

ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING

REC-11  
AUG 13 2008

████████████████████ )  
Student )  
 )  
and )  
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████████████████████ )  
District )

Case no. 2008-0488  
Stacey L. Stutzman  
Impartial Hearing Officer

**DECISION AND ORDER**

This matter is before the undersigned for a due process hearing concerning Parent's request for Orders that District contract with a different transportation company to transport Student to and from school, reimburse Parent for educational services provided at home while Parent would not permit Student to ride the bus to school due to her concerns for his safety, and provide compensatory services to Student for the periods of time he wasn't permitted to ride the bus to school. <sup>1</sup> The hearing officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02a(g)(2008). The parties were informed of their hearing rights under 23 ILAC 226.625 and 34 CFR 300.512. The undersigned Hearing Officer has also advised the parties that there are and have been no conflicts which have prevented her from conducting a fair and impartial hearing and rendering a fair and impartial decision in this cause.

**Procedural History**

Through her attorney, Parent submitted her request for a due process hearing in this matter on April 30, 2008. The District received the request on May 6, 2008 and submitted a response to same on May 16, 2008. Hearing Officer received her appointment from the Illinois State Board of Education electronically on May 8, 2008 and by U.P.S. on May 9, 2008. A resolution session was held, outside of the statutory timeline but by agreement of counsel, on June 5, 2008. The Pre-Hearing Conference date designated by the Illinois State Board of Education's Special Education Database System (SEDS) was June 6, 2008. However, it was scheduled for June 10, 2008 by agreement of the parties as District counsel was not available on June 6. The Pre-Hearing Conference proceeded as scheduled on June 10, 2008 and a copy of the Pre-Hearing Conference Report is incorporated into the record as H.O. Ex. A. The date originally designated by SEDS for hearing was June 20, 2008. However, at the time of the Pre-Hearing Conference, the parties requested a postponement of the hearing date for the reason that

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<sup>1</sup> At the time of the Pre-Hearing Conference in this matter, Parent was also seeking an order for reimbursement for a private assistive technology/augmentative communication evaluation, but said remedy was no longer available or required at the time of the hearing as District had already agreed to pay for said evaluation and convene an IEP meeting to consider the report of evaluation. In her closing argument, counsel for Parent requested that the recommendations made in the private evaluator's report be implemented as compensation for the education and services Student missed during the time Parent kept him home from school due to her concerns over bus safety.

Parent's counsel was still seeking records from the District and also because a private evaluation of Student was scheduled for June 20, 2008. District counsel stated that she wished to receive a copy of the report of said evaluation and to convene an IEP meeting to consider it before the hearing, as District was being asked to pay for the evaluation as part of the requested relief in this matter. Therefore, the parties agreed to a 2 day hearing to be scheduled on July 31 and August 1, 2008.

Hearing was held as scheduled on July 31 and August 1, 2008 at the District's administrative office. This Decision is being issued within 10 days of completion of the hearing. It is not being issued within 45 days of the initiation of the 45 day timeline due to the aforesaid continuances.

In attendance at the hearing were Parent and her counsel, [REDACTED], and District counsel [REDACTED], assisted by District counsel [REDACTED]. The hearing was reported by [REDACTED] and [REDACTED] of [REDACTED].

Nine witnesses were called to testify. Common to the final witness lists of both parties dated July 24, 2008 were: [REDACTED], Dist. Administrator/Case Manager; [REDACTED], Dist. Transportation Coordinator; [REDACTED], private school Principal; [REDACTED], private school Speech Pathologist; [REDACTED], private school Teacher; and Parent. Additionally, called to testify on behalf of Parent were [REDACTED] District Quality Assurance Safety Manager; [REDACTED], private evaluator; and [REDACTED], private CNA. Parent's counsel declined to call eight of the witnesses on her final witness list and District counsel declined to call one of the witnesses on her list.

Parent's counsel submitted copies of 247 pages of documents for use at hearing at the disclosure deadline. The following pages were referenced during witness testimony at hearing and are preceded by a "P" if cited in the Findings of Fact section of this Decision: 1,2,5,21,23-26,36-41,46-50,68-69,73,87-88,90-91,93-96,99,113-114,116-120,150,152-158,161-168,173-174,176-179,188,190,199, 200-201,208-226,244-246.

