

Case Number: 2009-0172

vs. [REDACTED]

Hearing Officer: James Wolter

Illinois State Board of Education
Special Education Services
100 North First Street
Springfield, Illinois 62777

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SPECIAL EDUCATION
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**Impartial Due Process Hearing Decision
Cover Page**

Instructions: Complete this form and return it along with the decision. The information collected on this form will be used for the purpose of indexing the decision by subject matter as required by 23 Illinois Administrative Code 226-695

District Name [REDACTED]

Phone: [REDACTED]

Superintendent [REDACTED]

Address [REDACTED]

Represented by [REDACTED]

Parent Name [REDACTED]

Address [REDACTED]

Represented by [REDACTED]

Date and Timelines

Date of Written Request: 11/03/2008

Date of Pre-hearing Conf: 02/10/2009

Date of Hearing: 03/12/2009 to 3/12/2009

12:00:00 AM

Date of Decision:

Summary of Decision

The parent's due process complaint raised the following issues: 1) whether the district provided the student with the amount of special education and related service specified on his IEPs and with the modifications and accommodations listed on his IEP, 2) whether the district provided the student with appropriate transition service and 3) whether the district provided the student with sufficient assistive technology service.

A finding of fact affirmed that the district failed to provide the student with all the special education instruction and related service specified on his IEPs. However, the district did provide the student with the modifications and accommodations listed on his IEP, as well as appropriate transition service and sufficient assistive technology service.

The student was awarded 80 hours of extended school day service in the form of one-on-one tutoring by a certified special education teacher as compensation for the special education and related service the district failed to provide.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) ISBE CASE NO. 2009-0172
)
) James Wolter
) Impartial Due Process
) Hearing Officer

PROCEDURAL BACKGROUND:

The parent filed a due process complaint by ISBE Form 19-86A dated October 24, 2008. The complaint was received by the Illinois State Board of Education on November 12, 2008. The case was assigned to this hearing officer on November 12, 2008. The parties were sent a notice, on November 13, 2008, that the pre-hearing conference was scheduled for December 14, 2008. The parties mutually requested and were granted several continuances to enable them to attempt to resolve their differences without a due process hearing. The pre-hearing conference was held on February 12, 2009 and a report of that conference was sent to the parties on that date

The due process hearing was held on March 12, 2009 in the district's central administrative offices.

The parent elected to have due process hearing closed and elected to have the student present at the due process hearing.

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

The district submitted documents consisting of 101 pages that were accepted into evidence. The parent submitted eight exhibits that were not sequentially numbered but marked and identified when referred to during the due process hearing.

Witnesses, with the exception of the student, were sequestered during the hearing and instructed not to discuss their testimony until the hearing was completed.

The following witnesses provided testimony:*

For the parent:

1. [REDACTED] Student

For the district:

1. [REDACTED] English Teacher, [REDACTED]
2. [REDACTED] Science Teacher [REDACTED]
3. [REDACTED] Special Education Teacher [REDACTED]
4. [REDACTED] Case Manager [REDACTED]
5. [REDACTED] History Teacher [REDACTED]
6. [REDACTED] Case Manager [REDACTED]

*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 nor will the names of the two high schools attended by the student for that same reason.

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 hearing are:

1. Whether the district failed to provide the student with an IEP containing appropriate and adequate services such as transition service from high school to post high school life.
2. Whether the district failed to provide the student with the special education and related services listed on his IEP such as allowing the student to take tests orally, retake tests and reporting the student's progress to the parent on a weekly basis.
3. Whether the district failed to provide the student with special education services and instruction reasonably calculated to provide him benefit.

Remedies: The parent seeks the following remedies:

1. The parent desires the hearing officer to order the district to provide the student with tests administered orally in all courses, taken the past two years and currently, after the student has had an opportunity to review the material, he is to be tested on with his special education teacher. Should the parent prevail and should the student's grades change, the parent desires the hearing officer to order the district to change the student's transcript to reflect the new grades.
2. The parent desires the hearing officer to order the district to provide the student with compensatory education in the form of free evening, summer and Saturday school along with special education transportation from September 2008 through September 2010; 90 hours of Spell Read from SCORE Learning Center and 8 hours per week of one-on-one instruction in writing for a period of two years.
3. The parent desires the hearing officer to order the district to provide the student with assistive technology in the form of; a laptop computer, printer, scanner, fax machine, Microsoft 2008 and virus protection, Merit, Speak writer, Text Writer, Electronic Dictionary, and Books on Tape.

