

Case Number: 2009-0227
[redacted] vs. [redacted]
Hearing Officer: Alfred A. Spitzzeri

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

Impartial Due Process Hearing Decision Cover Page

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District Name [redacted]

Phone: [redacted]

Superintendent Address Represented by [redacted]

Parent Name [redacted]

Phone: [redacted]

Address Represented by [redacted]

Date and Timelines

Date of Written Request: 12/09/2008
Date of Pre-hearing Conf: 07/07/2009

Date of Hearing: 09/15/2009 to 9/17/2009 12:00:00 AM
Date of Decision:

Summary of Decision

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Parents' request for reimbursement for tuition and related expenses for the unilateral placement of their daughter in a private day school is denied. Parents were active participants in the development of their child's IEP. The proposed [redacted] program provided FAPE.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

-) ISBE CASE NO. 2009-0227
-)
-) Alfred A. Spitzzeri
-) Impartial Due Process
-) Hearing Officer

Summary of Decision

Parents' request for reimbursement for tuition and related expenses for the unilateral placement of their daughter in a private day school is denied. Parents were active participants in the development of their child's IEP. The proposed [REDACTED] program provided FAPE.

DECISION AND ORDER

Jurisdiction

This Hearing Officer has jurisdiction to hear this case pursuant to a letter of appointment by the Illinois State Board of Education ("ISBE") dated June 15, 2009, the previously appointed Hearing Officer being unavailable to accept the appointment. Appearing on behalf of the [REDACTED] was [REDACTED]. Appearing on behalf of the parents were attorneys [REDACTED] and [REDACTED]. [REDACTED] attended all 3 days of the hearing. The court reporter was [REDACTED]. The transcript was ordered written by the parents' attorneys, but the Hearing Officer did not have a copy of the transcript available to him at this time.

This hearing officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02 (a) et seq, and 23 Ill. Admin. Code 226.600 et seq., the Individuals with Disabilities Improvement Act of 2004 (IDEA) 20 U.S.C. 1415, and 300 C.F.R. 507 et seq. The parties were informed of their rights according to 105 ILCS 5/14-8.02 (a), 23 Ill. Admin. Code 226, subpart G, 300 C.F.R. 300.512.

The testimony at the hearing covered 3 days, the final day of testimony being September 17, 2009. The parties requested and were given 10 days thereafter, by September 27th, to file written briefs to supplement their closing arguments. Thus, the Decision and Order are due by October 7, 2009.

Factual Summary

[REDACTED] born on June 10, 2003, recently turned six years of age. Her eligibility classification is

“developmental delay”. [REDACTED] was initially identified as eligible for special education services following an Individual Education Program (IEP) meeting on March 17, 2006. On December 9, 2008, [REDACTED] parents, through their attorneys, [REDACTED] filed a request for due process with [REDACTED]. At the time her home school was [REDACTED] but the school she was attending was [REDACTED]. According to the due process request, [REDACTED] has developmental delays including speech and language delays. Reportedly, she is functionally non-verbal and utilizes vocalizations, gestures, facial expressions and an AT device to communicate.

During the 2006-07 school year, [REDACTED] attended [REDACTED] half-day early childhood education program at [REDACTED] for five days a week. Allegedly, this placement could not offer her all of the mainstreaming opportunities she needed for sufficient language immersion. Thus, the parents decided to pay privately for [REDACTED] to attend a private preschool program, [REDACTED] three afternoons a week, for additional mainstreaming and more intensive language services.

During the 2007-08 school year, the parents decided to increase [REDACTED] time at [REDACTED] preschool to five mornings a week, reducing her attendance at the [REDACTED] early childhood program to only three afternoons a week.

On February 4 and 13, 2008, [REDACTED] held [REDACTED] annual review. She was “aging out” of the [REDACTED] early childhood program. According to the due process request, at this meeting [REDACTED] team members informed the [REDACTED] that they would not make a placement recommendation but rather would forward her IEP to the [REDACTED] placement office at [REDACTED] for determination as to her placement. Ultimately, [REDACTED] team members recommended 750 minutes per week (MPW) with 150 MPW set aside for mainstreaming. Allegedly, [REDACTED] team members did not advise the parents that this was a half-day program and denied the parents’ request to take the full IEP home so they would have an opportunity to review the document and understand the recommended services.

The due process request further alleges that [REDACTED] failed to send the information to the parents until May 20, 2008, four months after the IEP meeting. The placement ultimately selected by [REDACTED] for [REDACTED] was an early childhood program at her neighborhood elementary school, [REDACTED]. The [REDACTED] letter advising the parents of same, is dated April 30, although the envelope was not postmarked until May 20, 2008, just days before the end of the school year.

[REDACTED] requested permission to observe the program at [REDACTED] and subsequently did so. Reportedly, she was surprised to learn that this was not a full-day program but only met from 8:00 a.m. to 10:15 a.m. daily for a total of 675 minutes, not 750 minutes as designated by her IEP. Further, even though [REDACTED] IEP required 150 MPW of integration, she was advised that the program had never mainstreamed any children. As a result, the [REDACTED] decided to place [REDACTED] in a private program that they felt could meet her needs. On July 31, 2008, the [REDACTED] sent [REDACTED] a 10-day notice of their intent to place [REDACTED] at [REDACTED] and to seek reimbursement from [REDACTED].

[REDACTED] has been attending [REDACTED] since August 25, 2008. She has recently completed the full day kindergarten program which included both a special ed and a regular education classroom.

Procedural History

February 13, 2008 – IEP meeting completed (initiated on February 4) [REDACTED] Ex. 22.

May 21, 2008 – Date letter from [REDACTED] dated April 30, 2008 received by parents recommending placement at [REDACTED] Ex. 52.

June 23, 2008 – Letter from parents' attorneys to [REDACTED] advising of objections to [REDACTED] and possible due process request. [REDACTED] Ex. 53.

