

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) ISBE CASE NO. 2010-0005
)
) Sheana Hermann
) Impartial Due Process
) Hearing Officer

OCT 22 2009

Special Education Services

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] ("Parents") by and through their attorney, [REDACTED] of The [REDACTED], on behalf of the "Student", against [REDACTED] ("District") represented by its attorney [REDACTED] of [REDACTED]. 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 by Parents on behalf of Student on July 9, 2009. It was received by the Illinois State Board of Education (ISBE) on July 15, 2009. This hearing officer was assigned the case on July 16, 2009. This hearing officer immediately contacted the parties. The parties waived the resolution session but agreed to a longer date for the pre-hearing conference due to conflicting schedules and attorney availability. The pre-hearing conference was conducted on August 26, 2009. A longer hearing date was schedule to accommodate the District's special education director who was away on maternity leave. The district requested a hearing date in November, however, the parents were not willing to agree to a longer continuance. The Hearing Officer did not grant the longer date but allowed the director to participate by telephone testimony. The hearing was held on October 6, 7 and 8th 2009 at the District offices [REDACTED]. The following individuals testified: [REDACTED] private clinical psychologist; [REDACTED] private clinical psychologist; [REDACTED] student's case manager; [REDACTED] student's case manager; [REDACTED] student's speech and language pathologist; [REDACTED], student's occupational therapist; mother; [REDACTED] autism consultant for District; Samuela Memije, District's Director of Special Education by telephone; and [REDACTED]

██████████, District's private consultant. The parties acknowledged receiving their rights and the parties' evidence was admitted into evidence.

Issues Presented

1. Whether the District's proposed placement pursuant to the individualized education plan (IEP) developed on June 2, 2009 provides the Student with a free appropriate public education (FAPE)?
2. Whether the program requested by the parents provides the student with a FAPE?

Parents Are Seeking the Following Relief

1. Applied Behavioral Analysis and Direct Instruction- both staff and consultants. (Full day home based program costs).
2. Occupational therapy services. Costs of private therapy.
3. Speech therapy services.
4. Augmentative communication device as well as training by consultants for programming and use of the device.
5. Facilitation and integration with typical peers provided by parents including but not limited to the extended school year.
6. Curriculum and material costs.

Finding of Fact

The Student is eight years old and was born on April 10, 2001. His qualifying disability under IDEA is ██████████. Currently the Student is in third grade and is in a home based program which the parents are funding.

The dispute in this matter revolves around the proposed placement of the Student. While both parties agree that the Student is in need of a self contained classroom with access to regular education peers, the parties are in dispute in the proposed placement. The District proposed a placement in a multipurpose self contained room at the ██████████ (██████████). The Parents do not believe the proposed placement is appropriate and in the meantime have been providing the Student with services through a home based program.

Previously the Student received services in the District as a pre-schooler and kindergarten student. He has been in a home based program for over two year going on his third year. The parents would like the Student to attend a program in his home school, ██████████ School.

[REDACTED] clinical school psychologist hired by the Parents to evaluate the Student was a credible witness and his opinion was relied on both parties. He is employed by Rush Neuro behavior Department. He first evaluated the Student in November of 2007. He did a second evaluation in April 8, 2009 (P. 114). He administered the Leiter International performance scale for non verbal test of intelligence and felt that that the Student was in the low average range which was commiserate with his testing in 2007. He noted that language is an area of weakness for the Student. He administered the oral and Written Language Scales (OWLS) which measures language functioning and determined that he is very low functioning. The Student's receptive language functioning is higher than his expressive functioning. Academically his ability to identify letters on demand was low, receptively he did better, and he could identify all. He administered the Woodcock John Tests of Achievement with modifications and found that the Student's overall adaptive functioning was within the deficit range, borderline range. He strongly recommended fairly intensive one to one instruction (P 123). He found that during the testing he had to work hard to make the Student perform due to his high distractability. Many of the tasks did not hold the Student's interest. He did state that working in a group would be possible as he gets older and his attention improves. He also stated that the Student had made progress from 2007 to 2009 and that his home program benefited him. The Student did make gains with language but he was concerned that the Student is limited (P 123). He said the Student needs a visual language system to help express himself. His fine motor is not well developed, He needs intensive occupational therapy. He lacks in reading readiness and that his attention is at best 3 to 4 minutes at a time. He has no intrinsic motivation to learn. Appiled Behavior Analysis (ABA) helps him focus, cooperate, correct mistakes, and reinforces learning and it is essential to keep the Student motivated and engaged. He found that his key cognitive limitation is in language and that he needs intensive language therapy. Socialization is also important and he needs the opportunity to interact with peers both formally and informally. The Student is anxious and thrives on structure and predictability and routine., however, variation and unpredictability can be introduced. He needs visual schedules. (P 125) In April he was told that the District was developing a program for the Student.

