ILLINOIS STATE BOARD OF EDUCATION
DUE PROCESS HEARING PROCEEDING

[redacted]	)	
	)	
Petitioners	)	**ISBE Case No. 2008–0428**
	)	
v.	)	**Robert E. Lehrer, Hearing Officer**
	)	
[redacted]	)	
	)	
	)	
	)	
	)	
Respondent	)	

JUN 30 2008

Robert E. Lehrer, Hearing Officer

DECISION AND ORDER

Robert E. Lehrer, Hearing Officer

I. Introductory Statement

Petitioners in the special education case, which arises under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA 2004"), 20 U.S.C. §§1400-1487, are an 11 year old student, [redacted] and his mother and representative [redacted][1] *See Winkelman v. Parma City School Dist.*, 127 S. Ct. 1994 (2007) (parents as well as students enjoy substantive and procedural rights under IDEA). The case is before the undersigned hearing officer pursuant to petitioners' due process complaint notice ("DPCN") against the respondent school

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[1] To preserve the confidentiality of the student petitioner, this Decision and Order ("Decision") refers to him as the "student" or "[redacted] To preserve his mother's confidentiality, the Decision refers to him as the "mother" or "[redacted] The Decision usually refers to the respondent school district as the "District" and to this due process hearing officer as "this hearing officer"or "this officer."

district, [redacted] ("District"). In general, in her DPCN, the mother contends that the Individual Education Plan that the District formulated for her son, [redacted] did not afford him a "free appropriate public education"("FAPE") during the 2007-08 school year or prospectively, *see* 20 U.S.C. §1401(9), 1412(a)(1)(A) (defining FAPE, and imposing on states the "obligation" to provide a FAPE to each eligible child). The mother seeks prospective relief (in the form of home based instruction, which, in her view, was the only means through which a FAPE could be afforded her son), and corresponding compensatory relief to account for the time in which he was not (during 2007-08 school year) receiving home bound instruction

After settlement efforts failed, the case proceeded to a hearing.

Petitioners have proceeded pro se–that is, by the mother-- throughout these proceedings, including at the hearing itself. [2] The District has been represented by counsel.

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[2] Because cases arising under IDEA 2004 are, commonly, complex factually and legally, pro se litigants are at an enormous disadvantage in these cases, most of all at the hearing itself if the case proceed to hearing, given that putting on one's case at a hearing requires trial experience and skills, which parent advocates who are not lawyers never have. This disadvantage is compounded by the inability of pro se litigants to afford to hire experts to support their cases; litigants who cannot afford to hire a lawyer to represent them can rarely, if ever, afford to hire an expert either.

The failure of IDEA 2004 to guarantee to students and their parents some access to counsel to press their special education cases before school districts, and in administrative hearings, except by way of fee shifting provisions to prevailing parties (and then only when the case proceeds to judicial, as distinguished from administrative forums) is an enormous structural defect in the federal statute that, in the experience of this officer, eviscerates, for low and moderate income parents, and even those families with substantially higher incomes, the promise of the statute. Indeed, absent counsel to prepare and present student petitioners' cases at hearings (when DPCNs gives rise to hearings), the hearings themselves are likely to be little more than a sham–just as any civil or criminal evidentiary proceeding of any complexity in which a litigant proceeds pro se is likely to be a sham. Federal and state administrators who take pride in the special education due process hearing system thus have absolutely no reason for such pride in many cases, but only embarrassment. This officer does not mean to criticize the Illinois state administrators for this structural defect, for which they are not responsible. At the same time, these administrators have done nothing to address this

The officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02a, and 23 Ill. Admin. Code, Part 226, Subpart G. The parties were informed of their rights under IDEA 2004, 20 U.S.C. §1401 et seq., under the Illinois School Code, 105 ILCS. 5/14-8.02a, the Code of Federal Regulations, 34 C.F.R. Part 300, and the Illinois Administrative Code, 23 Ill. Admin. Code §226.10 et seq.

This decision and order resolves the contested issues, which are described below, based on the evidence adduced at the hearing and the law. The specific resolution decides all the underlying liability issues in favor of the District and against petitioners.[3] It follows that the decision and order does not address any relief issues because, the District having prevailed on the underlying liability issues, petitioners are not entitled to any relief.

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defect, to which they seem oblivious. And surely no criticism of the District's counsel in this case is thereby implied, as she at all times discharged her responsibilities capably, ethically and with appropriate regard to her client's interests.