Findings of Fact:

1. The student is a 17 year 4 month old male from an English speaking home. He is currently in 11th grade at SHS and receiving special education service in regular education college preparatory classes that are co-taught by a regular education and a special education teacher. He has received special education and related services since fifth grade under the criteria for students with learning disabilities [School District Document 1, page 1 (hereafter SD 1.1)]. It is noted that, within the last three weeks, the district unilaterally moved the student to a self-contained special education English class.
2. The student's psycho educational/psychological assessments indicated he has the intellectual potential to benefit from a college preparatory program [SD 1-3 and SD 36-41]. There is no evidence to indicate that the student's learning disability is so profound or complex that he is unable to succeed in a college preparatory program with special education services. However, the testimony of all the witnesses, including the student, indicates the student has failed several courses and received grades of "D" in others. This is supported by the evidence [SD 89 & 90].
3. The parent contends the district failed to provide the student with the special education and related services listed on his IEP such as allowing the student to take tests orally, retake tests and reporting the student's progress to the parent on a weekly basis. Testimony of district witnesses contradict this contention, with the exception that the student's current history teacher admitted that she stopped contacting the parent on a weekly basis because the student was getting angry about the school personnel contacting the parent that often. This does not appear to have had any effect on the student's school performance. The testimony of the district personnel, supported by written evidence [SD88], was determined credible.
4. The parent contends the district did not provide all of the special education service listed on the student's IEP. It appears this contention is correct in two instances. The student's March 21, 2007 IEP indicates the student required paraprofessional support to "transition from class to class for all courses and all classes" [SD 21]. The parent did not specifically site this as an issue, but the fact that the district maintains that one primary reason for the student's failure was his absence from and tardiness to class it is appeared that the paraprofessional service was not provided. The student's May 5, 2008 IEP states that a special education teacher will provide the student with 230 minutes of service per week (46 minutes per day for 5 days per week) in a regular education English class. The students [REDACTED] case manager testified that the special education teacher provided the student service for three days per week. The [REDACTED] case manager testified that the student did not start receiving special education service at [REDACTED] until approximately the third week of September 2008. Finally, the [REDACTED] case manager testified that the student had been moved out of a regular education co-taught English class to a special education English class without holding an IEP meeting, consulting with the parent or even informing her. Additionally, this change constitutes a change in placement in that it is contrary to what is listed on the student's mutually agreed upon IEP that was in effect at the time his parent filed a due process complaint

[SD 62].

5. The parent maintains the student failed because the teachers did not provide the student with the modifications and accommodations listed on the student's IEPs [SD 21 -23 AND 49 -51]. District witnesses testified that they received copies of the student's IEPs and provided the modifications and accommodations listed on the IEPs. The district witnesses testified that the reason the student failed and continues to fail is because of his frequent absences from class and his frequent tardiness to class. This testimony is supported by the written documentation contained in the student's psychological evaluation [SD 36-41], social assessment [SD 42-44], student progress reports [SD 80-87] and school attendance records [SD 94-95]. Additionally, the preponderance of testimony, as supported by the written evidence, indicated the teachers have and are implementing the modifications and accommodations listed on the student's IEPs and that the student's failure is the result of his excessive absences from class and tardiness to class, failing to complete homework assignments, sleeping during class, talking to other students during class, not completing required assignments or otherwise not being engaged in his education.
6. The parent contends that the district failed to provide the student with appropriate and adequate services such as transition service from high school to post high school life. District witnesses state they did and point to the fact that the parent and student participated in developing his transition plan [SD 67]. The student desires to attend college, have a profession that requires a college education and is in a college preparatory curriculum. The district witnesses and the psycho-educational assessments [SD 1-3 & SD 36-41] indicate the student is capable of benefiting from and has benefited from his college preparatory program. A comparison of standardized achievement tests scored [SD 2 and SD 37] indicates the student has made 2 to 3 years of academic progress over the past 3 years.
7. The parent contends the district failed to provide the student with special education services and instruction reasonably calculated to provide him benefit. Specifically, the parent believes the student requires assistive technology, particularly a laptop computer for home use and other hardware and software, to assist him with reading and writing. District witnesses contend the student was provided with an assistive technology assessment [SD 77-79]. He has been provided with assistive technology in the form of: a reading pen, CoWriter, Write Out Loud, and Lexia SOS [SD 77] and Franklin Speaking Dictionary and Thesaurus and Inspiration 8 [SD 91-92]. District witnesses testified that the student has access to computers at [REDACTED] prior, during and after school. The [REDACTED] case manager testified that he took the student to the [REDACTED] library and taught him how to access the [REDACTED] computers. The student testified that he went to the library a couple of times and that it was closed. He did not provide the specific times or dates that he found the library closed or that he reported it being closed to a [REDACTED] teacher. Without that specific detail or other supporting evidence, testimony that the library was closed is not persuasive.
8. The adults in the student's life, particularly his mother but also his teachers, have worked diligently to help the student achieve in school. Testimony, as supported by the written evidence [SD 1-3, SD 36-41 and SD 77-79] indicate the student is