[REDACTED], a licensed clinical psychologist who oversees the Student's home program was also a very credible witness. She helped assemble the team who provides services to the Student, and she provides supervision of the case managers. She initially choose ABA for the Student by virtue of his diagnosis and the fact that the Student benefits from a high degree of structure and repetition. He requires a systematic program to allow for generalization. She observed the District's proposed program The room was cramped, confusing with three cubbies in back to do work study. She stated the Student would have had a difficult time due to the size of the room and how the space was used. He needs visual clarity for his sensory needs and the room would make it difficult for the Student to regulate himself. There were also fluorescent lighting which

creates a distracting sound. She did not observe much visual support, no social stories, no task strips. She stated that the multi needs classroom would not be appropriated. The classroom was described to her as a push in with many of the services being provided in the classroom which would be particularly difficult for the Student due to his high distractibility. In the summer he spent time with neighborhood peers which was instrumental for him in his use of language with peers and play which she has observed carry over into his sessions. She did not observe any good verbal models in the District's proposed program. She observed 7 students. One student had downs syndrome, two were non verbal without any communication device, one was physically fragile and two had a high rate of self stimulating behavior with hand flapping and making loud noises which would be very problematic for the Student. She also did not observe anything that would indicate that the teacher was trained properly in autism. In his home based program, the team collaborates. The team is trained in autism. There were no sensory areas in the proposed placement which is essential for the Student.. He needs sensory breaks and sensory equipment outside and inside the classroom. She did not observe any appropriate sensory equipment or area for the Student in the [REDACTED] ogram. She also could not get a good understanding as to integration of the Student with non-disabled peers. (P 100-105). She also testified that she is not aware of any appropriate school program.

[REDACTED] testified. She also presented as a very credible witness. She is one of the Student's case managers. She first met the Student in 2005. She con-consults with [REDACTED]. She is a co-case manager and oversees the Student's home program. She helps create goals for the Student and supervise therapist methodology used for the Student in ABA with discrete, incidental and TEAACH. His performance and program are measured on performance data achievement (P 168-350). One of his major challenges is his language (P 160). The team based the curriculum used for the Student from that of [REDACTED] and adapt to the Student's needs and adaptability (P 140). His goals are realistic and appropriate based on his current level of performance (P 97-98). His immediate team meets once a week. The team reviews and revises his goals (P 106). She was emailing reports to the District on a monthly basis in hopes of transferring the Student to the District for the 2009/2010 school year. It was her understanding that the District was creating a program for the Student. That is why the parent had opened her home to the District's hired consultant [REDACTED]. She also did not think the District's proposed [REDACTED] program was appropriate. It did not support his sensory needs. There were no sensory rooms, nor was visual support was being used. She did not know if the teacher in the program was trained in autism. She believes he is benefiting from his home based program and that he needs a teacher with autism training, ABA, one on one teaching in a small group setting and interaction with non-disabled peers for social skills. The program would also need visual supports and integrate sensory needs and a sensory room. She also stated that she was not aware of any program which was appropriate for the Student.