District counsel submitted copies of 151 pages of documents for use at hearing at the disclosure deadline. The following pages were referenced during witness testimony at hearing and are preceded by a "D" if cited as support in the Findings of Fact section of this Decision: 1-5, 8,13-14,17,19,28,36,45,50-52,61-62,65-66,69-70,75-76,96-98,105-107,112-116,119.

### **Issues Presented**

1. Whether the District violated Student's right to a free, appropriate public education by failure to provide safe and reliable transportation of Student to and from school from April 30, 2006 through the present per the Student's IEP?
2. Whether the District violated Student's right to a free, appropriate public education by failure to provide home services to Student while resolving the aforesaid transportation issue from April 30, 2006 to the present?
3. Whether the District violated Student's right to a free, appropriate public education by failure to provide an augmentative communication and assistive technology evaluation of Student from

April 30, 2006 to present?<sup>2</sup>

### Findings of Fact

The material facts relevant to the aforesaid issues are as follows: Student is a 16 year old male who is eligible to receive special education and related services from District in the categories of Severe/Profound Cognitive Impairment; Hearing Impaired; Other Health Impaired; Physical Disability; and Speech/Language Impairment. He is medically fragile, is frequently out of school due to illness, and requires 24 hour nursing. He receives nourishment through his feeding tube, and needs assistance relating to toileting and diapering. Student is non-verbal, and, although ambulatory, is unstable when he stands and walks (Parent; [REDACTED] P1, 5, 23) Student has been placed in a specific private therapeutic day school at District expense in a community outside of the District since August, 2003.(Parent) He excels at making his needs known in the classroom. [REDACTED] Student's IEPs designate transportation as a necessary related service on a bus equipped with a lift and a bus aide.(P21, 68) A harness is provided to him which attaches to the bus seat. [REDACTED] P21) For the past three school years, District has contracted with the same bus company to transport students from District, including Student, to and from the therapeutic day school in which Student is enrolled. [REDACTED]

Student resides with Parent, and, since August, 2007, Parent has paid [REDACTED] who is a licensed C.N.A., \$10 per hour to care for Student, including accompanying him to his full day of school and home again, from 7:00 a.m. until 5:00 p.m. Monday through Friday, not including holidays. [REDACTED] puts the bus harness on Student after she helps him dress each morning, and then pushes Student, across the street to the bus in a specially designed three-wheel stroller. A bus aide and bus driver then use the bus lift to put Student on the bus in his stroller. He is then helped out of the stroller and into the bus seat, and the harness is attached to the Student's seat by the bus aide. [REDACTED]

During the 2007-2008 school year, Parent complained to District of three incidents involving the bus company in question which she felt posed unsafe situations regarding Student's transportation and which involved 2 specific bus drivers and 1 aide employed by the bus company: First, on September 7, 2007, Student, accompanied by [REDACTED] was left in his stroller on the bus by the bus aide, and the stroller was attached to the floor of the bus, rather than removing Student from the stroller and harnessing him into his seat. This was the first and last time he was transported in this way. [REDACTED] On the way to school that particular morning, the stroller tipped over as the bus made a sharp turn. Student hit his head on another child's stroller. The bus driver stopped the bus thereafter, and paramedics were called. The paramedics did not find any injuries, and Student was not transported to the hospital. [REDACTED] Parent) Parent, who is a nurse and is also employed as a teacher by the District, came to the scene to pick up [REDACTED] and Student and took Student to be checked out by his personal physician and then took him home. He had a bump on his head and a bruise on his shoulder. She did not allow him to return to school until September 25, 2007 for the reason that she did not feel the bus was safe. After the accident on September 7, Parent complained to the bus company and the District. (Parent) As a result of the

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<sup>2</sup> At the time of the hearing, District had already agreed to pay for the evaluation of [REDACTED] and convene an IEP meeting re: same. The requested remedy of reimbursement is therefore moot, and the issue remains only in the event that a violation of FAPE is found and other remedies are appropriate.

