 (7th Cir. 1997). 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 this case, the District has provided a program which will allow the Student the ability to be with non-disabled peers along with receiving additional support he needs. Unfortunately that program is not in his home school but the law allows district's to utilize programs in different buildings including cooperative programs. *Beth B.*


### Conclusion

It is clear that the Parents in this case are very well intentioned, loving and concerned. Without the District sponsorship of the speech feeding and nutrition therapy, the financial responsibility on the Parents is burdensome. However the services which the Parents are seeking are not required by law. It is also understandable the concern they feel with possible set-backs with his feeding, however, the District has presented itself as being very willing to work with the family and having very knowledgeable and competent staff.

### IT IS HEREBY ORDERED:

1. The District's did not fail to identify the Student as a student eligible for special educational services in its June 2007 IEP;
2. The District's July 2008 IEP is appropriate;
3. The District is not required to provide speech feeding and nutrition services to the Student;
4. The District shall not be required to reimburse the Parents evaluations conducted by Dr. [REDACTED] or [REDACTED]; and
5. The District need not take any further action.

ENTERED THIS 14<sup>th</sup> DAY OF NOVEMBER, 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' Attorney, 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 November 14, 2008.



Sheana Hermann  
Impartial Due Process Hearing Officer