capable of succeeding and has made academic progress; yet he has failed several classes and passed others with grades of "D". This has resulted in a dispute between the parent and school over why the student is not obtaining better grades and passing. The district witnesses maintain that the student's grades reflect his non-participation in his education. Their testimony, as supported by the evidence [SD 89-95 and elsewhere], indicated the student has excessive absences from class and tardiness to class and that, when he does attend class, he sleeps, talks to other students, does not complete required assignments and is not engaged in obtaining education. An indication of his non-engagement in obtaining an education is his testimony that he has prescription eyeglasses but does not wear them. The parent does not dispute this, but maintains that the reason the student does not actively participate in his education is that the district has not provided him with the modifications and accommodations listed on his IEP or the amount of services listed on the IEP or the appropriate transition service or the appropriate assistive technology. The preponderance of evidence, with the exception of the district's failure to provide the student with the amount of special education and related service listed on his IEPs, contradicts the parent's contention.

DISCUSSION ISSUES AND CONCLUSION OF LAW:

The parent is the moving party in this matter. As such, she 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 parent's due process complaint raised three issues: 1) whether the district provided the student with the amount of special education and related service specified on his IEPs and with the modifications and accommodations listed on his IEP, 2) whether the district provided the student with appropriate transition service and 3) whether the district provided the student with sufficient assistive technology service.

The following is a discussion of the three issues the parent brought before the due process hearing:

1. Whether the district failed to provide the student with an IEP containing appropriate and adequate services such as transition service from high school to post high school life.

The district addressed the student's transition needs in his 2007-2008 and 2008-2009 IEPs in compliance with IDEA 2004 [Section 614(d)(I)(A)(i)(VIII)(aa)-(cc)]. As indicated in Findings of Fact Number 6, the parent and student participated in the student's transition plan. His plan is to attend college after high school; he has the ability to attend college and is in a college preparatory program. The services, modifications and accommodations listed in the IEPs are reasonably calculated to enable the student succeed in that college preparatory course of study. In every instance the student has to

be an active participant in their education. For example, the student has prescription glasses but doesn't wear them. He has classes where he can obtain an education but doesn't attend and, when he does attend, as indicated in Findings of Fact Number 8, he is unprepared, sleeps and/or talks to other students. The district has established goals appropriate to the needs of the student [34 CFR 300.157(a)(4)] and has made a "good faith" effort to assist the student achieve his transition and academic goals.

2. Whether the district failed to provide the student with the special education and related services listed on his IEP such as allowing the student to take tests orally, retake tests and reporting the student's progress to the parent on a weekly basis.

As indicated in Findings of Fact Number 3 and 5, the student was provided with all the modifications and accommodations listed on his IEP.

As indicated in Findings of Fact Number 4, the district did not provide the student with the services listed on his 2007-2008 and 2008-2009 IEPs in violation of 34 CFR 300.347(a)(6). Additionally, the district changed the student's placement without holding an IEP meeting with the parent present in violation of 34 CFR 300.344(a)(1) and the "stay put" provision of IDEA 34 CFR 300.51(a) and [*Carl B. v. Mundelein High Sch. Dist. 120 Bd. of Educ.*, 20 IDELR 363 (N.D. Ill. 1993)].

