

Case Number: 2009-0475

vs. [REDACTED]

Hearing Officer: Sheana Hermann

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

SEP 23 2009
Special Education Services

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]
Superintendent [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Phone: [REDACTED]

Parent Name [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Date and Timelines

Date of Written Request: 05/11/2009

Date of Hearing: 09/08/2009 to 9/11/2009

Date of Pre-hearing Conf: 06/25/2009

Date of Decision: 09/21/2009

Summary of Decision

Parent requested due process hearing based on district's failure to provide a student with FAPE from the time period of the summer of 2007 to the present time. The Parent contends that the District failed to conduct adequate assessments and failed to develop a proper IEP, FA/BIP, failed to provide proper training to staff in the Alert system and restraint, failed to provide the Student with home/bound instruction and failed to provide proper extended school year services for the summer of 2007 and 2008. Finding in part for the District and in part for the parent.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) **ISBE CASE NO. 2009-0475**
)
) **Sheana Hermann**
) Impartial Due Process
) Hearing Officer

HEARING DECISION AND ORDER

This matter comes before this hearing officer pursuant to the Individuals With Disabilities Education Act of 2004 (IDEA) on the Impartial Due Process Hearing Request of [REDACTED] ("Parent") by and through her attorney, [REDACTED] of the law firm [REDACTED] on behalf of the "Student", against the [REDACTED] ("District") represented by its attorney [REDACTED] of the District's Due Process and Mediation Department. This Hearing Officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02(a) et. seq., 23 Illinois Administrative 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.

Procedural History

An Impartial Due Process Hearing was file on behalf of Student on May 8, 2009. It was received by the Illinois State Board of Education (ISBE) on May 22, 2009. This hearing officer was assigned the case on May 23, 2009. This hearing officer contacted the parties on May 27, 2009 to advise them that she was assigned to the case and to apprise the parties that she had previously worked for the District in the capacity as a Due Process Coordinator and that she would recuse herself if either party wished. Both parties acknowledge the prior employment but agreed to allow the hearing officer to remain on the case. (IHO Ex. 1 and 2). A pre-hearing conference was conducted on June 25, 2009. The parties agreed to longer hearing date in order to attempt settlement. The parties were able to reach a partial settlement which lead to the Parent withdrawing her request for placement at [REDACTED]. The hearing was conducted on September 8, 9, 10 and 11, 2009, at [REDACTED]. The following witnesses testified: [REDACTED] District occupational therapist (OT), [REDACTED], Student's chiropractor, [REDACTED] private speech and language pathologist(SLP), [REDACTED] private occupational therapist, [REDACTED] District child welfare attendant, [REDACTED] District special education teacher, [REDACTED] District school psychologist, [REDACTED] District speech and language pathologist, [REDACTED] District school nurse, [REDACTED] District case manager at [REDACTED], District special education teacher at [REDACTED] Student's physician, [REDACTED] Student's ABA therapist, [REDACTED] District principal at [REDACTED] District case manager at [REDACTED] private clinical and neuropsychologist, [REDACTED] District manager of home hospital services

for the Office of Specialized Services, [REDACTED], District special administrator, prior District attorney, and the Parent.

Issues Presented

1. [REDACTED] did not provide a free and appropriate education during the extended school year school year session, June and July, 2007 based on failure to provide a full time aide in accordance with [REDACTED] IEP. As a result the parent paid for the aide, at a cost of \$2,430:
2. [REDACTED] conducted a 3-year evaluation of the student in May and June of 2007, and then initiated a special evaluation in March and April of 2009. The three year evaluation in 2007 failed to conduct adequate assessments of all areas of potential disabilities, including social/emotional needs and anxiety; attention and executive function skills; motor and sensory integration needs, central auditory processing disorder; and assistive technology (AT), with the result that the student's IEP's for this period through April 2009 do not address, or address inadequately, his learning impediments;
3. The IEP's developed for the student on 6/29/07 and 7/18/07 do not offer a free and appropriate public education in that:
 - a. The IEP team did not consider, nor did they reflect consideration in the IEP document, three reports presented by the parent, including
 - i. [REDACTED] D.C., whose report concerns the student's special problems, and the student's need for an organic lunch;
 - ii. [REDACTED] a private occupational therapist whose report addressed the need for sensory integration strategies for the student – although the team provided for training in the Alert program for school staff, the IEP does not reflect the direct and consultative services necessary to adequately implement an effective sensory diet across the student's curriculum and school day;
 - b. The IEP team did not fully consider nor incorporate into the IEP a list of parent concerns for the student;
 - c. The IEP team did not produce accurate or complete charting of student's behaviors as required by his behavior intervention plan;
 - d. The IEP team arbitrarily, and without adequate discussion determined that the student would not be eligible for ESY services in 2008;
 - e. The IEP team failed to provide for a consistent 1:1 aide for the student, which has been the practice in past years, and which he requires because of his disabilities;
 - f. The IEP team inappropriately rejected goals drafted by his classroom teacher at the end of the 2006-2007 school year, and further did not consider draft goals presented by the parent; the present levels of performance, goals, and objectives listed in the current IEP do not accurately reflect or respond to the student's disabilities or needs for direct services, in that
 - i. There is not goal related to spelling, although that skill is notably