investigation by the District and the bus company, the aide was terminated and the driver was suspended and removed from the route, and a new driver and aide were assigned to the route. (██████████ D98)

Second, on February 21, 2008, based on the report of ██████████, Parent complained to District about her concern that on February 13, 2008, the bus driver opened the door to a man with whom she began talking while the bus was stopped and allowed him to ride 4 blocks in the stairwell of the bus and then let him out. The complaint was investigated, and there was a conflict between the report given Parent by ██████████ and the report given by the bus aide and the bus driver. Student and ██████████ continued to ride the bus during the investigation. (Parent; ██████████)

Third, before the February complaint investigation had been completed, Parent complained to District on March 8, 2008, based on the report of ██████████, that on March 7, 2008, the driver and ██████████ engaged in a verbal altercation on the bus returning home from school, and that after ██████████ and Student were unloaded from the bus and were crossing the street to get to Student's home, the driver retracted the traffic control sign before they were safely across the street and stated that she "...hoped that they would get hit by a truck." Mother requested that the District immediately change bus companies to transport Student. (Parent; D15)

While the investigation was pending, the bus driver complained of was removed, a new bus driver was installed on the route, and Student's route combined with another route, requiring Student to board the bus 15 minutes earlier, with two aides on the bus. The practice is to continue to send a bus to the address of the Student for three days, and if the Student does not board the bus for three days, it is discontinued until Parent to contact District when she wants service to resume ██████████. However, Parent did not allow Student to return to school for the remainder of the school year, from March 8 through June 6, 2008, because she wanted District to contract a different company to transport Student, not just change the driver and the aide. She called a livery service she had used in the past for herself to inquire about transportation for Student, but that service advised that it did not want to transport Student with his stroller. She contacted Yellow Cab and inquired about a van, but she did not wish to pay the approximate \$100 roundtrip fare for the transportation of ██████████ and Student each day. (Parent)

██████████, who has no educational training or background, did activities in the home with Student and took him out to Border's bookstore, grocery shopping, and other field trips, attempting to duplicate Student's educational program at the therapeutic day school. She was not paid any additional money beyond her regular \$10 per hour wage and did not extend her work day to do so. The school was not contacted regarding sending work home or providing instruction or therapies for Student while he remained at home. (Parent; ██████████) Parent, unhappy with the District's failure to change the bus company as she requested, went to her lawyer. (Parent)

District is not contracting the bus company of which Parent complains to transport students, including Student, to the private school in question for the 2008-09 school year, as the District, private school, and bus company have agreed otherwise. ██████████

Student is non-verbal and he does not write. He communicates at home by pointing to pictures and objects, taking persons to the object he desires, and uses some signs. He knows some words by sight. (Parent; ██████████) In December of 2003, an augmentative communication evaluation was done by District at Parent's request and discussed at a subsequent IEP meeting, wherein Parent expressed her concerns that she wanted Student to move beyond PECS, pictures, Big Macks and robots to more advanced assertive technology. Technology and augmentative

communication were discussed at the IEP meeting Parent attended in October, 2005 (Parent; P69, 87-88; 93-96). District has in the past provided Parent with certain assistive technology devices for the home. (Parent; P99) Parent has PECS (Picture Exchange Communication System) cards at home. She doesn't think Student should have to sift through PECS cards on a key chain to communicate. (Parent) Augmentative communication technology is not easy to program for Student beyond the picture exchange communication system because of his level of functioning and also because he is mobile. ( )

Parent was invited but did not attend Student's IEP meeting in October 2006 due to her personal medical issues and did not wish the meeting to be rescheduled for her. A copy of the IEP was provided to her. (Parent)

Parent consented to performance of a triennial evaluation of Student on July 24, 2007, to include, among other domains, data to be collected on Student's communication status by the speech therapist. (Parent; ( ) P36, 37) The triennial evaluation was conducted and an IEP meeting convened on October 3, 2007 at which it was reviewed. ( ) Parent did not attend the meeting due to her personal medical issues, and did not wish the meeting to be rescheduled for her. By phone during the 2007 meeting, she advised that she had concerns about the bus driver and safe transportation of Student and also that she wanted the speech therapist to work with Student to try more varieties of foods. A copy of the IEP was provided to her. (Parent; ( ); P2)