July 31, 2008 – 10-day notice of parent's intent to place [REDACTED] at [REDACTED] Ex. 55.

August 7, 2008 – [REDACTED] letter to parents advising them of alternative placements at either [REDACTED] or [REDACTED] Ex. 57.

December 9, 2008 – Formal request for due process hearing. [REDACTED] Ex. 60.

December 18, 2008 – District's response to the parents' complaint for due process. [REDACTED] Ex. 63.

June 15, 2009 – Current hearing officer appointed, the previously appointed hearing officer being unavailable to complete the assignment due to suffering a stroke.

June 24, 2009 – Status conference. Prehearing conference set for July 1. Continued.

July 9, 2009 – Prehearing conference conducted via a telephonic conference call. See HO Ex. 1.

August 11, 2009 – Status conference to discuss hearing dates.

August 26, 2009 – Hearing commenced at administrative offices of [REDACTED]

August 31, 2009 – Continued hearing (a [REDACTED])

September 17, 2009 – Continued hearing, completed at [REDACTED]

Findings of Fact

As the Hearing Officer did not have a copy of the transcript available to him at the time of the writing of this decision and order, the following is a summary of pertinent testimony based upon the Hearing Officer's notes, recollections, observations, and his review of all of the material entered into evidence at the hearing.

The first witness in the case was [REDACTED] [REDACTED] has been the placement coordinator for [REDACTED] for the last five years including the 2007-08 school year. As such, she was responsible for hundreds of placement decisions involving special education students at that time, including the programming decision for [REDACTED]. Before making a programming recommendation, [REDACTED] typically reviews the student's IEP, and confers with the parties who know the student. Since October, 2008, [REDACTED] has been employed by [REDACTED] as the director of specialized schools and services. Previous positions she has held with [REDACTED] included teacher, master teacher, instructional class teacher, support teacher and director of special education. In a letter dated April 30, 2008, [REDACTED] notified [REDACTED] that [REDACTED] was being placed at [REDACTED] (P's Ex. Tab 52). This is [REDACTED] neighborhood school as she lives only four blocks away on the [REDACTED]

The April 30, 2008 correspondence is an obvious form letter containing information which did not apply to [REDACTED] e.g., instructions to give a copy of the letter to your child's high school counselor ([REDACTED] was five years old at the time). The letter also noted that the parent must enroll their child within ten school days of the date of the letter, an impossibility since it was not received until 20 days thereafter.

[REDACTED] testified that she could not be certain whether it was she or the other placement coordinator who made the placement decision concerning [REDACTED] although her signature appears on the bottom of said letter. She appeared to have no independent recollection of the events in question, although she did testify that most likely she did review [REDACTED] February 13, 2008 IEP. See P's Ex. Tab 22. For unknown reasons said letter was postmarked May 20, 2008. See. P's Ex. 52, p. 509. She testified that she might have discussed the placement decision with [REDACTED] or [REDACTED] the principal at [REDACTED] (where [REDACTED] had been attending).

[REDACTED] never attended any of [REDACTED] IEP meetings because she only attended them if requested. She never observed [REDACTED] in class either.

Although [REDACTED] IEP was completed on February 13, 2008, a decision on her placement was not made until April 30, 2008. See P's Ex. Tabs 22 and 52. In [REDACTED] opinion, [REDACTED] staff could implement the IEP. Since [REDACTED] was five, her recommendation was for an early childhood program. The IEP recommended half-day placement consisting of 750 mpw, 600 mpw in the early childhood instructional class and 150 mpw for mainstreaming. (A full instructional week consists of 1,500 minutes). See P's Ex. 22, Sec. 13, p. 213.

At the time of this IEP conference, [REDACTED] was attending [REDACTED] in a blended program. Since she was turning five, she was aging out according to [REDACTED]

[REDACTED] further testified that [REDACTED] placement was based on the February 13, 2008 IEP. Among the factors she considers in making her placement recommendation is the child's home school. One benefit of placing the child at their home school is that they can interact with other children in the neighborhood both before and after school. [REDACTED] did not believe that it was a problem that the letter was dated 20 days after it was dated, because some parents don't enroll their children until over the summer, or even wait until after school begins in the fall. In her opinion, the proposed IEP provided [REDACTED] with FAPE. It was written by the staff at [REDACTED] who actually worked with [REDACTED]. Even though [REDACTED] was her home school, [REDACTED] would never receive transportation to and from school since it was provided for in her IEP. See P's Ex. 22, Sec. 18, p. 217. Nothing in the IEP indicated [REDACTED] needed a special day placement. The parents never dissented from the IEP. Nothing in the IEP indicated that [REDACTED] needed an accessible school. If she had, it would have been shown on the modifications and accommodations page. See P's Ex. 22, Sec. 11, p. 196. [REDACTED] had no reason to believe that [REDACTED] could not provide FAPE for [REDACTED]

The next witness was [REDACTED]. She is a speech and language pathologist employed at [REDACTED], a private preschool. She worked with [REDACTED] for three years from November, 2005 to July, 2008. She completed a speech-language evaluation of [REDACTED] in November-December, 2005 when [REDACTED] was two years, five months of age. Based upon her observations and evaluation, she opined that [REDACTED] was severely impaired in her oral-motor skills and in both her receptive and expressive language. In fact, [REDACTED] was non-verbal at the time. [REDACTED] worked with [REDACTED] to improve her vocalizations and her functional communication ability. She identified [REDACTED] social skills as a strength (something each of the witnesses who have personal knowledge of [REDACTED] also recognized). She utilized picture exchanges, for example, and an AT device known as a "tech talk [REDACTED] did not participate in [REDACTED] IEP of February, 2008.