- c. Necessary AT resources, and direct AT support for at least 30 minutes per week;
- 5 Direct [REDACTED] to provide compensatory education services for denial of FAPE during the period of October, 2007 through the present, and for denial of homebound services during the period October, 2007 through January, 2008 and January, 2009 through June, 2009, including, but not limited to:
 - a. Speech language services, by a provider selected by the parent, for 60 minutes per week for two years;
 - b. Occupational therapy services, by a provider selected by the parent, for 90 minutes per month for two years;
 - c. Counseling support for two hours per week for two years, by a provide and at a location selected by the parent; and
 - d. Behavior therapy for 10 hours per week for two years by a provider and at a location selected by the parent.
- 6 Direct [REDACTED] convene an IEP meeting that will consider results of evaluations and implement the foregoing relief; and
- 7 Other relief that will be determined after the receipt of additional school records and evaluations

Finding of Fact:

The Student is a 9 and a half year old fourth grade student. He lives in the attendance area of [REDACTED]. He has not attended school since October of 2007 due to severe school anxiety. The Student's eligibility under IDEA is [REDACTED] emotional disturbance, learning disability and other health impairment (PD 007).

The Student first entered the District in pre-school. The Student was attending [REDACTED] during the 2006-2007 school year as a first grader.

While at [REDACTED] for the 2006-2007 school year, the parties met several times to revise the Student's IEP. The IEP drafted on June 2, 2006 (PD 201) was the IEP in effect. The IEP was revised on October 24, 2006 and again on November 20, 2006 (PD 188)

During the 2006-2007 school year the District assigned an aide to the Student who subsequently left after the Parent filed a complaint against him. A subsequent aide was assigned to the Student in April of 2007, [REDACTED]. However, during her testimony it was determined that she was in fact a child welfare attendant, which is not the same thing as aide. She stated that the student had good days and days. She stated he averaged 4 bad days a week. She stated that the Student was pulled out often from the classroom. She stated she was never trained on the ALERT system, but did state that the OT gave her tips which were helpful and that his behavior had improved at the end of the school year. She observed that he was not included in classroom activities at [REDACTED]. She also was hired by the Parent to serve as the Student's aide during extended school year services (ESY) for the summer of 2007. She confirms that she listened to the recording of the District in which they agreed to pay for her services. She said the Parent paid her \$2,430 for those services.

The summer assessment team met in June and July of 2007 for the Student's three year evaluation (PD 124). For the June and July 2007 IEP the Parent submitted proposed goals (PD 157-167). The IEP was completed on July 18, 2007 (PD 122). The Parent dissented to the IEP (PD 155). From review of the evidence and testimony, the District did use some of the Parent's proposed goals but not all of them. The District had listed an extensive amount of modifications and accommodations for the Student. (PD 134-135). In this IEP, the District also stated it would implement the Alert Program with training to begin prior to the start of the 2007-2008 school year (PD 135). However, during the summer, the Parent attempted to enroll him in [REDACTED]. His mother enrolled him in [REDACTED] for the 2007-2008 school year. The Parent initially did not meet the residency requirements for [REDACTED] school, and the school initially refused enrollment, however the principal [REDACTED] subsequently did allow the Parent to enroll the Student for the 2007-2008 school year. The Parent stated she had entered into a 6 month lease starting in September 2007 through February 2008 in order to meet the residency requirements. [REDACTED] the principal for [REDACTED], stated that at one point he had questions the residency but enrolled the Student anyway and later had requested a residency fraud investigation which was terminated when the Student ceased attending school in October of 2007. The Student's IEP was revised at [REDACTED] on October 3, 2007 to change service of speech and language services and language arts from a separate room to the regular classroom. (PD 116). The remainder of the July 2007 IEP was adopted.

[REDACTED] described his concerns with the Student's behavior and the difficulty the staff had in controlling the Student's behavior while he attended [REDACTED]. The record indicates that the Student was struggling from the start of the school year (PD 375). The Student engaged in hitting, kicking, flight, choking, pushing and pinching. On October 17, 2007, the Student was suspended for the day for pinching a student and punching another one (PD 775). After the incident, the Student refused to go to school and became very anxious.