[3] Nothing in n. 2 above should suggest that the result here, a ruling against petitioners on all of their claims, would have been different if they had been represented by counsel or at least a representative with some legal training. (The mother here has none). It would not have been different. Indeed, if petitioners had been represented by counsel in the first instance, the case would almost certainly have not gone to hearing at all, for the facts, even when read in the light most favorable to petitioners, did not lend themselves to even a whisper of a theory on which petitioners might have prevailed, and so even minimally competent counsel would have strongly advised not to proceed to a hearing, but to reach some agreement with the District, affording petitioners some relief, even if not relief close to that for which petitioners wished

II. Procedural History

Petitioners directed a DPCN to the District on or about April 1, 2008 (JE 005-006.[4]), later amending it on April 3, April 15 and 18, 2008. [5] See JE 14-15 (District's Notice of Insufficiency),

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[4] The Decision employs the following citation conventions. For purposes of the due process hearing ("hearing"), the parties prepared a set of Joint Exhibits ("JE"), which were agreed to and admitted into evidence. Petitioners and the District also sought to introduce their own hearing exhibits ("PX" and "DX" respectively). All of the District Exhibits were admitted into evidence, petitioners having no objection to their introduction, except as to DX 16-41, which objections were overruled. As explained below, some of Petitioners' Exhibits were also admitted into evidence, the District having no objection to those exhibits admitted. The record in this proceeding also includes submissions by the parties (such as prehearing submissions), this officer's prehearing orders and responses to inquiries of the parties, andother papers not included among the hearing exhibits. These papers, separately numbered from the hearing exhibits and cited as "AR__" do not duplicate the hearing exhibits; no hearing exhibit is included among the AR papers. The transcript of the hearing is cited as "Tr___." When the transcript citation is to testimony of a witness, the last name of the witness is noted. When the transcript citation is to a statement of the District counsel or to the non-testimonial statement of the mother as representative, then the citation is to District counsel" or '[redacted] as representative."

[5] The record offers conflicting evidence as to when the mother initiated her due process request. JE 005 is a letter dated February 28, 2008, signed by the mother, in which she unambiguously requests a due process hearing. One question here is whether the mother mailed this letter to the District on or about its date, February 28, 2008.

While the letter is dated February 28, 2008, the record copy shows an April 7, 2008 District stamp indicating that the District did not receive a copy of the letter until that day, after (as the mother acknowledges, Tr. June 12, 2008 at 61 and as the handwritten note on JE 005 attests) the mother resent the letter on April 3, 2008. April 3 was two days after the mother penned a handwritten note to the District, dated April 1, 2008, stating her "disagree[ment] with the IEP and Behavior plan, "and requeting legal help to protect my rights under IDEA . . . ." The District considered this note a request for a due process hearing (JE 001-002).

The Executive Assistant to the Superintendent testified convincingly that the likelihood that the District would have received the February 28, 2008 letter shortly that date but misplaced it or lost it, was about zero. Tr., June 9, 2008 at 265-71 ([redacted]). And the usual presumption in favor of receipt, in ordinary course, of mailed items–here the February 28 letter if mailed on or about that date-- has not been overcome. This hearing officer concludes, in any event, that the mother's testimony (Tr. June 12, 2008 at 60) that she mailed the February 28 letter on or about that date is not credible. This officer concludes that it is more likely than not that the mother drafted the

AR 46-51 (Order denying Notice of Insufficiency)

On May 23, 2008, this officer conducted a prehearing conference ("Prehearing Conference") telephonically. Subsequent to the Prehearing Conference, this officer issued the Prehearing Conference Report Order ("Prehearing Conference Order")

The Prehearing Conference Order (AR 46-51) explained that the issues presented for resolution at the hearing were as follows.

1. Whether the District denied the student a free and appropriate public education ("FAPE") during school year 2007-2008?

(a) Whether the District denied the student special education and related services to which he was substantively entitled under IDEA 2004, during school year 2007-2008?

(b) Whether the District denied the student's parent procedural rights during school year 2007-2008, such that the denial impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or

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February 28, 2008 letter on or about April 3, 2008, but backdated it to February 28, 2008. Similarly, the mother's testimony that, at the October 17, 2007 IEP meeting, she "wanted some sort of legal proceedings in order" to challenge the IEP (Tr. , June 12, 2008 at 13) is not credited, it being contradicted by the IEP itself and the February 28, 2008 letter, which, whether drafted on or about February 28, 2008 or later, reads as if petitioners were there raising their due process complaint for the first time, and so had not raised it much earlier, in the fall of 2007. Supporting the conclusion that the mother backdated the February 28 letter is not only that the District did not receive the letter until April 7, 2008 but that the mother, as found below, admitted to trying to deceive the District with respect to the critical issue of her son's withdrawal from the [redacted], *see* Finding of Fact ¶¶10-12 below. If the mother dealt deceptively with the District on the large issue of her son's withdrawal from school, the closely related but lesser issue of the date she wanted the District to believe she had initiated a due process hearing request might well also have been a tool freighted with–this hearing officer concludes it was a tool freighted with–her deceptive tactics as well.