3. Whether the district failed to provide the student with special education services and instruction reasonably calculated to provide him benefit.

As indicated in Findings of Fact Number 7, the district has provided the student with services, in particular assistive technology services, which are reasonably calculated to provide the student with educational benefit. The district determined the student's assistive technology needs could be accommodated by computers available to him at [REDACTED] before, during and after school and that he did not require a personal computer as required by and consistent with 34 CFR 300.308(b).

The following is a discussion of the three remedies the parent is seeking through the due process hearing:

1. The parent desires the hearing officer to order the district to provide the student with tests administered orally in all courses taken the past two years and currently, after the student has had an opportunity to review the material, he is to be tested on with his special education teacher. Should the parent prevail and should the student's grades change, the parent desires the hearing officer to order the district to change the student's transcript to reflect the new grades.

This remedy is denied on two accounts. First, as a factual matter, the district has provided the student with an opportunity to take all tests orally and has a standing offer to allow the student to retake tests that he has failed and specifically has offered to let the student take tests that he had taken over the past years [SD 88]. Additionally, the changing of grades and altering of academic transcripts is not within the scope of an

impartial due process hearing officer's authority 34 CFR 300.513(a).

2. The parent desires the hearing officer to order the district to provide the student with compensatory education in the form of free evening, summer and Saturday school along with special education transportation from September 2008 through September 2010; 90 hours of Spell Read from [REDACTED] and 8 hours per week of one-on-one instruction in writing for a period of two years.
 - This remedy is granted in part with the modifications described below. Districts are required to implement an IEP in its entirety 20 USC 1414(d)(2)(A). However, if a district fails to fully implement an IEP and if that failure is not material to the student obtaining educational benefit, the courts have affirmed a judgment in favor of the district on the student's FAPE claim [*Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 47 IDELR 182 (9th Cir. 2007), *Houston Indep. Sch. Dist. v. Bobby R.*, 31 IDELR 185 (5th Cir. 2000); *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003)]. In this case the district failed to fully implement the students 2007-2008 and 2008-2009 IEPs in three instances by failing to provide the student with any special education service the first three weeks of September 2008, providing only three periods of co-taught regular/special education English per week rather than the five days per week required by the 2008-2009 IEP and the failure to provide paraprofessional support to "transition from class to class for all courses and all classes" required by the 2007-2008 IEP. Any one of those violation may have been considered non-material but all three violations over two years constitutes a pattern that cannot be considered non-material.
 - The student is entitled to receive compensatory education for the special education services listed on his IEP but not provided by the district. Specifically, the three weeks of co-taught courses he did not receive in September 2008, the two days a week of co-taught English he did not receive from October 2008 through February 2009 and the paraprofessional service he did not receive for the 2007-2008 school year. The appropriate compensatory education must be an equivalent of the group special education instruction the student was not provided.

The parent request for compensatory education in the form of evening, Saturday and summer school is denied because they are regular education classes designed for students who have failed those courses during the regular school year. The student did fail those courses due to his non-attendance, non-cooperation and otherwise non-availability to the instruction and support provided him. Therefore, ordering the district to provide the student with free regular education class is not appropriate nor is it an equitable remedy.

The parent's request for special education transportation is likewise denied. No evidence was presented that the student's disability was so severe and complex that he was unable to use regular transportation and required and therefore was qualified to receive special education transportation as a related service [34 CFR 300.24(a) and (b)(16)].

The parent's request for 90 hours of Spell Read from [REDACTED] is denied because the parent failed to provide information that this remedy would be equitable to the special education service that the student missed as described above.

While the student is eligible for one-on-one tutoring as compensation, the parent's request for 8 hours per week of one-on-one instruction in writing for a period of two years is denied as requested because it does not specify instruction by a certified special educator. Further, it appears the amount of tutoring requested by the parent is arbitrary in that no rationale was presented to justify 8 hours of one-on-one tutoring per week for a period of two years.

In determining the equitable compensatory education that the student is entitled to, one must consider one-on-one special education tutoring because a special education group instructional setting cannot be created for the purpose of providing one student with compensatory education. Therefore, in this instance, one five-hour day of co-taught group instruction is equated to one-hour of one-on-one instruction by a certified special education teacher. Using this formula, the student is eligible for 15-hours of one-on-one special education instruction for three weeks of special education instruction the district did not provide in September 2008.