Neither Parent nor staff have requested assistive technology or augmentative communication evaluations since the 2003 evaluation. (Parent; ( )) Student's speech therapist has not felt that a referral has been needed, and Parent has not requested her to make a referral, and so she has not made one. The devices used for Student during the 2007-08 school year are appropriate for Student considering his level of ability. ( ) A picture exchange system has been devised and is used for Student at school, as the formal PECS system belonged to the former teacher who has been gone for over two years. Student has been making quite a bit of progress in his current program with photographs and the picture exchange system devised by the staff. ( )

Student receives 60 minutes of speech therapy each week. His speech therapist is self-trained in use of PECS. Student is good at letting people know what he needs by using a picture exchange system and taking people's hands. He is at about a level 2 in the PECS and has just stepped up to using a few abstract symbols in addition to photographs. He retrieves pictures and takes them to the staff to let his needs be known. He has made progress on his speech goals. Other communication devices are available at school, including VOCA, a Big Mack, a classroom computer, and some computer programs, but PECS works best for him, and items in the classroom are most motivating for him in PECS. Parent has never contacted the speech therapist, and she has never met Parent. ( )

Parent took Student to ( ) Ph.D, CCC-SLP, for a private Alternative, Augmentative Communication and Assistive Technology Evaluation on June 27, 2007. <sup>3</sup> J.M.J.

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<sup>3</sup> The due process hearing request submitted by Parent's attorney, dated April 30, 2008, requests "...a due process hearing (including an IEE per S. 226.180 at public expense if district refuses to provide evaluation)...., and states that Student "has not had an assistive/augmentative communication-technology evaluation to adequately identify and update educational needs." As Proposed Resolution # 4, the request seeks an Order of an augmentative communication and assistive technology evaluation or reimbursement for same if the district refuses to complete a comprehensive evaluation.(see Due Process Hearing Request, pp. 1 and 2) District did respond to the aforesaid

administered the Test of Aided-Communication Symbol Performance (TASP) to Student and demonstrated and had Student attempt use of certain AT programs. ( [REDACTED]; Parent; P2) [REDACTED] did not observe Student at home or consult with school staff. ( [REDACTED].) She issued a report making recommendations of various devices(P3-8) which Student's teacher and speech therapist have reviewed and feel some of which might be appropriate for Student at some point in his education, but that they cannot say are necessary for his progress or which would help him make any further progress than he has been making in school with the system already in place. They would like to have a pre-fabricated PECS system to use instead of having to make their own and are happy to collaborate with any specialist in regard to Student's programming. ( [REDACTED])

### Conclusions of Law

At a due process hearing convened pursuant to the provisions of the Illinois School Code, it is incumbent upon the District to present evidence that it has provided or has offered to provide the student in question with a free appropriate public education in the least restrictive environment, in accordance with the stated issues in the case. *ILCS 5/14-8.02a(g-55)(2008)* However, the burden of persuasion falls upon the party seeking relief, in this case, Parent. *Schaffer v. Weast, 546 U.S. 49(2005)*

An appropriate education, or *FAPE* as it is commonly designated, is an education that is reasonably calculated to provide the student with meaningful educational benefit, as based on an individual education plan, or *IEP*, developed by an IEP team, including the student's parents. *Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S.176(1982)* The school district is required to follow procedures that are designed to allow the parents to participate in the development of the IEP. Per *IDEA 2004* and its attendant regulations, procedural violations alone cannot be deemed a denial of *FAPE* unless the evidence proves that the violations impeded the student's right to *FAPE*, the parents' right to participate in the decision making process, or caused the student to be deprived of an educational benefit. Otherwise, a hearing officer's determination of whether *FAPE* was received must be based on substantive grounds. *20 U.S.C. 1415(f)(3)(E)(2007); 34 CFR s. 300.513(a)(2006)*

Based on the material facts that are relevant to the issues in this cause, the undersigned concludes as follows:

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hearing request but did not specifically address the parenthetical referring to the IEE. (see District's response dated May 16, 2008) At the Pre-Hearing Conference on June 10, 2008, Parent's counsel stated that she would be using at hearing an evaluation to be conducted by [REDACTED], already scheduled for June 20, 2008. District counsel stated that the District would not have the ability to conduct the evaluation itself during the summer months. (see Pre-Hearing Conference Report pp. 2, 3)

**Issue 1.** Whether the District violated Student's right to a free, appropriate public education by failure to provide safe and reliable transportation of Student to and from school from April 30, 2006 through the present per the Student's IEP?