The IEP team originally convened on February 4, 2008. The IEP meeting was adjourned at the parents' request and continued to February 13, 2008. See P's Ex. Tab 22. The reason the February IEP meeting was adjourned was because the parents wanted a copy of the IEP to review before they signed off on it. Since this was not a common request, the case manager, [REDACTED], called [REDACTED] legal department to see if this would be alright. They decided to allow [REDACTED] and [REDACTED] to take home that part of the IEP which appeared to be the most important to them, for purposes of review and to supplement it as they saw fit. The IEP provided for 90 mpw of speech and language therapy. According to [REDACTED] progress reports at [REDACTED] although she made good gains during this period of time, [REDACTED] testified that [REDACTED] speech and language skills were still severely impaired.

[REDACTED] was mainstreamed while enrolled at [REDACTED]. She appeared to enjoy interacting with typically developing students and often initiated the interaction herself.

The next witness was [REDACTED] an occupational therapist (OT) employed by [REDACTED] at [REDACTED] since 1991. She knew [REDACTED] while she was attending [REDACTED] and provided both occupational therapy for her and also attended IEP meetings. In fact, she drafted the OT goals found in her IEP at P's Ex. Tab 22, pp. 206-209. The IEP provided for 60 mpw of OT. At that time she was essentially non-verbal but utilized some signs. She was attending [REDACTED] three days a week and [REDACTED] (incorrectly) assumed that [REDACTED] attended [REDACTED] on the other two days of the week. ([REDACTED] actually attended [REDACTED] five days a week.)

[REDACTED] described [REDACTED] OT needs as "moderate". She would only use the term "severe" for students who were either wheelchair bound or physically could not move. According to [REDACTED] the staff at the IEP meeting understood [REDACTED] and her needs and that their job was to identify her needs so someone else could make the appropriate placement decision for her. [REDACTED] and [REDACTED] contributed significant input to the modifications and accommodations pages (section 11) of [REDACTED] February IEP. See P's Ex. 22, pp. 195-196. [REDACTED] further testified that [REDACTED] IEP was appropriate and the goals identified for her were reasonably calculated to allow her to make educational progress. [REDACTED] classroom teacher was a co-provider of her OT goals.

The next scheduled witness was [REDACTED] a regular education teacher at [REDACTED]. Since the first day of the hearing was scheduled over the summer months, the parents' attorneys subpoenaed [REDACTED] to testify at the hearing. She failed to attend and the school district's attorney's attempts to contact [REDACTED] were unsuccessful as her phone was disconnected. [REDACTED] never did testify at the hearing which went on for two more days, including in September after school was back in session.

The next witness was [REDACTED] is a finance lawyer at [REDACTED]. She testified at length (over objections as to relevance) about [REDACTED] early developmental delays and medical issues, which need not be repeated here as they are well documented in the records. See [REDACTED] first IEP drafted on March 17, 2006 (P's Ex. 19); [REDACTED] second IEP of February 22, 2007 (P's Ex. Tab 20); and [REDACTED] third IEP of February, 2008 (P's Ex. Tab 22).

[REDACTED] IEPs are extensive. For example, her first IEP from 2006 included 10 pages of goals. See P's Ex. 19, pp. 87 to 97.

According to [REDACTED] no one at the February 2008 IEP meeting wanted [REDACTED] to go to [REDACTED]. She testified that [REDACTED] teacher, [REDACTED] her special education teacher at [REDACTED] ran the meeting and "almost got angry" that they would not even consider [REDACTED]. This assertion was never corroborated by any of the other witnesses in the case.

In the fall of 2006, [REDACTED] attended [REDACTED] school five mornings a week for half day and also attended

██████████ in the afternoons for three days a week. ██████████ class at ██████████ was a self-contained, instructional early childhood program. ██████████ were very happy with the staff at ██████████ and described them as “wonderful”. ██████████ testified at the IEP meeting agreed that ██████████ needed an aide. Notwithstanding this, the parents decided that the following year, 2007, that ██████████ would attend ██████████ only three days a week and ██████████ five days a week. ██████████ began considering other options for the following school year because ██████████ the principal at ██████████ told them that it would not be an option for ██████████ to return to ██████████ for the following school year. ██████████ assumed that this was because ██████████ was aging out of the program.

██████████ attended both IEP meetings in February, 2008. See P’s Ex. Tab 22. Her concerns are listed in Section 4, p. 192, such as ‘██████████ struggles in large group settings and loud/busy environments. She becomes overwhelmed and distracted. For optimal learning, she needs consistency with adults.’ A number of modifications and accommodations were drafted for ██████████ as identified in Section 11, p. 196 of the IEP at P’s Ex. Tab 22. E.g. use multi-sensory approach, simplify and repeat directions, allow use of a personal chewy tube (██████████ had a problem with “mouthing”, in other words, she puts anything she can get her hands on into her mouth).

Both ██████████ and ██████████ attended ██████████ IEP meetings on February 4, and February 13, 2008. They even brought their own speech therapist from ██████████ ██████████ was concerned because the case manager, ██████████ told them that the IEP team would identify ██████████ needs but the IEP would go elsewhere for someone else to make the placement decision. Since the placement decision would be made based upon this “one piece of paper” as ██████████ put it, the parents wanted to make sure it was accurate and they had time to review it and contribute to it. In fact, they were given this opportunity to do so, as the IEP meeting was adjourned. A lengthy list of the parents’ concerns is found at Ex. 22, p. 192. An extensive list of goals, modifications and accommodations for ██████████ were prepared as well. See Ex. 22, pp. 192-212. According to ██████████ testimony, the IEP meeting was four hours long (approximately one hour was spent with ██████████ contacting ██████████ legal department to see whether it would be appropriate to give the parents the drafted IEP before signing off on it). In fact, the IEP goals, modifications and accommodations are 16 pages long.