The evidence supports that the staff at [REDACTED] did not have at that time training in the Alert program or on restraint techniques but were in the process of receiving such training. The evidence also supports that the District was collecting information to formulate a behavior plan, however the Student was there for a very short time which did not allow for further collection of data.

Written evidence provided by district shows that the staff at [REDACTED] received in service on the Alert program on October 29, 2007 (SD 341).

[REDACTED], the case manager at [REDACTED] testified. Her recollection of events seemed very limited. She discussed reviewing the IEP, taking to the occupational therapist to implement the behavior plan (PD 135) however she never followed through to see if the OT had in fact did so. She describes seeing the Student literally bouncing off walls. She was concerned for his safety. She was concerned that his placement was not appropriate

After the Student refused to go to school, his doctor's referred him for home bound instruction. [REDACTED] initially provided home bound instruction to the Student. He was assigned to the Student in Fall of 2007. He initially saw the Student in the library, by parental request, but the Student experienced difficulties due to distractibility. After the library did not work, he saw the Student in Starbucks; again by parental request. He

observed that the Student needed instruction from a special education teacher, with the curriculum broken down and the opportunity to receive sensory breaks. He consulted with the staff at [REDACTED] including the principal, case manager, autism consultant., SLP and OT. Although the Student was experiencing difficulty, he felt the Student was at grade level. He was in agreement with the IEP team in the Spring of 2008 (PD 66) that the student needed special education 21-60% due to his behavior problems.

The District offered a home bound to school transition to be implemented starting February 11, 2008 (PD 099) however this was never done.

Assistive technology evaluation was conducted on December 5, 2007 (PD 423) The evaluation is not clear to whether AT is offered. Rather it makes a statement that he has access to computers which he can use as a word processor. (PD 423)

A Central Auditory Processing Assessment was conducted by the District on June 26, 2007 however it was not completed due to the Student's interfering behaviors (PD 431).

Parent's private Central Auditory Evaluation was conducted by [REDACTED] and, indicated that her results ruled out specific central auditory processing disorder (PD 449).

[REDACTED] referral dated August 14, 2007 (PD 609) lists the Student's allergies and need for an epi-pen. The District was aware of the Student's medical needs and listed the issues in his IEP's.

[REDACTED], the school occupational therapist provided testimony. She stated goals for occupational therapy services were not written in the IEP because occupational therapy was provided only on a consultative basis. She provided consultative services to the homebound instructor [REDACTED]. She stated that she had provided both the student and his aide with sensory activities and thought he was responding during the 2006-2007 school year. She conducted the occupational therapy report during April of 2009 (SD 52-52).

[REDACTED] testified. She is the private speech and language pathologist. After reviewing the District's most recent SLP evaluation, she had stated she would have re-administered the "TOPS" (SD 49). She would have recommended further tests, not enough information could be gathered from the "CASTLE" since the newest indicate that his skills have become worse. She also acknowledged that the Student's removal from school could be the cause of his decline in skills.

[REDACTED] the District school psychologist provided testimony regarding her testing of the Student. She relied on the parent's private evaluation. She did not do any additional attention skills testing as she felt she had enough information based on the other information she received from teachers and the evaluations. During his second testing in 2009 his scores declined, but he also had significant behavior issues which were interfering with performance. She did not feel psychological services were needed as he was to receive social work services (SD 44).

[REDACTED] the district speech and language agreed with the evaluation conducted by the Parent's independent SLP. She stated that the IEP probably should have included

SLP as consultative. She felt he had lost some ground from being out of school and that it was detrimental to him.

██████████ the district's case manager testified. She attended several IEP meetings for the Student since he was in kindergarten. She stated that the student was at grade level at the end of his first grade year and was progressing well and that his behavior had improved. After the revised IEP's during the summer of 2007, ██████████ school was ready for the return of the Student. However, she found out that the Parent had transferred the Student to ██████████. She set up the homebound instruction for the beginning of 2008-2009 school year. During the time of 2007 school year, the parent had requested several meetings to revise the Student's IEP. She feels that the school has responded appropriately to the parent's concerns and demands.

██████████ the student's homebound instructor for the fall of 2008-2009 school year. She experienced difficulty in instructing the Student as he had difficulty sitting still for the hour she was there. She saw he was more verbally and physically aggressive. She started to come to the conclusion that homebound was not working for the Student and by Christmas break she was convinced that it was not helping. When she showed up to teach him, he would not be ready to be taught. She stated that she did not wish to continue after the winter break. The Student has not received home bound instruction since.

