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SPECIAL EDUCATION  
SERVICES

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

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ISBE CASE NO. 2008-0376

**James Wolter**  
Impartial Due Process  
Hearing Officer

**PROCEDURAL BACKGROUND:**

The grandparents/legal guardians (hereafter parents) filed a due process complaint by ISBE Form 19-86A on March 7, 2008. The complaint was received by the Illinois State Board of Education on March 12, 2008 and assigned to this hearing officer on March 12, 2008. A pre-hearing conference was held on April 28, 2008 and the due process hearing was scheduled for May 15, 2007. The parties were granted a continuance to enable them to participated in State of Illinois sponsored mediation. The district agreed to provide the student with an independent evaluation which required several continuances. However, the parties were unable to resolve their difference regarding the level of special education services required by the student and the due process was rescheduled for July 14, 2007.

The parties mutually requested a continuance of the due process hearing to July 21, 2008 because a witness was not available. The due process hearing was initiated on July 21, 2008 and concluded on July 22, 2008.

The district submitted documents consisting of 646 pages that were accepted into evidence. The parents submit documents consisting of 38 pages that were accepted into evidence.

The following witnesses provided testimony:\*

- |    |            |                                     |
|----|------------|-------------------------------------|
| 1. | [REDACTED] | Student's Regular Education Teacher |
| 2. | [REDACTED] | Assistant Principal                 |
| 3. | [REDACTED] | Special Education Coordinator       |
| 4. | [REDACTED] | School Psychologist                 |
| 5. | [REDACTED] | Special Education Teacher           |

\*The witnesses will be referred to by title rather than name in the remainder of this document to ensure the privacy of the student. In addition, the district will not be identified by name for that same reason.

The due process hearing was closed and the student was not present per the parent's decision at the pre-hearing conference. Witnesses were sequestered during the hearing and instructed not to discuss their testimony until the hearing was completed.

Legal counsel represented the district. Legal counsel did not represent the parent.

The 45-day timeline for conducting the due process hearing was exceeded because of multiple mutual requests for continuances by the parties. This did not have a detrimental effect on the student's education.

The hearing officer has jurisdiction to hear this matter under PA 94-1100, Section 14.02(g) of the Illinois School Code, 34 CFR 300.506-509, and 23 Illinois Administrative Code 226 Subpart G.

**ISSUES:** The issues of this due process are:

1. Whether the student requires a change in the level of special education services from a consultation only to special education classes in Language Arts and Reading while taking all other classes in the regular education program.
2. Whether the district provided the parents with adequate reason and notice for changing the level of special education services it has recommended for the student.
3. Whether the student requires an independent educational evaluation at district expense.

**RESOLUTION:** The resolutions sought in this due process hearing are:

1. The parent desires the hearing officer to order the district not to change the level of special education services provided the student.
2. The parent desires the hearing officer to order the district to pay for an independent educational evaluation.

**Findings of Fact:**

1. The student is a 10 year 2 month old male from an English speaking home. He is eligible for special education under the criteria for Other Health Impaired because of an Attention Deficit Hyperactivity Disorder and a secondary Emotional Disorder. He has completed fourth grade and is entering fifth grade. He has received special education and related services since first grade.
2. The district recommended a change in the level of the student's special education services from a consultation only to special education classes in language arts/reading at the February 20, 2008 IEP meeting [District Exhibit 326 - 346 (hereafter DE 326 - 346)]. The parents were provided written notification of the meeting on January 23, 2008 [DE 325] and the IEP team's recommendation on February 20, 2008 [DE 348].
3. The parent's filed a due process complaint to prevent the district from changing the student's placement March 7, 2008 [DE 351]. The parents contend the district failed to consider alternatives to placing the student in special education for language arts/reading and failed to stipulate the reasons for recommending a change in placement. The student's regular education teacher, assistant principal, special education coordinator, school psychologist and special education teacher

testified that the option of the student remaining in regular education language arts/reading was considered and rejected with the justification "not enough support" [DE 378]. The parents contend the IEP team did not consider supplemental aides and services such as and a one-on-one aide in his classes, co-teaching and extended school year. The student's regular education teacher, assistant principal, special education coordinator and special education teacher testified a one-on-one aide was considered and rejected because it would cause the student to become too dependent and was too distracting for the student. The school personnel testified that extended school year was considered [DE 378] and rejected because the student did not meet the regression-recoupment criteria to be eligible for that service. Additionally, the school personnel testified that co-teaching was not considered because it would be too distracting for the student. The district noted that the parent did not request co-teaching at the February 20, 2008 IEP meeting.