It would make no difference to the result in this case if the mother had drafted and sent the February 28 letter on or about that date, and the District had received it shortly thereafter. *See* Conclusions of Law at ¶1(a)(i) below.

caused a deprivation of educational benefits?

2. Whether the District's IEP and behavior management plan, which does not anticipate either the provision of homebound instruction to the student or the reassignment of a paraprofessional to assist him, denies him a FAPE, prospectively?"

The Prehearing Conference Order also stated that the relief '[redacted] seeks is the provision of those special education and related services that will afford him a FAPE, and such compensatory relief as will redress any denial of a FAPE to him during the school year 2007-2008."

On May 27, 2008 this officer amended the Conference Order, in relevant part, as follows.

> " Nothing in the above statement of issues should be construed to provide that specific issues that petitioner claims may be relevant to a claim raised by the DPCN are so relevant. The District has preserved its right to object, at the hearing, to the presentation of any testimony or the introduction of any documents on the ground, among others, that the testimony and/or documents are not relevant to any issue the DPCN has raised. Petitioner's Statement of Issues, dated May 16, 2008 and submitted to this hearing officer, did not serve to amend the DPCN for this purpose. Once the hearing has commenced (and within five days preceding the hearing), petitioner may amend his DPCN only if the District consents in writing to such an amendment and is given the opportunity to resolve the complaint through a resolution meeting. 34 C. F. R. §508(d)(3)."

(AR 145-47).

At the Conference, the parties agreed to the conduct of a hearing beginning on June 6, 2008, which is, in any event, 14 days from the conduct of the prehearing conference and issuance of the Prehearing Conference Order, *see* 105 ILCS 5/14-802a(g). The Hearing was held on three non-consecutive days in June: June 6, June 9 and June 12, 2008, at the District's Administrative Headquarters, [redacted] Each of the parties presented numerous witnesses at the Hearing and made closing statements (by representative and counsel). Except for the mother herself, however, all the witnesses were employees of the District, whom the mother,

acting as the representative of the student petitioner,[6] was allowed to examine as adverse witnesses. [redacted] himself was not present for Hearing, and did not testify. The Hearing was closed, at the mother's request, and witnesses for both sides (save, of course, for the parties themselves) were excluded when not testifying, as provided for in the Prehearing Conference Order.

During the course of the hearing, this hearing officer ruled on the admissibility of various documentary exhibits the parties sought to introduce into evidence. All the Joint Exhibits, having been agreed to by the parties, were admitted (Tr. June 6, 2008 at 4). The following exhibits, proffered by petitioners, were also admitted: PX, 2-3, PX 291 (but a copy without any handwritten notes by [redacted] The following hearing exhibits, proffered by the District, were also admitted into evidence. DX 1- 41 . This officer sustained the District's varying objections to the introduction of petitioners' other proffered exhibits (PX 1, 4, 5-47, 51, 58, 65-290, 292), for the reasons stated on

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[6] At the hearing, and in the prehearing proceedings as well, the mother showed herself to be well-intended, and this officer does not doubt that she wishes the best for her son. But good intentions are not at all the same as coherent–or winning-- legal theories. The mother here, in any event, never advanced any coherent legal theory of her case at all, and the closest she came to advancing *any* theory of her case was the conclusory assertion that the District had denied her son a FAPE, even though the evidence that it might have done so was absent, perhaps because the District had "thrown away" the evidence, Tr. June 12, 2008 ([redacted] as representative) at 194-96. Partly as a result of the mother's failure to advance a coherent legal theory in support of her case, much of the evidence she introduced in her case in chief strongly supported *the District's* position. Certainly, little, if any evidence she introduced supported the position that the District had done anything legally wrong at all. The mother's defaults–in failing to advance any coherent theory of her case and in presenting little if any evidence that the District had done anything legally wrong at all--were grievous, but understandable, after a fashion, in light of the mother's pro se status. And *see Bd. Of Educ. Of Harlem Consolidated School District. No. 122,* 44 IDELR 18 (July 26, 2005). ("This is an unfortunate situation in which a . . . well intentioned and loving grandmother/guardian is trying her very best to obtain services and provide for her granddaughter. However, she is unfortunately fighting against the very people who could help her. Her many complaints, to many agencies, have done nothing to help her granddaughter").

the record during the hearing (Tr. June 12, 2008 at 131-166). This officer reserved ruling on certain of petitioners' other exhibits marked for identification, and that they sought to have introduced into evidence. These proffered exhibits were PX 4, PX 48-50, PX 59-61, PX 63-64. Having considered the District's objections to these exhibits, the objections are sustained as follows: PX 4 is excluded on grounds of lack of foundation; PX 48-50 is excluded because the exhibits are cumulative; PX 59-61 are excluded on grounds of lack of foundation; PX 63-64 are excluded on grounds of lack of foundation, as irrelevant, and as hearsay, and PX 291(with handwritten notes) is excluded because the handwritten notes are hearsay, because they are not the best evidence of what is written in the notes, and because they are irrelevant.