[REDACTED] is the other case manager who works with the Student. She has known the Student since 2005. She shares the role of case manager with [REDACTED]. She helps create the ABA program and supervises the therapists who work with the Student. She helps manage his overall needs and jointly takes data (P 160-168). No one from District had discussed the data. She is not opposed to school based program for the Student but he needs a small class with direct one on one instruction and integration of sensory strategies and integrate into regular education with an adult he needs much structure, needs visual cuing. It is critical that the staff be highly trained in autism. She is not aware of any program within close proximity to the District that is appropriate for the Student. When the parties were developing the goals at the June 2, 2009, she was aware that they were able to provide feedback.

[REDACTED] the Student's private speech and language pathologist was very credible and provided very compelling testimony. She first met the Student in December of 2006 and started treating him in January of 2007. She works with him three times a week for 180 minutes per week. The Student has an attention problem and a perceptual issue. He has word retrieval issues, for example he may know a word but cannot retrieve it. She informally assess every three months. (P 109). The Student also has a phonological articulatory problem along with a motor speech problem which effects reading and phonological development. His attention is short and making a group with many students difficult for him. His attention level depends on the topic. A reward system works well with him. He needs built in sensory breaks During her sessions they take three sensory breaks. It use to be more. As his comprehension improves, he is less anxious. She engages in pre-teaching, visual schedule. Whoever works with him has to understand autism and understand the need for sensory breaks. His spontaneous speech is better he is able to say things such a s "Hi" "What is your name " with prompts. Word retrieval is taxing need to give him the skill of accessing words. In school he needs a combination of group and individual therapy. To get maximum output he needs therapy 5 days a week in the classroom with a behavior milieu. The SLP will need to work with the classroom teacher with goals and needs. He also needs individual therapy because of his motor disorder. It is important for him to have good language models. Important to have contact with typically developing peers. In the summer park district program he thrived However this interaction needs to be planned and well thought out. If he is with non verbal, his language could regress. If not give appropriate language models, he could regress. He needs staff trained in autism, his autism is very involved. He needs an autism consultant to develop the program and be there to implement it because his behavior is very involved. She expressed a couple of concerns with the IEP as developed in June such as the fact that they were relying on her April 2009 evaluation when he had made a lot of progress. The goals need to be specific such as work on verbs, which verbs should he be working on. She stated he has made excellent progress in his home based program. His speech articulation has improved, sensory integration has improved, he needs a sensory integration room. He comes to her office after his occupational therapy and he is ready for

his sessions. This is planned. She believes he could receive appropriate speech and language services in a school based program but he also needs specific conditions to be met. She is not aware of any program in the area and knows that the District's proposed program is not an option. She recommends that he receive speech and language services 3-4 times per week. (P 109-113).

One of the most impressive witness was the Student's mother. She has arranged to great expense and time, a very strong program for the Student with impressive service providers. She stated that she does not expect the District to duplicate the program, or the methodologies in the program, nor does she want the Student to remain in a home based program. It is her wish that he be in an appropriate program with interaction with non-disabled peers. She discussed the great success the Student had during a summer park district camp with non-disabled peers. The Student was able to learn much from his peers. She has been very active in the Student's programming. During the summer of 2009, she wanted to give him an opportunity to put the skills he had learned into play. She has also enabled the Student to have social interaction with neighborhood peers by fostering relationships. She thought the District was developing a program. In computing costs of home program, she based on a calendar year calendar. At the June 2, 2009 IEP meeting, she requested part of the day at [REDACTED] and was told that the District would not provide the level and intensity the Student needs. (SD 70 2/22, bottom paragraph). She was not given any information regarding the training of the staff at the [REDACTED] program. The team had determined at the IEP team meeting that a therapeutic Day program was not appropriate. The team had discussed therapeutic programs. (SD 70 3/22). The training of the District's personnel resulted after prior due process hearing request. She felt the District should have done their own evaluations, to know Student. Instead, the District relied on the Parents evaluations, reimbursing the parents for [REDACTED] evaluation. The last time the District evaluated the Student was in 2005. Parents rejected the District's program at the June 2, 2009 IEP meeting (P 35).

