

Case Number: 2010-0223  
[Redacted] vs. [Redacted]  
Hearing Officer: Kristine Anderson

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 [Redacted]  
Address [Redacted]  
Represented by [Redacted]

Parent Name [Redacted]

Phone: [Redacted]

Address [Redacted]  
Represented by [Redacted]

#### Date and Timelines

Date of Written Request: 12/21/2009  
Date of Pre-hearing Conf: 02/10/2010

Date of Hearing: 02/25/2010 to 2/25/2010 12:00:00 AM  
Date of Decision:

#### Summary of Decision

- Parent filed a due process complaint asserting that the District's decision to place the Student in a therapeutic day school violated the Student's [Redacted] to LRE. The Hearing Officer ruled in favor of the District, finding that the evidence showed that the Student had failed to make behavioral and academic progress in his self-contained ED classroom.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

- )
- ) **ISBE CASE NO. 2010-0223**
- )
- ) **Kristine Anderson**
- ) Impartial Due Process
- ) Hearing Officer

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

Student )
vs. ) Case No. 2010-223
Local School District )

KRISTINE L. ANDERSON, Hearing Officer

HEARING DECISION AND ORDER

This matter comes before me pursuant to the Parent's due process complaint on behalf of his son,
The Parent, was not represented by counsel, but has represented his son's interests pro se. At the hearing he was assisted by his adult son, The District also was unrepresented by counsel, with assistant superintendent, acting on behalf. I have jurisdiction to hear and decide this matter pursuant to 105 ILCS 5/14-8.02(a) et. seq., and 23 Illinois Administrative Code §§226.600 et. seq.

PROCEDURAL HISTORY

The procedural history of this matter is brief. filed a request for a due process hearing on December 21, 2009. I was appointed as the Hearing Officer on January 4, 2010. The parties held an unsuccessful resolution conference on January 12, 2010. I convened a status call on January 20, 2010, in which we agreed that the pre-hearing conference would take place on February 10, and the hearing would proceed on February 25, 2010. On January 21, 2010, I sent the parties written notice of the pre-hearing conference, which included a description of the purpose of the pre-hearing conference, and a statement of the parties' legal. The pre-hearing conference and hearing took place as planned on February 10 and February 25, 2010.

Issues Presented:

There is only one issue in dispute. In a December 17, 2009 IEP meeting, the District determined that the Student's current placement in the ED program at was not meeting his needs, and that placement at the District's public therapeutic day school, would provide with a free appropriate public education (FAPE) in the least restrictive environment. (LRE) The Parent disagrees with the District's determination and asserts that his son's current placement at is the least restrictive environment (LRE) appropriate. To place in a therapeutic day school, according to would deny his son FAPE.

Request for Relief:

The Parent requests that the Hearing Officer enter an order finding that the ED program at is the least restrictive environment for and provides him with FAPE.

The District requests an order finding that is the least restrictive environment, and

that placement at the therapeutic day school is necessary to provide the Student with FAPE.

### FINDINGS OF FACT

█ is a sixth grade student who currently attends a self-contained classroom for students with emotional disabilities at █. This is █ first year in █ self-contained ED program. Last year, as a fifth grader, █ attended a cross categorical classroom for approximately two hours a day to address his emotional and behavioral needs. As part of that program, █ also attended several regular education classes, including science, social studies, and reading with his non-disabled peers. (See 5/12/09 IEP, pp. 38, 42, Ex. 8)

On May 12, 2009, the IEP team at █ elementary school met to complete a new IEP for █ (Id.) At this meeting, school staff determined that, although █ was functioning on grade level academically, he was not making progress behaviorally. In particular, the team noted that █ was not able to control his behavior in the regular classroom setting, and during unstructured activities. (Id. at 42) As an example of █ deteriorating behavior, the team discussed an incident in which █ became verbally and physically disruptive and violent when he had failed to earn enough behavior points to attend an end of the year special event. (Id.)

The team recommended to █ that █ be placed in █ self-contained ED classroom for his 6th grade year. (Id.) They explained that the program was specially █ to meet █ behavioral needs, and that he would be taught new ways to problem solve to avoid inappropriate behaviors. Though he had concerns about the program, █ agreed to the team's placement recommendation. (Id. at p. 43) It was agreed that █ would receive 1200 minutes per week of instruction (4 hours a day) in the ED classroom, and would attend non-academic classes, i.e., P.E., music and art, with his non-disabled peers. The team also agreed that █ would receive 60 minutes per week of social work services (Id. at 51)

Once his placement had been decided, the team wrote IEP goals for █. Though █ functioned in the low average range in reading and math, the IEP nevertheless includes goals for math, reading and writing. Particularly with respect to math, statements █ present level of performance make clear that █ academic progress was hindered by his unwillingness to perform work that he perceived to be too difficult. (Id. at p. 44) In addition to the academic goals, the team also wrote behavioral goals to help █ express anger and frustration appropriately, and to improve his ability to follow directions and complete █ (Id. at 44-48) Notably -- and of concern -- the May 12 IEP presented as evidence at the hearing did not include a behavior intervention plan (BIP) or functional assessment for █ As will be noted below, however, there was testimony indicating that █ did have a current BIP when he arrived at █ in the fall of 2009, and that students' functional assessments and behavior intervention plans are updated at least yearly.