A school district must provide those related services, as defined in the regulations attendant to the IDEA, which are necessary to assist a disabled student in benefiting from his special education. *23 ILAC 226.310(2007)* Transportation to and from school and specialized buses adapted with lifts and other equipment is a related service within the IDEA regulations. *34 CFR 300.34(2006)* In this matter, the preponderance of the evidence supports Parent's contention that Student was denied educational benefit on March 7, 2008 due to the bus aide's failure to transfer the Student to his bus seat from the stroller and use the harness provided to him as special equipment for his safe transportation to secure Student in a bus seat, which is a part of the provision of Student's special education and which was provided daily with the exception of March 7, 2008. Student was denied a day of school, which is an educational benefit, because of the resulting incident, as it was reasonable for Parent to take Student to his personal physician and take him home for the rest of the day.

However, Parent has not sustained her burden of proving that District denied Student FAPE because of lack of the related service of transportation as to any other days of school Student missed during the period from April 30, 2006 to the present. Parent chose to keep Student from the private therapeutic day school and instead to have the C.N.A. do the programming for Student under Parent's auspices, rather than use the transportation provided by the bus company in contract with the District for the school year in question or secure alternative transportation for the time complained of. I do not find compelling Parent's testimony that, even with a two aides and a bus driver different from the driver who committed the acts she complained of, she could not allow Student to ride the bus, instead demanding that the District change the bus company immediately before she would allow Student to return to school. Further, although there was some testimony as to the bus being frequently late, that testimony lacked sufficient detail as to when and why delays occurred, no one having documented the nature or extent of same, to constitute competent evidence in this matter. Parent's counsel has provided a copy of *23 ILAC 226.700(2007)* and other hearing officer opinions, OSEP letters, and cases in her packet of materials in this case, which are not persuasive in this matter based on the facts in evidence.

**Issue 2.** Whether the District violated Student's right to a free, appropriate public education by failure to provide home services to Student while resolving the aforesaid transportation issue from April 30, 2006 to the present?

Included in the continuum of options to be made available to students with disabilities is instruction in the home, where it is necessary due to the child's inability to attend school for an extended period of time due to a medical condition. *23 ILAC 226.300(2007)*; *34 CFR 300.39 and 300.115(2006)* However, in this matter, Parent has not proven that Student was at home during the periods complained of in September of 2007 and from March through June in 2008, due to a medical condition. Rather, he was home because Parent chose to keep him at home and allow J.B. to provide his education under Parent's supervision rather than put him on the bus. Student had an IEP in effect and the private school staff was available to implement the IEP.

Transportation was available per the IEP to transport Student to and from school. Thus, the District was not obliged to provide home services to Student in order to provide FAPE, and FAPE was not denied by any acts or omissions of the District under these circumstances.

**Issue 3.** Whether the District violated Student's right to a free, appropriate public education by failure to provide an augmentative communication and assistive technology evaluation of Student from April 30, 2006 to present?