This Decision is not being issued within 45 days of the mother's request for a hearing due to the parties' joint requests for postponements of the hearing. It is being issued within 10 days of the close of hearing on June 23, 2008, that being the close date because this officer allowed the parties to make certain post-hearing submissions by that date (which they both did) and because that was the date of the transmission of the transcript to this officer.

III. The Parties' Positions

The issues presented by this case, and its procedural history, as reviewed in §II above, define the parties' respective positions, even though petitioners never explained their position in terms of a legal theory that had support in the IDEA statute, its implementing regulations, or the case law.

Petitioners' position is that the District denied [redacted] a FAPE during school year 2007-2008, and that the IEP for [redacted] (including the behavior management plan for him) denies him a FAPE prospectively. *See* JE 005-013. More specifically, petitioners' position is that only home bound instruction would have provided and will prospectively provide [redacted] a FAPE (at least from February

1, 2008 onwards), and that, since the IEP did not provide for home bound instruction and the District did not provide home bound instruction, a FAPE was denied to [redacted] (Tr. June 6, 2008 at [redacted] as representative). [redacted]s mother also sought the replacement of her son's paraprofessional aide in the classroom. *See* JE 005. Apparently, though the mother never said so specifically, the plea was for a full-time paraprofessional aide at home (in additional to the home academic instructor), for otherwise the plea for a replacement for her son's paraprofessional would be inconsistent with her plea for (exclusively) home bound instruction. The District, in contrast, maintains that the IEP for [redacted] did afford him a FAPE in the least restrictive environment, as attested to by the educational progress he was achieving under its provisions. (Tr. June 6, 2008 at 11-12)(counsel for District)

As for the alleged denial of petitioners' procedural rights, the closest that petitioners ever came to setting forth a position was the suggestion that, while the District was obedient to the technical procedural requirements of IDEA, such as giving the mother notice of IEP meeting, allowing her to participate in those meetings, and listing to her views, such obedience was a formalistic sham, in that the District had already predetermined how the IEP should read, never intended to give petitioners' views any weight, and did not in fact consider such views when petitioners presented them. See Tr. June 12, 2008 at 42-43 ([redacted] as witness) ("My signature was on meetings. ***But I was not an active participant. Everything was decided, written and chosen. And my choice was either to sit there and agree with it or not. But the disagreement wasn't going to make any difference"). Also, petitioners' examination of one witness ([redacted] District Director of Special Education, see Tr. June 6, 2008 at 107-112) suggested that the position of petitioners was that because the District did not agree with petitioners' views, adopting them wholesale into the IEP, this constituted a denial of petitioners' procedural rights. The District, in

contrast, insists that it consistently respected all of petitioners' procedural rights. (Tr. June 6, 2008 at 11-12) (counsel for District).

III. Findings of Fact

1. [redacted] is an eleven year old male student (d/o/b 10/2/96)whom the District has determined eligible for special education and related services under IDEA. (JE 053-78).

2 A 10/2006 IEP for the student is at JE 016-39. A 10/07 IEP for the student is at JE 053-078. (The then most current evaluation date was 10/24/05, with a reevaluation date of 1024/08. JE 053). The 2007 IEP, the relevant one for purposes of this hearing, did not, significantly, make any provision for provision of home bound instruction, but the mother did not, at the time the 2007 IEP was signed (by the IEP team, including the mother) express any disagreement with any of its provisions. The mother's contrary testimony (Tr. June 12, 2008 at 13), is not credible, it being contradicted by the documentary evidence. When the IEP was signed,, the mother did, however, express a "concern" (JE 067) that her son not be permitted to use a calculator on the State standardized tests–a concern that the District honored, Tr. June 6, 2008 at 118 ([redacted]).

3. The student, during his fourth grade year (2006-2007) and during part of his fifth grade year (2007-2008) was enrolled in the [redacted] a District School. JE 016-39(2006 IEP), JE 053-079 (2007 IEP).