In determining the equitable compensatory education the student is entitled to for the district's failure to provide him with 5-days per week of co-taught regular/special education English, rather than the 3-days per week, another formula was applied. In this instance, the two periods of co-taught group instruction the student was not provided from the end of September 2008 through February 2009 is equal to one hour of one-on-one tutoring. This entitles the student to another 25 hours of one-on-one tutoring for total 40-hours of one-on-one special education tutoring as compensation for the special education service the district failed to provide the student for the 2008-2009 school year.

In calculating of an equitable amount of compensatory education the student is entitled to for the paraprofessional service the district did not provide during the 2007-2008 school year, a formula of one-hour of one-on-one tutoring by a certified special education teacher is equated to one week of paraprofessional service. Therefore, the student is entitled to another 40-hour of one-on-one instruction by a certified special education teacher.

The student is entitled to 80 hours of compensatory education in the form of one-on-one tutoring by a certified special education teacher beyond the regular school day.

3. The parent desires the hearing officer to order the district to provide the student with assistive technology in the form of; a laptop computer, printer, scanner, fax machine, Microsoft 2008 and virus protection, Merit, Speak writer, Text Writer, Electronic Dictionary, and Books on Tape.

This remedy is denied based upon the facts of the case. As stated above, the student has been provide with an assistive technology evaluation, has been provided with and otherwise has access to assistive technology a [REDACTED]. The convenience of a student having a computer at home is not sufficient justification to order a district to provide a student with a computer for home use [*Anoka-Hennepin Indep. Sch. Dist. #011, 107 LRP 36787*]

(MN 2007)]. The parent failed to demonstrate that the student requires more assistive technology than that which is already available to him.

Summary:

The parent has, in part, prevailed in this matter because the district did not provide the three weeks of co-taught courses he did not receive in September 2008, the two days a week of co-taught English he did not receive from October 2008 through February 2009 and the paraprofessional service he did not receive for the 2007-2008 school year. The district prevailed in all other matters.

ORDERS:

1. The district shall provide the student with 80 hours of one-on-one tutoring in the area of language arts by a State of Illinois certified special education teacher.
 - The tutoring shall take place at the student's high school either immediately before or immediately after the student's scheduled classes.
 - The student shall receive not less than 1 hour of tutoring but not more than 2 hours of tutoring per week for each week school is in session including summer school.
 - If the student misses or is late to a tutoring session, the parent shall be informed by the tutor via email, the tutor shall be compensated for the time by the district but shall not be required to make up the time and the student will have forfeited that tutoring time.
 - These terms are binding on the parties unless the parent, student, district representative and tutor agree, in writing, to change them.
2. Within ten (10) school day receipt of this Impartial Due Process Decision, a representative of the district and the tutor(s) shall meet with the parent and student.
 - The district shall develop a written schedule of the time, dates and location that tutoring will take place and send it to the parent and student prior to the meeting.
 - The scheduled developed by the district shall be binding on the parties unless the parent, student, district representative and tutor agree, in writing, to change it.
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.

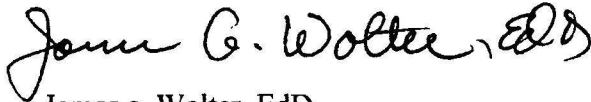
FINALITY OF DECISION: This decision shall be binding upon all parties.

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 17th day of March 2008.

A handwritten signature in cursive script that reads "James G. Wolter, EdD". The signature is written in black ink and is positioned above the printed name and title.

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

CERTIFICATE OF SERVICE

In the Matter of [REDACTED] v. [REDACTED]
ISBE Case Number: 2009-0172

I, the undersigned Impartial Due Process Hearing Officer, hereby certify that on March 17, 2009, I served the Decision and Order in the above matter by Certified Mail, at the [REDACTED] to the following:

[REDACTED]

7006 2760 0000 9438 7010

[REDACTED]

7006 2760 0000 9438 7027

Andrew Eulass, Esq.,
ISBE Due Process Coordinator
100 North First Street
Springfield, Il 62777-0001

James A. Wolter EdD
James A. Wolter, EdD
Impartial Due Process Hearing Officer
[REDACTED]

3/17/2009
Date