A school district must conduct a re-evaluation of a child who is receiving special education and related services if it determines that the child's service needs warrant it or if the parent or a teacher requests it, and at least every three years unless the parent and the district agree that it is unnecessary. *23 ILAC 226.120(2007)*; *34 CFR 300.303(2006)* Additionally, a parent has the right to request an independent educational evaluation (IEE) at public expense if she disagrees with an evaluation obtained by the district. The request must be submitted in writing to the district's superintendent. Upon receipt of a properly requested IEE, the district can agree to pay for the IEE or file a due process hearing request to show that its evaluation is appropriate. *23 ILAC 226.180(2007)*; *105 ILCS 5/14-8.02(b)*; *34 CFR 300.502(b)(2006)*

The preponderance of the evidence in this case does not support Parent's contention that Student was denied FAPE from April 30, 2006 to the present time by the District's failure to provide an augmentative communication and assistive technology evaluation of Student. Student received an AC evaluation from the District's AT Department in December 2003 at Parent's request. Neither the Parent nor teacher, nor the speech therapist requested such an evaluation since that time. Student received his triennial evaluation in 2007. The teacher and speech therapist testified that Student was making good progress in school with the system that staff was using to meet his needs. There was no testimony to the effect that Student was in any way denied educational benefit due to the absence of an ACC/AT evaluation as alleged. The Parent in this case does not challenge the IEP itself as to its goals or Student's progress toward them, or any other aspect of Student's education other than the bus company used for transportation and the failure to conduct an ACC/AT evaluation from April 30, 2006 to present.

The request for an IEE that was inserted into the April 30, 2008 hearing request in this matter tends to pose a bit of a procedural conundrum and needs to be addressed here. In it, Parent's counsel asked for an IEE "if District refuses to provide evaluation" in a parenthetical. It also states that Student "has not had an assistive/augmentative communication-technology evaluation" but goes on to indicate that Parent's counsel "will probably amend her due process complaint when she receives the student's records." District did not refuse to conduct the evaluation, although it had actually already been done at Parent's request in 2003, , but it did not specifically respond in the positive or the negative to the request, which was a bit confusing, for IEE either, instead responding only to the hearing request by stating generally that it had in fact provided Student with FAPE.

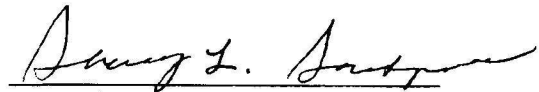
At the time of the Pre-Hearing, District counsel did state that District could not perform the evaluation over the summer and also that District would convene an IEP meeting to consider the report of the private evaluation that Parent had scheduled. At worst, District failed to comply with procedural requirements that it respond in writing to the April 30 request to agree to the IEE or file for due process hearing on that issue, although this due process hearing was already pending. However, based on the testimony in this case, Student was not denied FAPE by such a procedural violation. Neither the report of the private evaluation, the testimony of the evaluator,

nor any of the other evidence presented by Parent have persuaded this hearing officer that District should have performed an AAC/AT evaluation of Student or that FAPE was denied to Student due to the District's failure to conduct its own AAC/AT evaluation between April 30, 2006 and the present.

**IT IS THEREFORE ORDERED:**

1. That District shall provide Student with instruction and services consistent with what he would have received had he been in school on March 7, 2008, including any therapies, if they were scheduled for that particular day, the nature and extent of instruction to be determined by Student's teacher, in compensation for the special education and related services he missed on March 7, 2008 only.
2. That Parent's requests for Orders for assignment of a different bus company and for any further compensatory services or monetary reimbursement are denied.
3. That District shall provide proof of compliance with Order no. 1 above to the Illinois State Board of Education, Program Compliance Division, 100 N. First Street, Springfield, IL 62777-0001 on or before September 15, 2008.

DATED: August 11, 2008



Stacey L. Stutzman  
Impartial Hearing Officer

1242 Deer Trail Lane  
Libertyville, IL 60048  
(847) 362-1950

**RIGHT TO REQUEST CLARIFICATION**

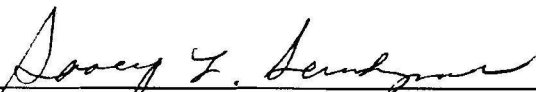
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party 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.

**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 ILCS 5/14-8.02a(i)(2007), 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**

The undersigned hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parent, Parent's counsel, District counsel (who works in District offices desires to accept service on behalf of District as well), and the Illinois State Board of Education at their respective addresses by depositing same as Certified Mail, postage prepaid, with the United States Postal Service at Libertyville, IL before 5:00 p.m. on August 11, 2008.

  
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Stacey L. Stutzman