4. The student did not attend [redacted] on or after February 1, 2008, for the remainder of the school year. JE 100, 103, 105. The mother, at the hearing, averred (as her son's representative), that her son was "really sick" throughout "February" (Tr. June 12, 2008 at 173) and that explained his absence. But, in her sworn testimony, she did not attest to her son being ill for the

entire month, but only for the first week or so of the month, and then with a "fever" and "throwing up" only, *id.* at 33. In any event, and critically, during the entire post February 1, 2008 school year, the mother, while she apparently made a few calls to District staff at the beginning of February, 2008 asserting that her son was ill, *see id.* att 33, 54 never, with one barely arguable exception, submitted any medical documentation of *any* illness, though the District required that she do so and requested that she do so if her son's absences were to be excused, *id.* at 33. (Much less did the mother submit any documentation of an illness that would have required his absence from school for more than four months). As a result, all of the student's absences from school, from February 1, 2008, to March 11, 2008, the date the mother withdrew her son from [redacted] as found below, were unexcused absences, *see* JE 100.

5. The one barely arguable exception (respecting medical documentation) referred to above was a note that the mother secured from [redacted] M.D. (The note is at JE 008 and also at JE 157). It is addressed to "whom it may concern," is dated February 14, 2008, and was generated as a result of mother and student's medical visit to [redacted] on February 7, 2008, *see* Tr. June 12, 2008 at 36. The exception is only "arguable," however, because only by a stretch, is any illness that would require the student's extended absence from school documented, or even described, in the letter at all. The note thus refers to the student's autism, but that is was a disability with which the student had long suffered, and it had not prevented him from attending school. The note also refers to the student as "having been more depressed and not comfortable at school," which are not illnesses requiring absence from school at all, but merely descriptive of the student's moods *at school.* It also refers to the student's "current illness," but what this "illness" was–and whether it is any different from the student being "depressed and not comfortable at school" or different from

the student's "autism"-- is not identified or described or otherwise documented. This officer finds, in any event, that the February 14 note from [redacted] did not document any illness or condition that required the student to be absent from school for even one day, much less for more than four months. In any event, it is extremely doubtful that [redacted] suffered from any illness requiring his extended absence from school (i.e. his absence from school for other than during the first week or so of February 2008). The lack of any medical documentation of such an illness–submitted to either the District or "retroactively" at the hearing to this officer-- supports that conclusion So does the mother's own testimony, for while the matter of her son's medical treatment was raised with her at the hearing (Tr. June 12, 2008 at 94-97), she did not testify that she even sought professional medical assistance for [redacted]

[redacted] at any time after February 1, 2008 (other than from [redacted] on February 7, 2008). Yet, if her son, had truly been suffered from an extended illness during the last four months of the school year, serious enough to keep him out of school, this officer would expect her to have sought just such assistance, and been eager to testify about it.

6. Petitioners solicited the February 14 letter from [redacted] (JE 008), *see* Tr. June 12, 2008 at 34-37, for a different purpose that to provide medical documentation of [redacted]s illnesses requiring [redacted]s absence from school. The letter is thus framed in terms of a joint request for home-bound instruction. It says that [redacted] had "requested" of [redacted] a recommendation for home bound instruction. JE 008. Then, [redacted] implicitly invoking [redacted]s "autism," his "depression" and [dis]comfort[ ]" at school, and his unspecified "current illness," himself requests that [redacted] "receive homebound services for the remainder of the year." Whether this request is based on the independent judgment of [redacted] that the provision of such services was medically appropriate,

or he was merely being responsive to [redacted]s request to him, is unclear from the text of the letter, and [redacted] did not testify in the matter, so this officer has no way of knowing what his views are on the matter.

7. [redacted] ensured the transmission of [redacted]s February 14, 2008 letter to the District's Health Services Supervisor, [redacted] Tr. June 6, 2008 at 204 ([redacted]). [redacted] received the note on or about February 15, 2008 (*id.* at 204) and treated it as a request from the parent for home bound instruction, with the request being based principally, if not exclusively on the note itself, *id.* at 209-211. Subsequently, by a letter February 21, 2008 (JE 007), and after discussions with the principal at [redacted] M[redacted] (*id.* Tr. June 6, 2008 at 210-211, [redacted]), she denied the request for home bound instruction. The letter stated, in relevant part, as follows.

> It is the school district's obligation to provide an education in the Least Restrictive Learning Environment, with Homebound, of course, being the most restrictive academic setting.
>
> The school currently reports that your child is performing well in his classroom setting and feels that they can accommodate the needs of his disability. They have no documented reports of uncontrolled behavior issues and describe a happy child, eager to engage in learning environment.
>
> ***
>
> Based on this information, I cannot approve Homebound tutoring services. Your child will be expected to attend school complete his work under the same requirements as his peers and is obligated to the district's guidelines for attendance.