When the IEP meeting adjourned, ██████████ felt that everyone was “on the same page”. She became concerned when there was delay in ██████████ informing her as to its placement recommendation for ██████████. When she learned that ██████████ had recommended that ██████████ attend ██████████ school’s program, ██████████ became concerned because in her opinion ██████████ could not meet ██████████ needs. She contacted ██████████ the principal at ██████████. He suggested ██████████ take a look at the ██████████ program at ██████████. He knew nothing about the program there, but knew the principal. ██████████ went out to observe the class the next day, sometime in March, 2008, and concluded that the program there could not provide ██████████ with FAPE either. Her opinion was based upon the fact that the program included mostly boys, bigger than ██████████ some of which had behavioral issues, and the presence of stairs at the school ██████████ was one floor. Although ██████████ could walk, it was a complicated process for her and she had motor planning issues).

The parents agreed to the IEP. What they did not agree to was the ultimate placement decision.

██████████ had 18 steps going into the building. ██████████ needed assistance and prompting to deal with steps. ██████████ IEP provided for an aide. School personnel testified that one of the duties of the bus aide was to get the students off the bus and into the school. According to testimony from multiple witnesses, ██████████ is a tiny girl and has difficulty navigating steps (██████████ did not appear at the hearing, so the hearing officer never had an opportunity to personally observe her).

██████████ became “frantic, nervous” when she received ██████████ placement letter dated April 30, but received

on May 21. See P's Ex. 52, pp. 509-510. She feared that she had missed the opportunity to enroll [REDACTED] in the program since more than 10 days had passed.

[REDACTED] disagreed with the placement decision at [REDACTED]. Her interpretation of the IEP was that [REDACTED] would not receive any transportation if she went to her neighborhood school. See P's Ex. 22, Sec. 18, p. 217. However, school personnel who testified at the hearing stated that this was not the case, and that the IEP did provide for transportation and that she would have an aide. [REDACTED] just four blocks from her home is [REDACTED] neighborhood school.

[REDACTED] had an opportunity to observe the program at [REDACTED] taught by [REDACTED]. According to [REDACTED] told her there would be no opportunity for integration at [REDACTED]. There were eight to ten students in her class. [REDACTED] observed that the level of instruction there was beyond [REDACTED] level and not tailored to her. It was set up like a typical kindergarten class, and [REDACTED] had safety concerns as well, due to the mouthing issues and other issues already identified. Since she felt this program could not meet [REDACTED] needs, she became "frantic" and retained a lawyer.

On June 23, 2008, the parents sent a letter to [REDACTED] concerning [REDACTED] placement. P's Ex. 53. On July 31, 2008, the parents provided [REDACTED] with their 10-day notice of a private placement. P's Ex. 55.

On August 7, 2008, [REDACTED] responded to these concerns, providing alternative recommendations for placement at [REDACTED] or [REDACTED]. Ex. 57.

In August, 2008, the parents chose to enroll [REDACTED] at [REDACTED] day school where she has remained to the present.

On November 14, 2008, [REDACTED] a psychologist, wrote a report based upon an evaluation she had completed of [REDACTED]. Since the report came after the fact, it was not and could not have been considered by the team at [REDACTED] IEP meeting which is at issue. P's Ex. 59. Additionally, since [REDACTED] did not begin her evaluation of [REDACTED] until the latter part of September, 2008, her opinions could not have formed a basis for the parents' unilateral placement at [REDACTED] over a month earlier.

[REDACTED] is not [REDACTED] home school. It is approximately a half an hour drive away. When [REDACTED] first attended [REDACTED] school at age three, she attended five half days a week for a total of 750 minutes. When [REDACTED] turned four, the parents changed her program to three days a week at [REDACTED] and five half days a week at [REDACTED]. [REDACTED] agreed to accommodate the parents' wishes in this regard.

The parents did not follow up on the invitation by [REDACTED] to meet to discuss [REDACTED] placement because they felt it was "too little, too late". See [REDACTED] letter of August 7, 2008. P's Ex. 57.

[REDACTED] did not visit or observe [REDACTED] since it was summer and class was not in session. The school district had offered [REDACTED] three alternative placements: [REDACTED] two of which [REDACTED] did visit and rejected those options. [REDACTED] was critical of the teachers she observed at [REDACTED] saying she wouldn't "hire her as a babysitter".

Day two of the hearing commenced on August 31, 2009. The next witness was [REDACTED] the principal at [REDACTED]. He has been the principal there for 18 years. Prior to this employment as the school principal, [REDACTED] was a school psychologist for seven years. He is no longer the principal at [REDACTED]. Rather he is a school administrator charged with overseeing 16 schools with special education programs in [REDACTED]. He was familiar with both [REDACTED] and the early childhood

program at [REDACTED] which included children from ages three through six. The [REDACTED] early childhood program serviced a wide range of students with physical and cognitive disabilities. [REDACTED] was initially placed there with the 2006-07 school year. It was an accessible school, on one level. She was enrolled there for two years. It was a good placement for her. She was mainstreamed and enjoyed interacting with the typically developing students. [REDACTED] was present for at least part of the IEP meeting on February 13. He is not aware of anyone who ever said that [REDACTED] could not meet [REDACTED] needs. He made sure that the parents' concerns were taken into consideration by the IEP team. He explained that the IEP the team writes is for a certain program, but not necessarily for a certain school/location. It is for special education services to identify the school that has the program to implement the IEP.

The next witness was [REDACTED] the physical therapist at [REDACTED]. She has been assigned to [REDACTED] since 2003 and has been a physical therapist for many years. Previously she worked at [REDACTED] for 10 years. She was [REDACTED] physical therapist for the 2006-07 school year. She also attended her IEP meeting in February, 2008 and helped draft the goals for her along with the rest of the team. Her understanding was that [REDACTED] would be placed in a small, self-contained classroom, with supports, where her goals, as identified in her IEP, could be addressed and opportunities for inclusion in subjects like music, gym, assemblies and for lunch. As her physical therapist, one of her rules was to make recommendations as to accessibility. One of the goals for [REDACTED] was to improve her navigation of stairs. She needed assistance to use steps in a safe and timely fashion. P's Ex. 22, p. 204. She had met her previous goal of ascending and descending four steps with a handrail, and was working on navigating eight stairs with a rail. P's Ex. 20, p. 135 and P's Ex. 22, p. 204. [REDACTED] agreed that it would be difficult for [REDACTED] to go up and down 18 stairs, but stated she could do it but would just need extra time. She felt that endurance was not an issue for [REDACTED] and she did not recommend a building with a limited number of stairs. She attended [REDACTED] IEP meeting in February, 2008. In her opinion, [REDACTED] did not need an accessible school, otherwise they would have provided for it on the modifications and accommodations page. She did agree that [REDACTED] needed assistance. P's Ex. 22, pp. 195-196. [REDACTED] opined that the IEP was appropriate to meet [REDACTED] needs.