4. The parents contend the fact that the student had four different regular education teachers at the start of fourth grade resulted in the student being disorganized and failing. The school personnel dispute this. However, it is noted that the student's fourth grade teacher did not know which books he was reading before he took tests on those books. This contributed to the student obtaining failing grades in reading. She stated that she did not monitor the student's reading because the fourth grade reading program was a self-paced student-directed program.
5. The parents contend the student has made adequate progress in his current regular education language arts/reading class. While the student may have had failing grades at the time of the February 20, 2008 IEP [DE 397], he passed all his subjects by the end of the semester [DE 403 & 411]. They contend the student's scores on standardizes reading test have gone up [DE 430 & 431].
6. The student's regular education teacher, assistant principal, special education coordinator, school psychologist and special education teacher acknowledged that the student made academic progress during the year but contend it took too much effort by the regular education teachers for the student to make that progress.
7. His regular education teacher testified that the student still struggles with organizational skills. He is unable to fill out his agenda accurately and as a result frequently does homework assignments incorrectly. She did not assist the student fill out his agenda because she stated fourth grade students should be able to do that on their own.
8. The special education teacher testified that he provided the student with 75 minutes of special education consulting service per week as written in the student's IEP [DE 317]. However, the time for that service was not specifically allocated in the teacher's daily schedule. The consulting service was provided as the special education teacher ran into the regular education teacher or the student in passing. There was no record of the time spent on consultation, no specific agenda for the consultation, no specific plans developed for achieving and monitoring IEP goals and no follow-up consultative sessions. Rather, the service provided was an informal discussion between teachers.
9. The special education teacher testified that he pleaded with the parents to let him

work with the student in a special education language arts/reading class because he could provide the student with instruction tailored to his needs in an environment that would have fewer distractions, provide closer monitoring of the student's progress and address difficulties the student encountered. He was concerned that, while the student is making progress, the student's progress is not equivalent to the amount of progress his non-disabled peers are making which is causing the student to fall further behind his peers.

10. The school psychologist evaluated the student on March 27, 2008 and found that no discrepancy between the student's academic achievement and ability. The student's low average academic achievement is consistent with his low average potential [DE 360 -363].
11. The testimony of all witnesses, as supported by the written evidence, indicate at the time of the February 20, 2008 IEP team meeting, the student was not progressing in regular education language arts/reading. However, by the time of this due process hearing, the student had made progress in those academic areas.
12. It is noted that the parties participated in state sponsored mediation. The district agreed to provide the student with an independent educational evaluation.

#### **DISCUSSION ISSUES AND CONCLUSION OF LAW:**

The parents are the moving party in this matter. As such, they had the burden of proof in this matter [*Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005)]. However, this burden does not relieve the district of its responsibility to provide the student with a free appropriate education in the least restricted environment [23 Illinois Administrative Code 226.50; 34 CFR 300.101 -300.103]. The parents' due process complaint concerned appropriate placement and independent educational evaluation.

As noted above the district offered to provide the student with an independent evaluation. Therefore, the issue of whether the student requires an independent educational evaluation and it's accordant remedy are moot. The only relevant issue remaining for this due process hearing is whether the student requires a more restrictive special education placement as prescribed in the February 20, 2008 IEP.

#### **Whether the district provided the parents with adequate reason and notice for changing the level of special education services it has recommended for the student**

A duly constitute IEP team [23 Illinois Administrative Code 226.210] followed all procedural safeguards in conducting and developing the February 20, 2008 IEP [23 Illinois Administrative Code 226.230]. The team made three errors in making the placement recommendation [23 Illinois Administrative Code 226.240].

1. As indicated in **FINDINGS OF FACT # 3** above the district wrote "not enough support" under the *Justification for selection or rejection* section of the IEP. The phrase, "not enough support", is a conclusion that should be supported by facts that in turn would constitute a series of justifications.
2. The team did not list on the IEP a justification of why a one-on-one aide in the language arts/reading class or other supplementary services cannot assist the

student achieve satisfactorily in the regular education classroom [34 CFR 300.114(a)(2)(ii)]. This hearing officer has no reason to doubt the testimony of the district personnel that a one-on-one aide was discussed even though the parents claim they did not hear such a discussion. During the course of the due process hearing, the parents requested, on numerous occasions, the hearing officer and witnesses to speak louder because of hearing problems. Additionally, a redundancy of their question indicated they were not following answers that were contrary to what they expected to or wanted to hear. It is entirely likely that the district personnel discussed a one-on-one aide at the IEP meeting without that discussion registering with the parents. This is all the more reason for the district to precisely list in writing the justification for accepting and/or rejecting a placement.

3. As indicated by the testimony of student's regular education teacher, assistant principal, special education coordinator, school psychologist and special education teacher, the student made academic progress by the end of the school year but they contend it took too much effort by the regular education teachers for the student to make that progress. A student with a disability cannot be removed from an age-appropriate regular education classroom solely because of needed modifications in the general education curriculum [34 CFR 300.116(e)].

The reasoning that a student should be removed from regular education language arts/reading class because it requires the regular education teacher to put forth too much effort to make modifications or accommodations to the curriculum for a student with a disability is contrary to IDEA 2004 and the reason The Education of All Handicapped Children Act of 1978 was enacted into law in the first place.