In her testimony at the hearing, [redacted] testified that approval of home bound instruction would only be warranted when there is medical documentation for an "acute medical condition that might go unnoticed in the classroom," Tr. June 6, 2008 at 254. [redacted] letter, she further testified, did not even warrant contacting him for further information (much less approving home

bound instruction) because it neither described nor documented such an "acute medical condition," *id.* *See also* ¶9 below (referring to medical consent form). [redacted] also testified that homebound instruction was the most restrictive possible learning environment as a reason for denying the request for instruction in this case, *id.* at 256-57. She also testified that her review of [redacted]s health records on file with the District did not cause her any concern, in terms of his suffering from an acute medical condition that would warrant home bound instruction. Tr. June 9, 2008 at 277.

8. Heedless of the District's warning that [redacted] was expected, in light of the denial of the homebound instruction request, to attend school (JE 1007), [redacted] refused to permit his attendance, so that [redacted]'s absences from school continued–unexcused absences since neither before nor after February 21 did [redacted] ever submit any documentation attesting to what medical conditions or illnesses explained [redacted]s absence from school.

9. The District, alerted by the number of unexplained absences of [redacted] from school after February 1, 2008, dispatched a truancy officer ([redacted]) to visit with [redacted] at her home on March 11, 2008. Tr. June 6, 2008 at 272-74 ([redacted]). According to [redacted] testimony, which this officer credits, in the ensuing conversation with [redacted] claimed that her son had been absent from school because he had been sick. *Id.* at 275-76. Nonetheless, [redacted] himself was outside shoveling snow with his mother when [redacted] arrived at the home. *Id.* at 276. [redacted] also testified that she discussed with [redacted] the need to sign a medical consent form, if the District officials were to discuss her son's medical condition with any medical providers, but that the mother said that she would not sign any such consent. *Id.* As to [redacted]s options, [redacted] testified that she explained that [redacted] could attend another school, or return to [redacted] but he could not simply fail to attend school at all. Id. at 274-75. [redacted] she said, was not "open to

any option that we discussed." *Id.* at 277.

10. At the hearing, [redacted] testified that she felt threatened by [redacted] appearance at her home, stating that [redacted] had told her that unless the continued truancy issue were satisfactorily resolved, "DCFS would be called on me and my son would be taken away" and that "I would possibly be put in jail and fined." Whether [redacted] made such statements or not–[redacted] own testimony does not suggest that she did and this officer credits her testimony and not [redacted] s[redacted] promptly after [redacted] departure, wrote a letter to the District that appears at JE 187. That letter carries a heading of [redacted], with the following phone number: [redacted] The letter states, in relevant part, as follows.

> This is to inform you that as of March 7, 2008 my child, . . . [redacted] will be withdrawn from attendance at [redacted]
>
> He . . . will be transferring to the [redacted] which is a nonpublic school.
>
> [He] . . . will receive instruction in the branches of education taught in the public schools and in the English language. All instruction will be in compliance with the requirements of Chapter 105, Sectiom 26-1 of the Illinois School Code.

11. At the hearing, [redacted] testified that she wrote the letter because she believed that it would "get . . . [the District] off my back [about her son's absences from school]." Tr., June 12, 2008 at 64. But she also in effect acknowledged, in her own direct examination, that the entire letter was deceptive. For one thing, there was no such school as [redacted] and the address listed for it was simply a mail drop box that [redacted] had rented, though she "never go[es] there," *id.* at 65. [redacted] also effectively acknowledged that her representation in the letter that [redacted] would receive "instruction"–even home bound instruction–was a lie, in that she felt herself

completely unqualified to impart any instruction to him, and there was no [redacted] at which he could receive classroom instruction. *Id.* at 64-65. [redacted] (Tr. June 9, 2008 at 234-35))–she followed up on March 11 letter by phoning the number on the letter (which turned out to be [redacted]s cell phone number)–confirms that the March 11 letter was entirely deceptive.

12. The mother committed a fraud upon the District, and did a profound disservice to her son educationally, by purporting to withdraw him from the [redacted] in order to enroll him in [redacted], when there was no school by that name, but only a mail box drop at the address shown for the school. That the mother, when questioned about the [redacted] by a District staff member, told the staff member that the [redacted] was non-existent (Tr. June 12, 2008 at 64-65) and, moreover, that she had no intention of providing any home schooling (*id.*) does not make her conduct any the less fraudulent, or lessen the adverse impact of her son not receiving any schooling for the last four months of the school year. Indeed, the mother's admission that she had sought to deceive the District, albeit artlessly, with her mail drop ruse–but without offering any excuse or apology for it, other than she believed that it would get the District "off of my back" about her flaunting the truancy laws (*id.*)–suggests how casually she treated her fraudulent conduct, as if it were conduct that she could engage in without regard to the consequences to her son or to any future litigation of claims under IDEA, which ensued.