[REDACTED] worked with [REDACTED] for two years on going up and down steps. She observed [REDACTED] make progress. She also accompanied [REDACTED] to gym for inclusion.

[REDACTED] testified that the parents provided input at the IEP meeting. They did not ask for placement at an accessible school.

The next witness was [REDACTED] the case manager for [REDACTED] during the school years in question. [REDACTED] has a Bachelor's Degree in education; a M.S. and guidance and counseling, a Type 45 special education administrator's certificate and holds four state certifications. She retired from [REDACTED] on June 14, 2009. Prior to that, she served as the case manager for 14 years at [REDACTED] as a case manager at another school before that and was employed by [REDACTED] overall for 34 years including service as a teacher.

[REDACTED] served as the district representative at the IEP meetings. She knew [REDACTED] and attended all of her IEP meetings. However, she did not provide direct services. She explained that after the IEP is drafted, it is sent to the placement office. The team's recommendation was for a half-day program, 750 minutes per week. She testified that before the meeting even started, the parents had asked for a copy of the IEP and the name of the school [REDACTED] would be going to. [REDACTED] replied that this information was not yet available. When the parents asked for a copy of the IEP as the meeting was concluding [REDACTED] called the legal department to inquire about the proper procedure as this had never been done before. She gave them Section 14 (justification of placement in the LRE) which appeared to be the part of the IEP they were most concerned with. P's Ex. 22, p. 214. [REDACTED] denied that the parents had requested a complete copy of the IEP before signing it. Subsequently, the parents took Section 14 home

and provided input into it.

██████████ testified that the IEP team never discussed placing ██████████ in a full-time program. The parents never requested an accessible building. The parents never dissented from the IEP. A full-time placement was not discussed, was not warranted and in her opinion the proposed IEP was appropriate.

At the IEP meeting, the parents did not request for ██████████ to be placed in a more restricted environment. Rather, they asked for ██████████ to be included with the regular education students. They were instrumental in providing for the justification of placement in the LRE. P's Ex. 22, Sec. 14, p. 214. The team could have written and IEP for a full-time program if it were deemed appropriate. Students age out of the early childhood program at age six. In February, 2008, ██████████ was only five. Thus, she was still eligible for the early childhood program. In her opinion, the IEP provided FAPE.

██████████ was the next witness. She was the special education teacher at ██████████. She has been so employed for 11 or 12 years. She taught ██████████ during the 2006-07 and 2007-08 school years. That first year ██████████ was three years old. She attended Stock five mornings a week and ██████████ during the afternoon, but she did not recall how many days per week. She did not know why the parents had placed ██████████ at ██████████ since it was never discussed with her. The parents asked that ██████████ be mainstreamed and they accommodated her when appropriate. ██████████ had two self-contained early childhood programs and five preschool classes. Each were half-day programs for a total of 14 classes. She described ██████████ as being a "bubbly", social child who liked to be around people. At ██████████ ██████████ actually received more mainstreaming than provided for in her IEP. She observed ██████████ make progress during her time at ██████████.

During ██████████ second year at Stock, she attended only three days a week during the afternoon. She was at ██████████ for five mornings a week. She was not that familiar with ██████████ ██████████ experienced success at ██████████ during her second year as well.

██████████ attended ██████████ IEP meeting in February, 2008. The team drafted seven goals for ██████████ to be implemented by her special education teacher. These goals included language arts, math, social/emotional development and independent functioning. P's Ex. 22, pp. 190-191 and 197-212. ██████████ worked with the parents collaboratively. For communication, ██████████ used an augmentative communication device. She also did some signing. Mouthing was a safety concern.

During ██████████ first year at ██████████ she was just starting to walk. By the second year, she could run. She did need supervision around stairs. ██████████ continued in ██████████ class for four months after the IEP meeting in February. She had no opinions as to ██████████ as she was unfamiliar with its program. The team all agreed that what ██████████ needed was a small instructional class with an opportunity for inclusion. There was never any discussion for a regular kindergarten class or for a full-time program.

The next witness was ██████████ a speech and language pathologist employed by ██████████ at ██████████. She worked with ██████████ during the 2006-07 and 2007-08 school years. She provides speech and language services to students both in and out of their classroom, depending on their needs. She works with a wide range of students including the severe and profound.

When ██████████ first began working with ██████████ she was non-verbal. Her receptive language was a relative strength. She had no opinions as to ██████████ current functioning since she had not seen her in over a year. ██████████ was able to communicate through her facial expressions and picture communication board. She also contacted the Assistive Technology (AT) department and set up an evaluation for ██████████. She began utilizing the Tech Talk 8 and later the 32. This is a small device with pictures programmed into it on which the student touches the picture which in turn talks for her. The AT device

proved helpful to augment the speech she did not have. ██████ made progress in both her receptive and expressive language in the two years she attended Stock.

████████ attended ██████ February IEP meeting and drafted her speech and language goals. P's Ex. 22, pp. 190-191, 197 and 210. The IEP was compared with her first IEP two years earlier to demonstrate the progress she has made. See P's Ex. 19, pp. 77, 92 of the March 17, 2006 IEP.

Day three of the hearing took place on September 17, 2009 at Stock Elementary School.