**Whether the student requires a change in the level of special education services from a consultation only to special education classes in Language Arts and reading while taking all other classes in the regular education program.**

The testimony by district personnel, as supported by the written evidence, indicates at the time of the February 20, 2008 IEP team meeting, the student was not progressing in the regular education language arts/reading class. However, it must be noted that the student's fourth grade program had at least two notable flaws. First, as indicated in **FINDINGS OF FACT #7** the regular education teacher did not assist the student correctly copy homework assignments in his agenda. This was an accommodation the student required but did not receive. Second, as indicated in **FINDINGS OF FACT #8** the special education consulting service was not specifically allocated in the special education teacher's daily schedule. There was no record of the time spent on consultation, no specific agenda for the consultation, no specific plans developed for achieving and monitoring IEP goals and no follow-up consultative sessions.

It is further noted that by the time of this due process hearing as indicated in **FINDINGS OF FACT #11**, the student had made progress and had passed all academic areas. The special education teacher makes a compelling case that the student would have made more progress had the parents permitted him to teach the student language arts/reading in

the special education class. The hearing officer is persuaded that the student is likely to derive more educational benefit from an IEP that provides language arts/reading in the special education class than an IEP that provides language arts/reading in the regular education class. However, just as a district is only required to provide an “adequate” special education placement rather than the “best” special education placement [*Doe v. Board of Education of Tullahoma City Schools*, 20 IDELR 617 (6<sup>th</sup> Cir. 1993)], it can be argued that a parent may choose an “adequate” placement for their child over what might be a “better” placement offered by a district.

The question then, is what constitutes an adequate placement for the student. The courts have held that a placement that enables a student to make more than minimal progress is appropriate [*Polk v. Central Suquehanna Intermediate Unit 16*, IDELR 130 (EHLR 441:130) (3<sup>rd</sup> Cir. 1988)]. The court has also held that a district may change a student’s placement to a more restrictive setting if that student is not making adequate progress [*Board of Educ. Of Tp High School Dist. V. Ross*, 487 F.3d 267(7<sup>th</sup> Cir.2007)]. In this case, as indicated in **FINDINGS OF FACT # 10** the student’s low average academic achievement is consistent with his low average potential. At the time of the due process hearing, the student was passing all of his academic subjects and his scores on standardized reading tests had improved. As indicated in **FINDINGS OF FACT # 6**, the student’s regular education teacher, assistant principal, special education coordinator, school psychologist and special education teacher acknowledged that the student made academic progress during the year. The student’s progress in fourth grade was not optimal but it certainly was more than *deminimis*. Therefore, the hearing officer lacks the authority to enforce the district’s desire to place the student in a special education language arts/reading class.

The parent has prevailed in this matter. The hearing officer is compelled to order the district not to change the level of special education services provided the student.

**ORDERS:**

1. Within ten (10) school day receipt of this Impartial Due Process Decision, a representative of the district and a member of the student’s fifth grade team shall present the parents with a revised IEP that:
  - A) removes the 500 minutes per week of instruction in language arts/reading and replaces it with at least 30 minutes per week of special education consultation service that is specifically allocated in the special education teacher’s schedule.
  - B) reinstates the accommodations listed in the student’s fourth grade IEP and adds “checking the student’s agenda each school day to ensure he has accurately copied all of his homework assignments” to that list.
2. The district has offered to provide the student with an independent educational evaluation and need take no further action with respect to that issue.
3. Within fifteen (15) school days receipt of this Impartial Due Process Decision, the district shall provide the Illinois State Board of Education with written assurance of compliance with these orders.

**Right to request clarification:**

Section 14-8.02a (h) of the School Code, allows the hearing officer to retain jurisdiction after the issuance of the decision for the sole purpose of considering a request for clarification. A request for clarification must be submitted to me within five (5) days after receipt of the 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 parties and to the Illinois State Board of Education. The request shall operate to stay the implementation of those portions of the decision for which clarification is sought. I shall issue a clarification of the specific portion of the decision or issue a partial or full denial of the request in writing within ten days of receipt of the request and mail copies to all parties to whom the decision was mailed.

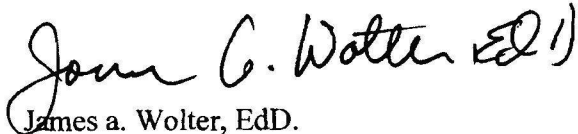
**FINALITY OF DECISION:** This decision shall be binding upon all parties.

**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.

**DATE OF DECISION AND ORDER:**

This Decision and Order rendered this 24<sup>th</sup> day of July 2008.



James a. Wolter, EdD.  
Impartial Due Process Hearing Officer

CERTIFICATE OF SERVICE

In the Matter of [REDACTED] v. Whiteside SD 115  
ISBE Case Number: 2008-0376

The following parties have been served a copy of the Decision and Order.

[REDACTED]

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[REDACTED]

7008 0150 0002 1101 2439

[REDACTED]  
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[REDACTED]

*James A. Wolter EdD*  
James A. Wolter, EdD

*7/24/08*  
Date