The mother stated that the home program costs \$124,883.13 (P 351-352). Of this amount the occupational therapist provided testimony that she was paid for by the parents' insurance. Parent's claim \$18,349.00 for Ms. Litchy-Hotary. Some of the other items such as travel and fuel along with community excursions, music and art had limited explanation as to the educational benefits that are directly related to the Student's program as opposed to being expenses a parent would normally incur while bringing up a child which would make the proved up home base expenses to be \$95,000.00.

[REDACTED] testified. She is the Student's private occupational therapist. She specializes in sensory processing disorders. She has worked with the Student for two and half years. She sees the Student three times per week with the exception of this summer where she saw the Student every other week. She is working on the Student's sensory modulation. The Student engages in sensory seeking motor apraxia postulation foundation with sensory process. She

works on both fine motor and gross motor skills. The Student's sensory processing effects his ability to learn. His ability is effected due to his auditory processing. He has difficulty following direction. He has motor difficulty. He needs one on one to break down tasks. He would have a hard time in a group. Each of his sessions is 50 minutes He is currently working on letter identification, scissor skills, dressing. He needs direct occupational therapy because of his difficulty following directions. If he has more distractions, the more difficulty it would be A sensory room or sensory area would be critical part of his programming. His sensory profile shows that he needs big movement such as swing or crashing. She did provide feedback on his IEP goals. She was concerned that his goals were not difficult enough. She is not aware of any program in the area that could meet the Student's needs. (P 93-94). He has shown some regression after the summer which demonstrates that he needs a high level of intervention to maintain progress. The 50 minutes every other week during the summer was inadequate. She stated she is aware of another program that may be appropriate in Wilmette. She reevaluated the Student in September of 2009. She summarized the Student's challenge is sensory modulation disorder with primary subtypes of sensory seeking sensory under-responsivity and dyspraxia (P 94). She recommended that the Student continue with OT services 2-3x/week as regression was observed when the Student had a reduction in therapy (P 95).

[REDACTED], an autism consultant hired by the District, also provided testimony. She visited the Student's home once. She went twice a week during the summer to talk to the teachers, however, this was not for the Student but general training of staff. She expressed concerns with the home program. She was there an hour. She observed 15 minutes of instruction. Felt that the instruction was on skills he already knew and he was not being challenged. She was also concerned with the lack of peers. She did not have an opinion on what would work for this Student but did state she was not part of the decision to not educate the student at the District. Of the Student's she observed at the District, the Student was the most disabled of those observed. She was not at the District to develop an autism program, rather she was there to make recommendations to staff for needs in dealing with autism. It should be noted that the staff was District staff not [REDACTED] the program the District was recommending. She did state that goals drive the placement in an IEP. She said that she was not able to make recommendations as to the placement for the Student.

[REDACTED] the District's Director of Special Education testified by telephone. The District's attorney made a formal objection to the hearing being held while [REDACTED] was on maternity leave during the pre-hearing conference and once again at hearing. IDEA calls for the hearing to take place within a specific timeline and the parent's attorney was not willing to extend that timeline. However she was able to testify by telephone and the District has its Superintendent sit in as the District representative during the hearing. District was open to other placement options and therapeutic was rejected because it

would not offer any peer interaction. She was not familiar with the sensory integration at the building of the [REDACTED] program. The program was housed in a regular school building. She did not know how much direct services were one on one or group. She stated this would not be determined until he was in the program what his schedule was for SLP or OT. She could testify as the autism training on the individuals in [REDACTED]. There was a new teacher in the program. She agreed that it would matter if the teacher was trained but that would be up to [REDACTED]. She also stated that the District has 12 students on the autism spectrum. The team concurred with the Student's service providers' evaluations, but felt that the evaluations were for a home setting opposed to a school setting. She did not think the District needed to re-evaluate the Student, as the private evaluations were sufficient.