13. After the District determined that the March 11, 2008 letter was deceptive, and that, in fact, [redacted] was not enrolled in any school, it directed a letter to [redacted] (at JE 198) inquiring whether she would be "interested in reenrolling . . . [redacted] in a District School, and advising her that the "[redacted]" of the District "would be available to assist . . .[her]." [redacted] never followed

up on that invitation, and [redacted] received no instruction at any school (or at home for that matter)for the remainder of the school year. *See* Tr. June 9, 2008 at 237-38 ([redacted]).

14. Pursuant to the March 11 letter, the District deemed Chance to have withdrawn deemed to have withdrawn from the [redacted]s "at the request of his mother." Tr. June 9, 2008 at 234 ([redacted]. [redacted]s was not "dropped" from school for any reasons having to do with his absence from school from February 1, 2008 onwards. *Id.* (Expulsion or suspension from school because of truancy would be a perverse sanction for truancy in any event, and there is no record evidence that this was District practice or policy).

15. Petitioners presented no evidence to show that the District had violated procedural rights had been violated in any way, much less that such violations had resulted in the denial of a FAPE to [redacted] significantly impeded the mother's opportunity to participate in the decision making process regarding the provision of a FAPE to [redacted] or caused a deprivation of an educational benefit to [redacted] Indeed, the mother appeared to acknowledge, at one point, that the District had been obedient to the technical procedural requirements of IDEA. (Tr. June 12, 2008 at 42-43). That acknowledgment to be sure was coupled with the suggestion that District IEP members did not seriously consider grievances she might have voiced , but the mother presented not a shred of evidence to support that contention.

16. [redacted]s IEP was reasonably calculated to enable him to receive educational benefits Petitioners failed to meet their burden of proof to show otherwise. Indeed, substantially all of the relevant evidence showed that [redacted] was securing substantial educational benefits under his IEP, having made progress in terms of his performance educationally and in terms of of his social skills and interaction with his peers. E.g., Tr., June 9, 2008 at 30, 35, 54 , 112-113, 146 ([redacted]

[redacted] Resource Teacher); *id.*.at 113-114 [redacted] Special Education Supervisor); *id.* at 286-92 [redacted], Teacher [redacted], *id.* at 334-38 [redacted] Paraprofessional, [redacted] *see* JE 042 (Occupational Therapy Annual Progress Report, 10/17/07)) ("has made nice gains toward his goals of on improving visual motor and sensory motor processing skills"), JE 088-092 ("progressing" on virtually all fronts, though notes for 2/29/08 attest that student "not here since 1/31/08").

17. Petitioners introduced no evidence that the provision of homebound instruction to [redacted] would confer on him any educational benefit, or that it was the least restrictive environment ("LRE") in which an otherwise appropriate IEP might be implemented.

18. Petitioners presented no evidence that there was any educational basis, grounded in IDEA or otherwise, for replacing [redacted]s paraprofessional. Indeed, the uncontradicted evidence is that [redacted]s educational progress was attributable, in part, to the participation of the paraprofessional in his educational program. See *id.*.at 289-91 [redacted]), *id.* at 334-38 [redacted])

IV. Conclusions of Law

1. An IEP is appropriate when it is adopted according to IDEA procedures and reasonably calculated to enable the student to receive educational benefits. *Bd. Of Educ. Henrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 206-07 (1982). At the same time, the prospective educational benefit to be conferred need not be educating an eligible child under IDEA to his or her "highest potential," but only that the IEP be likely to enable to the child to make satisfactory (non-trivial) educational progress, *Bd. Of Education of Murphysboro Community Unit School Dist. No. 186 v. Illinois St. Bd. Of Educ.*, 41 F. 3d 1162, 1166 (7th Cir. 1994).

(a) The IEP for [redacted] was adopted according to IDEA procedures.

(i). A "hearing officer's determination of whether a child received FAPE must be based on substantive grounds, 34 C.F.R. §300.513(a)(1). Thus, "in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefit, " *id.* at §300.513(a)(2), implementing 20 U.S.C. §1415(f)(2)(E)(ii) . *See Bd. of Education of Oak Park & River Forest High School Dist. No. 200 v. Illinois State Bd. Of Educ.*, 21 F. Supp. 2d 862 (N.D. Ill. 1998).