The next witness was ██████ the clinical psychologist privately retained by the parents to evaluate ██████. She has been a clinical psychologist for 14 years with offices in ██████ at the present time. Her practice is concentrated in the evaluation and treatment of mainly children and adolescence with a wide range of disabilities. She estimated that she had evaluated approximately 400 students in her career. In her experience as an evaluator, approximately one-third of those were independent educational evaluations, and the other two-thirds were evenly divided between school district referrals and parental referrals. She is also on the ISBE list of independent evaluators.

████████ conducted her examination of ██████ on September 23, 24, 26, October 2 and 23 of 2008. Her psychological evaluation, some 13 pages long, is found in the record. P's Ex. 16, pp. 45-57.

████████ earned her doctoral degree in educational and developmental psychology from the ██████. Following graduation, she completed a post-doctoral fellowship at the ██████. She has been published and is a member of the American Psychological Association.

█████ and ██████ had requested that ██████ evaluate ██████ for the purpose of measuring her (then) current functioning and determining her educational needs. The evaluation included school observations and examination of prior evaluations, IEPs and medical records in addition to the usual and customary battery of psychological tests.

Due to ██████ limited verbal language skills, the cognitive functioning tests administered by ██████ included nonverbal assessment measures. On the Differential Ability Scales – II, ██████ earned a Nonverbal Reasoning Cluster standard score of 61 placing her in the “mildly impaired” range. On the Leiter-Revised, ██████ standard scores ranged from a low of 45 to a high of 60 (an average score is 100 with a standard deviation of 15). These scores fall below the first percentile rank.

████████ also administered the Vineland-II Adaptive Behavior Scales to provide information about her adaptive functioning in the areas of communication, daily living skills, socialization and motor skills. ██████ standard scores in these areas ranged from a low of 53 (daily living skills) to a high of 72 (socialization). See P's Ex. 16, pp. 51-53. These scores fall generally below the first percentile rank as well, with the exception of socialization which fell at the third percentile.

████████ opined that ██████ language and cognitive skills were similar to that of an autistic child but her strengths were in the area of social functioning. She felt ██████ needed to be around typical functioning peers. ██████ further testified that ██████ needed to be in a self-contained classroom due to her cognitive functioning, and for assistance with her communication and motor needs in addition to her self-help needs, e.g., toileting, dressing, personal hygiene. She also felt that mainstreaming would be helpful to her in learning describing her as an “excellent imitator” who learns from models. ██████ believed that a half-day program was not acceptable for ██████ and would not provide enough intervention to meet her needs.

████████ observed ██████ and described the classroom as a typical early childhood

instructional classroom. She was concerned that the entrance [REDACTED] included 18 steps and that [REDACTED] had difficulty ambulating and was only working on maneuvering around five or six steps at the time. She also observed that the other students were higher functioning than [REDACTED] and they were all verbal. The regular teacher was not in class at the time of her observation, rather, a substitute teacher was present. In conclusion, [REDACTED] did not believe that [REDACTED] could have derived an educational benefit from a placement at [REDACTED] for the above reasons. On the other hand [REDACTED] observed [REDACTED] at [REDACTED] and did believe that it would provide [REDACTED] with FAPE.

[REDACTED] believes that mainstreaming is important for [REDACTED]. She also testified that for mainstreaming to be successful, there must be a culture in the school accepting of it. Allegedly, she had been told that [REDACTED] did not provide for mainstreaming and did not have an inclusion specialist. She also believes that [REDACTED] needs a one-to-one aide because of her mouthing issues which become a safety concern since she puts everything into her mouth.

[REDACTED] attended all three days of the due process hearing. He did not testify. Having called 11 witnesses, following [REDACTED] testimony, the parents rested their case in chief.

The school district called two witnesses in its case in chief: [REDACTED] the principal at [REDACTED] and [REDACTED] the special education teacher at [REDACTED] and earned an M.S. Degree from DePaul University. He has been with [REDACTED] for nine years but has only been the principal at [REDACTED] since July 1, 2009.

[REDACTED] is [REDACTED] neighborhood school located just four blocks from her home. There are 254 students in the school including both general and special education. They have three pre-kindergarten programs: (1) A tuition based preschool which meets from 7:30 a.m. to 5:30 p.m.; (2) A hard-of-hearing class for three to five year olds; and (3) An early childhood special educational instructional class which meets half a day for 150 minutes per day. There are a maximum of ten students in that classroom which includes two adults. Previously they had three adults which included one certified teacher and two teacher aides. The instructional services are all provided in the self-contained classroom along with related services such as OT, PT and Speech. The program has been in existence for five years.

[REDACTED] did not attend [REDACTED] IEP meeting but was familiar with it from having reviewed it prior to the hearing. [REDACTED] testified that [REDACTED] IEP could be implemented at [REDACTED]. All of the related services could also be provided to her there in the classroom. The special education assistants in the classroom could assist with toileting, diapering, the AT devices and the mouthing issues. A bus aide [REDACTED] is available to help students get off the bus and get into their classroom.

According to the IEP, [REDACTED] did not need an accessible school. The room in question is located right by the emergency room exit.

[REDACTED] has taught at [REDACTED] for eight years. Before that she worked for the Head Start Program for six years. She has also taught in the Catholic school system and at a private school and overall has been a teacher since 1983. She has a Bachelor's Degree in elementary education with early childhood approval for special education. She teaches a morning program and an afternoon program each consisting of ten students. She has one aide. She testified that if a student's IEP provided for an inclusion, she would include them in classes with the tuition based preschool students such as for music, gym and recess. She stated that it was not unusual for students to need help with stairs and that she had several students with similar issues. [REDACTED] described students in her class as having a wide range of disabilities including autism, cerebral palsy, Down's Syndrome, other health impaired and what you might expect to see in a cross categorical program. She has also taught students who have used augmentative communication devices.

██████████ did see ██████████ on one occasion in 2006. She also participated in her IEP. ██████████ was never enrolled in her classroom as she was placed in the private school prior thereto. P's Ex. 19 and 22. The IEP team's recommendation was that ██████████ be placed in an early childhood instructional program. The ultimate location was to be determined by the central office.