██████████ the student's autism physician testified by telephone. He described the Student as highly intelligent with his primary challenges in behavior and anxiety. He described the Student as recovering from autism. He stated he never spoke to anyone from the District. He filled out a prescription for an entire school year of home bound during the Fall of 2008 because he felt that the medical history and condition of the Student warranted a long term home instruction.

Written evidence provided by district is consistent with mom's statement of providing appropriate referrals (SD 333) in that the meeting scheduled on January 12, 2009 stated that the physician referral was provided.

██████████ the student's private neuropsychologist testified that the Student is not autistic but does meet the requisites of PDD-NOS, he is bright his verbal memory skills are impacted by his attention. He has combined type attention deficit hyperactivity disorder (PD 452). Based on his disabilities his challenges are in behavior and social interaction with a diagnosis of PDD-NOS, difficult which would warrant a transition into the therapeutic day school. He recommended a therapeutic setting with small class sizes. He stated the District's proposed modifications for the Autism Itinerant to provide monthly consult were not sufficient services to be appropriate (SD 85). Based on the testimony and history of the Student's behavior, the evidence supports that a monthly consult with the Autism Itinerant is not sufficient.

During the May 2008 IEP ██████████, the District's Special Administrator and a former due process attorney for the District testified that the District had proposed an interim functional behavior analysis and behavior implementation plan due to the student not being in school. She indicated that the District considered the evaluations of the

Parent's private evaluators. At this time the District recommended a separate class for the Student.

Parent testified. She presented as a very credible witness who was straightforward. She discussed her difficulties with dealing with District, including the District personnel refusing to speak to her while her son was attending [REDACTED]. He was suspended on October 17 2007 for one day for after which he refused to go back to school. She discussed the ESY for the summer of 2008 at the District proposed placement at [REDACTED] school. After visiting [REDACTED] she was advised that the program was not appropriate. She sent her son to the [REDACTED] summer camp [REDACTED] (Pd 767). She had a meeting with [REDACTED] on January 12, 2009 and signed the release for medical information and wanted to discuss therapeutic day school. [REDACTED] had sent an email on December 3, 2008 to consider a change in placement. (SD C1).

It is clear as early as December the District and the Parent agreed that a more restrictive placement in a therapeutic setting was needed. (SD C). The parties met on January 12, 2009 after which a domain meeting was conducted on March 30, 2009 which ultimately lead to the change in placement pursuant the April 16, 2009 IEP (PD 34, 38 and 1).

Conclusion of Law

The U.S. Supreme court case places the burden of persuasion in a due process hearing on the party challenging the IEP *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). The Student in this case is a young boy with a multitude of disabilities but from testimony it is his behavior which is significantly impeding his education. Of most concern is the fact that the Student has not been in school since October of 2007 and has not received any services since December of 2008. The evidence supports that the District has considered the Parent and her evaluators input appropriate in the April 2009 IEP, the IEP needs to provide for more speech and language services, revised assistive technology evaluation and more consultation for the Autism Itinerate. However, considering the length in which the Student has not attended school, the remainder of the IEP and BIP are appropriate as a whole.

Contents of IEP

IDEA provides that IEPs should be read in whole. Nothing in the law shall be construed to require the IEP team to include information under one component of a child's IEP that is already contained in another part of the document. 34 CFR 300.320 (d)(2). While the District did not list OT goals, it did include several modifications and accommodations in the IEP document.

Behavior Intervention Plan

Parents contend that the District failed to properly implement the behavior intervention plan and a failed to develop an adequate plan. IDEA does not make any specific requirements for the format or content of a BIP 34 CFR 300.324 (a)(2)(i).

Courts have applied various standards in interpreting the appropriateness of behavior intervention plans. In *Eric J. v. Huntsville City Board of Education*, 22 IDELR 858 (N.D. Ala. 1995), the court adopted the Rowley standard when it rejected the parents' claim that the district had not provided an appropriate behavior plan for their son. The district had developed a plan that was reasonably calculated to enable the student to attend a regular education public school and to confer an educational benefit despite his behavioral problems. The behavioral management component of the student's IEP assisted him in identifying inappropriate conduct and its consequences. The component offered him an opportunity to acquire appropriate social skills, and it was not required to cure the student of ADHD. The 7th U.S. Circuit Court of Appeals underscored that neither Congress, the ED or any statute or regulation "created any specific substantive requirements for the behavioral intervention plan contemplated by [the IDEA]." *Alex R. by Beth R. v. Forrestville Valley Community Unit Sch. Dist. #221*, 41 IDELR 146 (7th Cir. 2004). The content of a BIP is a matter of best practice, assuming no controlling state law or regulation. It is critical that the form or format of the BIP not control its content. *Id.*

In this case, the District stated that the BIP and PA are fluid documents which need to be revised once the Student is in attendance. The Student has not been in school since October of 2007, almost two years. However, the interim BIP/FA provides an appropriate plan which meets the *Rowley* standards and would allow the Student to receive a meaningful education plan.