(ii) The District did not violate petitioners' procedural rights under IDEA, there being no evidence of record either that it transgressed such rights, even technically, or even that the asserted (but never proven) procedural inadequacies impeded [redacted]s right to a FAPE, significantly impeded petitioners' opportunity to participate in the decision making process, or caused the deprivation of any educational benefit to [redacted]

(b) The IEP for [redacted] which did not provide for home bound instruction, was reasonably calculated to confer on him an" educational benefit" within the meaning of IDEA, and so, as a matter of law, should be the IEP that the District applies in [redacted]s case, unless and until a new IEP is developed in accordance with law and the professional judgment of District staff, see *Alex R. V. Forestville Comm. Unit Sch. Dist. No. 221*, 375 F. 3d 603, 615 (7th Cir. 2004). In contrast, because home bound instruction for [redacted] was very unlikely to confer on him any educational benefit, and moreover, would have placed [redacted] in an environment far more restrictive than a class room setting at [redacted] an IEP that provided for home bound instruction for [redacted] would itself violate IDEA, and be unlawful, *see* 20 U.S.C. §§1412(a)(5)(A) and 1413(a)(1), *Beth B. v. Van Clay*, 282 F.3d 493,

499 (7th Cir. 2002).

(i) In placing a student, the IEP team considers a continuum of placements and ensures that the student is placed in the LRE. *Bd. Of Educ. of Murphysboro v. Ill. Bd. Of Education.*, 41 F. 3d 1162 (7th Cir. 1994). *Bellingham Public Schools*, 41 IDELR 74 (February 17, 2004). (student sought home tutoring based on note signed student's physician, but neither this note nor other evidence constituted sufficient evidence to demonstrate that student needed home bound instruction).

(ii) To the maximum extent appropriate, children with disabilities are to be educated with children who are not disabled, *see Murphysboro, supra*. Special classes, separate schooling (including home bound instruction) or other removal of children with disabilities from the regular educational environment may, consistently with IDEA, occur only when the nature or severity of the disability, as medically documented, is that such that satisfactory educational progress in regular classes, with the use of supplementary aids and services, cannot be achieved 20 U.S.C. §1412(a)(5)(B)

(iii) For the District to have permitted home bound instruction for the student, when the nature and severity of his disability, as medically documented, did not even remotely suggest that he could not achieve satisfactory educational progress in the regular classroom, with the assistance of his assigned paraprofessional and the provision of other services, would have violated IDEA.

2. Petitioners' claims under IDEA are denied in their entirety. It follows that any and all relief they request must be and is denied in its entirety is well.

V. Order

It is hereby ORDERED, ADJUDGED, AND DECREED as follows.

The student petitioner's mother, [redacted] is ordered to enroll [redacted] at the [redacted] (or, with the District's approval, another District school) on or before the opening of the 2008-2009 school year, and to ensure that he regularly attends the chosen District school thereafter. If [redacted] student is not so enrolled and/or does not attend school regularly, the District should proceed *promptly and vigorously* to enforce the truancy laws against the mother;. provided, however, that nothing in this Order should be construed to prohibit the mother from exercising her right to enroll her son in a non-District private school or, if she moves out of the District, to enroll her son in the public school of her new residential district, or in a private school [redacted] is not, under any circumstances, entitled to be home schooled at District expense. Nor may the mother pursue the extremely regrettable path she chose this past school year: continue to reside in the District with her son, withdraw him from the District schools on the stated ground that she was enrolling him in a private school, but instead keep him at home, without, at that, providing him or making available to him any type of educational instruction (good or bad, homebound or otherwise).

DATED: June 26, 2008

s/
Robert E. Lehrer
Robert E. Lehrer
Due Process Hearing Officer

Robert E. Lehrer
LAW OFFICES, ROBERT E. LEHRER
36 S. Wabash Ave, Suite 1310
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312/332-2121

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 to the hearing officer shall be mailed to the other party(ies) and to the Illinois State Board of Education at 100 N. First Street, Springfield, IL, 62777, Attn: Requests for Clarification.. 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. The effective date of this decision is the date of receipt of any clarification of this decision.

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is 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 105 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.

CERTIFICATE OF SERVICE

Robert E. Lehrer hereby certifies that he is the assigned hearing officer in this proceeding, and that on June 26, 2008, he served a copy of the Decision and Order in ISBE Case No. 2008-0428 upon the following persons:

[redacted]

Representative for Petitioner

[redacted]

Counsel for Respondent

[redacted]

Service was by first class mail, postage prepaid .

s/

Robert E. Lehrer

Robert E. Lehrer
Due Process Hearing Officer

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