CONCLUSIONS OF LAW

This case revolves around the parents' decision to unilaterally place their child in a private day school, having rejected ██████████ recommendation for ██████████ placement into the early childhood, cross-categorical instructional program at ██████████

The issues in the case are as follows:

1. Whether the IEP drafted for ██████████ on February 4 and 13, 2008 was reasonably calculated to provide a free and appropriate public education (FAPE).
2. Whether the district's alleged procedural errors in failing to determine her placement at the February IEP meeting, and in failing to advise the parents of her recommended placement for almost four months following said meeting, resulted in a violation of FAPE
3. Whether the parents are entitled to retroactive reimbursement and prospective placement for ██████████

The school district asserts that its February, 2008 IEP and proposed placement at her neighborhood elementary school, ██████████ was reasonably calculated to provide ██████████ with FAPE. The school district does not dispute that ██████████ can provide ██████████ with FAPE.

Burden of Proof/Persuasion

The burden of production rests with the party filing the request for due process, in this case, the parents. *Schaffer v. Weast*, 546 US 49, 57-58 (2005). However, this does not alleviate the burden of the school district to show, by a preponderance of the evidence, that it has appropriately identified the student's educational needs and that the special education and related services are adequate, appropriate and available. 105 ILCS 5/14-8.02(a-g).

Issue #1: Whether the IEP drafted for ██████████ on February 4 and 13, 2008 was reasonably calculated to provide a free and appropriate public education (FAPE).

Under state and federal law, students with exceptional needs have a right to a "free appropriate public education". 20 USC, Sec. 1400(d). The term "free appropriate public education" (FAPE) means "special education" and "related services" that are available to the student at no charge to the parent, and that meet the state's educational standards, and that conform with the student's individual education plan (IEP). 20 USC, Sec, 1401(8).

The parameters for adequacy of a student's IEP were set forth in *Bd of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 US 176 (1982). The United States Supreme Court determined that the student's IEP must be reasonably calculated to provide the student with some educational benefit. The court in *Rowley* concluded that the Individuals with Disabilities Education Act (IDEA) did not require

school districts to provide special education students with the best education available or to provide instruction or services that maximize the student's abilities. Instead, the Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide some educational benefit to the student. Rowley, at 207-208.

To determine whether the school district offered [REDACTED] FAPE, the analysis must focus on the adequacy of the school district's proposed program, in this case, the early learning class at the [REDACTED] her neighborhood school. If the district's proposed program addresses the student's needs, provides her with some meaningful educational benefit, and comports with her IEP, then the district offered a FAPE even if the parents preferred another program and even if the parents' preferred program would likely result in a greater educational benefit. Rowley, 485 US at 207-208. Both federal and state law have a strong preference for having children with disabilities educated with children who are not disabled. 34 CFR, Sec. 550(b):

"Each public agency shall ensure –

1. That to the maximum extent appropriate, children with disabilities, including children in public or private institutions... are educated with children who are non-disabled; and

2. That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Unilateral Placements

The leading Supreme Court cases involving unilateral placements under IDEA are School Comm. Of Burlington v. Dept. of Ed. Of Mass., 471 US 359 (1985) and Forest Grove School Dist. v. T.A., 129 S. Ct. 2484 (2009). These cases, among others, provide that a court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under IDEA and put the child in a private school that provides an education that is otherwise proper. The parents must demonstrate, however, that the public school placement was improper under IDEA and that the private school placement complied with IDEA in that it was reasonably calculated to provide an educational benefit. See Burlington and Florence County, above. In [REDACTED] case, [REDACTED] has stipulated that [REDACTED] provides FAPE under IDEA. Still, the parents must overcome the initial burden of proving that [REDACTED] proposed IEP would not provide FAPE. 20 USC 1412(a)(10)(C)(i) bars reimbursement when a district makes FAPE available.

The School District's experts and methodology are entitled to due deference. Fairfax County School Board v. Knight, 261 Fed. 606, 49 IDELR 122 (4th Cir. 2008).

The Hearing Officer finds that the [REDACTED] proposed IEP and placement recommendations were reasonably calculated to confer an educational benefit on [REDACTED] and to provide her with a free, appropriate public education (FAPE). The detailed IEP, over 20 pages in length, was developed over 2 days by professional staff with personal knowledge of [REDACTED] educational needs and present levels of performance, with significant input from the parents.

Issue #2. Whether the district's alleged procedural errors in failing to determine her

placement at the February IEP meeting, and in failing to advise the parents of her recommended placement for almost four months following said meeting, resulted in a violation of FAPE

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or (3) caused a deprivation of an educational benefit. 20 USC, Sec. 1415(f)(3)(E); 34 CFR Sec. 300.513(a)(2). The hearing officer finds here that any alleged procedural violation on the part of [REDACTED] did not impede [REDACTED] right to a FAPE, did not impede the parents' opportunity to participate in the decision making process and did not cause [REDACTED] to suffer a deprivation of an educational benefit and thus, was "harmless error". Citing the case of *C.H. v. Henlopen SD*, 566 F. Supp. 2nd 352, 50 IDELR 217(d). (Del. 2008). (Ruling that the district's failure to provide timely notice of a subsequent IEP meeting and its delay in finalizing the IEP until one week after the school year started were harmless procedural violations). Also see *Anderson v. Dist. Of Columbia*, 606 F. Supp. 2nd 86, 52 IDELR 100 (DDC 2009) (holding that a proposed placement and IEP was substantively appropriate even though the district lacked a full IEP team and failed to produce monthly progress reports finding these harmless procedural violations).