BIP IMPLEMENTATION

Although the District seem to meet a minimal threshold in its BIP, the District failed to properly implement strategies during the 2007-2008 school year, while the Student attended Audubon. The failure to properly or consistently implement the behavioral interventions identified in a student's BIP can amount to a denial of FAPE. See, e.g., *Guntersville City Bd. of Educ.*, 47 IDELR 84 (SEA AL 2006).

Parental Input

Also of great concern to the Parent is her expressed dissent to the IEP's as developed and the District's failure to consider her input. The regulations state that parents have a right to participate in the placement process, although 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. Parents expressly do not have the right to veto the placement decision made by the group of individuals designated in 34 CFR 300.116 (a)(1). Although parents are "equal" participants in the IEP process, they do not have veto power over the IEP. Nor is there any "majority vote" rule for IEP team meetings. According to the ED, if the team cannot reach

- consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program. See, e.g., *Buser v. Corpus Christi Indep. Sch. Dist.*, 20 IDELR 981 (S.D. Tex. 1994), *aff'd*, 22 IDELR 626 (5th Cir. 1995).

Parents cannot force a school district to educate their child using a certain, specific educational methodology. In *Rowley*, "once a court determines that the requirements of (IDEA) have been met, questions of methodology are for resolution by the States."

If there cannot be a distinction between issues of methodology and issues of appropriateness, then methodology is an appropriate topic of discussion at IEP meetings. See, e.g., *Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 23 IDELR 36 (N.D. Ill. 1995). However such is not the fact with the Student. The District should not be restricted to one method but rather have an array to pick and choose to see which is the most appropriate as some may be more appropriate depending and the day and setting.

WHEN IEP MUST BE 'IN EFFECT'

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in [34 CFR 300.320]." 20 USC 1414 (d)(2)(A); 34 CFR 300.323 (a). In the Student's case, he was still within the District but attending a different school. Delays may be excusable when they do not impair the student's FAPE. However, in this case the District failed to implement the Alert system or have an individual who was able to properly handle the Student's behavior in an effective manner and although it is understandable that the transfer was rather sudden, it was not until the end of October that the district received the training after already experiencing significant difficulty with the Student.

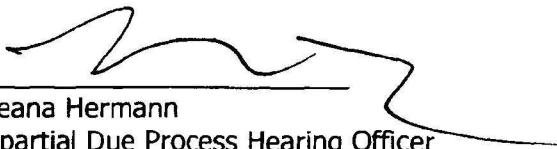
Conclusion:

While the District has provided IEPs which provide FAPE for the most part, the District failed to provide FAPE for the summer of 2008, during the school year of 2007-2008 while the Student was in school and for January 2009- June 2009.

IT IS HEREBY ORDERED:

1. The District shall reimburse the Parent for the services of [REDACTED] in the amount of \$2,460.00;
2. The District shall reimburse the Parent for summer school tuition for the summer of 2008 in the amount of \$4,600.00 ;
3. The District shall provide the Student with 52 hours of tutoring services;
4. The District shall provide 10 hours of direct speech and language services for the Student;
5. The District shall provide 10 hours of behavior therapy service to the Student by a properly licensed behavior therapist;
6. The District shall conduct an assistive technology evaluation on the Student when he starts attending school;
7. The District shall increase the IEP autism itinerant consult to bi-weekly;
8. The District shall increase the speech and language minutes to include 20 minutes per week consult;
9. The District shall provide the Parents with three names each for tutoring, speech and language pathologist, and behavior therapist on or before October 7, 2009. If the District fails to provide the names by that date, the Parent may seek the services of an independent provider and will be reimbursed by the District for such services.

ENTERED THIS 21st Day of September, 2009.


Sheana Hermann
Impartial Due Process Hearing Officer

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.

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(ies) 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.**

CERTIFICATE OF SERVICE

The undersigned hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parent's counsel (7008 0150 0002 3710 2015), District's counsel (7008 0150 0002 3710 2022), and the Illinois State Board of Education (7008 0150 0002 3710 2030) at their respective addresses by depositing same with the United States Postal Service in Chicago, Illinois with proper certified postage paid before 5:00 p.m. on September 21, 2009.



Sheana Hermann
Impartial Due Process Hearing Officer