[REDACTED] testified. He is employed by [REDACTED] as the director of program operations. He also runs a private consulting company called Intervention Development Incorporated. It is in his capacity as an independent consultant that he was employed by the District. He has been working with the District since August 2008. He provides them with professional development consultation and support. He observed the Student three times. He made the observations in the Student's home on April 3, 2009, April 15, 2009 and April 24, 2009. His concerns with the home program were lack of interaction with peers. He noted that the Student needed much verbal prompting. He responded well to discrete trial and attended well. He believes the Student needs interaction with age appropriate peers in a school. The Student needs peers available to model. He was at the June 2, 2009 IEP meeting and was involved in development of goals. He felt the goals as developed were specific and measurable and would be adjusted every 6 weeks at the [REDACTED] program. He described the [REDACTED] program. It is in [REDACTED] in [REDACTED]. There are 7 students in the multi-purpose room with a variety of disabilities and disability levels ranging in autism, down syndrome, cognitive delay or physical impairment. The integration with regular education students would be dependent on the students' needs. He could not state how the Student would engage with the regular education peers. A variety of methods would be used including discrete, small and large group. Visual cuing for students and objects are labeled for visual the room has both high tech and low tech augmentative communication devices. It would cost the school district eighty thousand dollars (\$80,000.00) not including transportation to attend the program for the 2009/2010 school year. Visual supports are at the student's desks with folder system. He believes sensory could be provided without a sensory room. Many of the related rehabilitative services would be within the classroom. He agreed with [REDACTED]'s expressed concerns including trained staff. (SD 65 review #2 "In light of these findings..#2-#10). He attended the IEP meeting as Intervention Development not as NDSEC representative. He was aware that the parents wanted programming at [REDACTED]. He knew that it did not happen but he was not aware why not. Although he stated he was working as an independent consultant with the District, he stated that during the program observation by the parent, he was acting as the [REDACTED] director. Although he could testify that the teacher was currently receiving

child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs."

In the instant case, the Parents decided to retain the Student in a home based program. Although the Student has limited interaction with peers, he is benefitting from the program which is well developed, implemented and supervised by an impressive array of therapists.

If the district's program offers the student FAPE, the parents are not entitled to reimbursement. *A.C. and M.C. ex rel. M.C. v. Board of Educ. of the Chappaqua Cent. Sch. Dist.*, 51 IDELR 147 (2d Cir. 2009). This rule applies even if the private program is superior to the services offered by the district. *Lewis v. School Bd. of Loudoun County*, 19 IDELR 712 (E.D. Va. 1992). In the instant case the District has offered a program which is not appropriate and in fact is in a program that their independent consultant has a vested interest.

The District contends that the Parents' home based program is not appropriate as it is not the Student's least restrictive environment, however, the witnesses have testified that no such program exists close to the Student's home and in the consideration of an appropriate placement overrides the least restrictive environment.

Conclusion

This matter is rather straight forward, the parents are merely requesting an appropriate placement for their son in a program which has an appropriate setting, with properly trained personnel and the ability to having meaningful access to non-disabled peers. It is a matter of law that the Student is entitled to receive a program that provides FAPE. For these reasons, the District's placement proposal at the [REDACTED] program is not appropriate, the Parents' home based program is appropriate.

IT IS HEREBY ORDERED:

1. The Parents' request for funding of their home based program is granted in the amount of ninety-five thousand dollars (\$95,000.00) for the 2009/2010 school year including the extended school year to be paid on or before December 31, 2009;
2. The District shall fund two hours per week opportunities for the Student to participate with neuro-typical peers in the district either in an after-school program at school or a park district recreational program. The District shall give the Parents a choice of at least four opportunities to choose and the District shall provide appropriate supervision for the Student. In the event the Parents do not wish to participate in this opportunity, the District shall deem to have complied with the portion of this order.
3. The District shall provide proof of compliance no later than January 11, 2010.

ENTERED THIS 19 DAY OF OCTOBER, 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 Parents' counsel (7008 0150 0002 3710 2121), District's counsel (7008 0150 0002 3710 2138), and the Illinois State Board of Education (7008 0150 0002 3710 2145) at their respective addresses by depositing same with the United States Postal Service in Lake Forest, Illinois with proper certified postage paid before 5:00 p.m. on October 19, 2009.


Sheana Hermann
Impartial Due Process Hearing Officer