Based upon the testimony of [REDACTED] staff from [REDACTED] and [REDACTED] and other evidence produced at the hearing, [REDACTED] had adequate resources to implement [REDACTED] IEP. In *MM v. New York City Department of Education*, 583 F. Supp. 2nd 498, 51 IDELR 128 (SD NY 2008) the district court ruled that the district's proposed IEP met the substantive standard, which is not maximization of potential. for a student with autism (another tuition reimbursement case). The appropriate standard is whether the child could obtain a meaningful benefit from the proposed placement. *Blake C. v. Dept. of Education*, 593 F. Supp. 2nd 1199, 51 IDELR 239 (D. Hawaii 2009).

In *Patskin v. Board of Educ. Of Webster Cent. SD*, 583 F. Supp. 2nd 422, 51 IDELR 94 (WDNY 2008), the court upheld a review officer's decision that the district's placement of a fifth grader with severe learning disabilities in a special education class for most of the day was the LRE rather than the specialized day school that the parents sought.

In this case it is clear that [REDACTED] has attempted to work with the parents, keep them informed and give them an opportunity for input into [REDACTED] educational programming. The parents participated in each and every one of [REDACTED] IEPs and were not only given an opportunity but in fact did provide input relative to [REDACTED] goals, objectives, modifications and accommodations. The parents were given ample opportunity to participate in [REDACTED] IEP, and in fact did so over two days, i.e., February 4 and 13, 2008. The parents were also given an opportunity to observe various classroom alternatives, none of which were acceptable to them. In the parents' minds, however, nothing [REDACTED] offered compared to the private day school at [REDACTED]

The regulations state that parents have a right to participate in the placement process. However, they do not have a right to unilaterally control or veto the outcome of placement decisions. See 34 CFR 300.116; 34 CFR 300.501.

The parents object that all the other students in [REDACTED] class are higher functioning than [REDACTED] and that she would be the most severely disabled student in the class. Respectfully, this objection is not well founded. For one thing, in any class, there is always going to be some student who is the lowest functioning just as there is another student who is going to be the highest functioning. Further, there is nothing to state that another student more severely disabled than [REDACTED] could move into the class

tomorrow, in which case she would no longer be the most severely disabled student in the class. Thirdly, even if we assume that [REDACTED] is the lowest functioning student in the class, the evidence supports the finding that she would derive some educational benefit from the program. The IEP, some 27 pages long, is individually tailored to meet her needs. P's Ex. 22, pp190-217.

The parents assert that [REDACTED] has procedurally violated IDEA in that the persons making the ultimate placement decision for [REDACTED] have never met her. Respectfully, the parents' position misses the mark. The point is that the IEP drafted for [REDACTED] was drafted by her actual teachers and service providers who did have personal knowledge of [REDACTED] all of whom possess the proper academic credentials, certifications and varying levels of experience and expertise. The mere fact that the ultimate location of the placement is determined by an administrator in a central office does not violate the procedural mandates of IDEA.

The key in the IDEA "procedural violation" cases centers on the loss of educational opportunity or the loss of an opportunity to participate in the process, neither of which is the case here. Evanston Comm. Consolidated School Dist. 65 v. Michael M. 356 F 3rd 798, 804 (7th Cir. 2004); Heather S. v. State of Wisconsin, 125 F 3rd 1045, 1059 (7th Cir. 1997). The IEP does not need to conform to the parents' wishes in order to be deemed sufficient or appropriate. In fact, "IDEA mandates individualized appropriate education for disabled children, it does not require a school district to provide a child with a specific educational placement that [her] parents prefer." School District of St. Louis County: Missouri Dept. of Elementary and Secondary Education, 449 F 3rd 816 (8th Cir. 2006) citing Black Man v. Springfield R-XII School Dist., 198 F 3rd 648 at 658 (8th Cir. 1999). In other words, even though the district did not agree to provide the programming and placement at [REDACTED] as advocated by [REDACTED] parents, [REDACTED] and [REDACTED] had a more than ample opportunity to participate in the IEP formulation process in a meaningful way, as the IEP team considered parent suggestions and even incorporated some of them.

In conclusion, the hearing officer finds that the IEP drafted for [REDACTED] on February 4 and 13, 2008 was reasonably calculated to provide her with a free and appropriate public education. The hearing officer does not find any procedural error in the school district's failing to determine [REDACTED] actual placement/location at the February IEP meeting, and finds that any failure on the part of [REDACTED] to advise [REDACTED] parents of her recommended placement for some four months following said meeting was, at best, "harmless error", since the new school program would not begin for 7 months until the fall (August/September) anyway. Therefore, the hearing officer respectfully denies the parents' request for both retroactive reimbursement and prospective placement at [REDACTED]

ORDER

Pursuant to the above findings of fact and conclusions of law, the Hearing Officer hereby Orders that:

1. The parents' request for tuition and transportation reimbursement for [REDACTED] at the [REDACTED] is denied.
2. The parents' request for prospective placement at [REDACTED] is also denied.
3. Should the parents wish to re-enroll [REDACTED] in the [REDACTED] then the IEP drafted on February 13, 2008 shall be implemented with the additional provision of a one-to-one aide for [REDACTED] from the time she gets off the school bus to the time she gets back on the school bus at the end

of the day; and for an inclusion specialist/consultant to be available to meet with [REDACTED] special education teacher and general education teachers, if any, for at least 30 minutes per week for consultation purposes to facilitate her mainstreaming.

4. The school district shall submit proof of compliance with this Order to the Illinois State Board of Education, Program Compliance Division, 100 N. First Street, Springfield, Illinois 62777 within 30 days of the receipt of this Order.

Dated this October 26, 2009

ALFRED A. SPITZZERI
Impartial Due Process Hearing Officer

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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 party and to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777. 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.**

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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 decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.01(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision was mailed to a party.

It is so Ordered.

Dated this October 7, 2009

ALFRED A. SPITZZERI
Impartial Due Process Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Decision and Order was emailed and placed in the U.S. Mail at [REDACTED], with first class postage prepaid, certified mail and directed to:

[REDACTED]

[REDACTED]

■ Andy Eulass
Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001

on October 26, 2009

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Due Process Hearing Officer

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