As decided, █ began attending the ED self-contained program at █ in the fall of 2009. █ is the special education administrator at the school. She provided helpful testimony about the components of the school's ED program. Specifically, █ testified that the ED program consists of three classes that serve 6th, 7th, and 8th grade students. Teachers and staff are trained in the research-based program, which is █ to teach students sixteen important social skills including, how to follow instructions, how to accept "no" for an answer, how to accept criticism, and how to get the teacher's attention in an appropriate way. (█ ED/BD Program Handbook, pp. 386, 395-97, Ex. 4) █ stressed that teachers are very consistent in their instruction of these skills and have █ expectations that the students exhibit appropriate behaviors.

To encourage appropriate behavior, teachers strive to provide the students with frequent positive feedback. Students also are awarded points at regular intervals for exhibiting appropriate behaviors. (See Daily Points, p. 405, Ex 5) At the end of each day, they may use those points to purchase various items. As they progress in the program, students are encouraged to save their points to purchase more substantial rewards like class outings.

According to [REDACTED] when a student exhibits behaviors that preclude him or her from participating in instruction, that student is deemed to be out of instructional control. Teachers quietly prompt the student to get back on task. After a few unsuccessful prompts, the student will be given a referral to meet with the social worker. Ernst stressed that the referral is not intended to be punitive. Rather it is an opportunity for the social worker to provide additional instruction on how to respond appropriately, and to allow the student time to deescalate his negative behavior. Students who receive frequent referrals are required to enter into a contract, in which they agree to try to avoid receiving a referral for a specified period, e.g., a day or an hour. They earn a reward if they are successful, but are penalized if they are unsuccessful in completing the contract. (See, e.g. Behavior Contract, p. 320, Ex. 18) Students who are out of instructional control are required to make up the schoolwork that they miss either during lunch or after school. This is referred to as academic restitution. (Ex. 4 at 397)

At the hearing, [REDACTED] asked [REDACTED] a number of questions about how the program was being implemented for [REDACTED]. In particular, [REDACTED] asked [REDACTED] why [REDACTED] had not been mainstreamed into academic classes as the IEP team had promised. [REDACTED] responded that it was not appropriate to mainstream [REDACTED] because his behavior had not improved. When [REDACTED] charged that the District unrealistically expects 100 percent success from [REDACTED] [REDACTED] disagreed, but also stressed that students are expected to be respectful and to complete class work and homework. She also disagreed with [REDACTED] [REDACTED] assertion that [REDACTED] is being unfairly targeted by his teachers, noting that she is often in the class and has not observed any student being treated unfairly. Finally, [REDACTED] asked whether the District allow [REDACTED] to attend an outing to the YMCA even if he has failed to earn the appropriate points. [REDACTED] suggested that this approach [REDACTED] motivate [REDACTED] by allowing him to see what he is missing. [REDACTED] responded that this would not be fair to the other students who have worked hard to earn the points. She also stressed the importance of consistency for the program to succeed.

[REDACTED] is [REDACTED] ED classroom teacher and case manager at [REDACTED]. She participated in the May 12, 2009 IEP meeting in which the team agreed to place [REDACTED] in the self-contained ED program. She testified about the general structure of her classroom, and about [REDACTED] performance in the class since his arrival last fall. Specifically, as [REDACTED] described, [REDACTED] uses a corrective teaching model to address [REDACTED] (and other students') misbehaviors. Applying this approach, [REDACTED] initially gives [REDACTED] several opportunities to get back on task when he is not participating in instruction. If he doesn't respond to her attempts to redirect him, he will receive a social work referral. [REDACTED] also stressed that adhering to the corrective teaching model requires her to praise [REDACTED] for his positive behaviors -- however small they may be -- even while she is addressing his negative behavior.

To encourage appropriate behavior, [REDACTED] and his classmates may earn points for positive behaviors. All students receive points at regular intervals for participating in class and completing class [REDACTED] and homework. Students earn additional points for demonstrating specific behaviors that are particularly challenging to them. In [REDACTED] case, he is rewarded points when he gets the teacher's attention in an appropriate way, follows instructions, and accepts criticism in an appropriate way. (See [REDACTED] Daily Point Chart, p. 124, Ex. 13) Students lose points for inappropriate behaviors.

Unfortunately, according to [REDACTED] the corrective teaching approach and point system have not

been effective in helping [REDACTED] to decrease his negative behaviors. Indeed, [REDACTED] noted that [REDACTED] received approximately 60 referrals in the first four months of school. (See [REDACTED] Out of Instructional Control Record, p. 91, Ex. 12) [REDACTED] the record of referrals that [REDACTED] described also shows that, from the beginning of school to early February 2010, [REDACTED] has missed over 56 hours of classroom instruction due to his negative behaviors. Equally concerning, [REDACTED] pointed out that these behaviors have not decreased in frequency or duration since he has been in the program. (*Id.* at 91-95)

When asked to describe [REDACTED] out of control behaviors, [REDACTED] testified that [REDACTED] often becomes noncompliant when faced with a task or an instruction he does not want to complete. He shows his noncompliance by simply refusing to do what is asked of him, or by putting his head on his desk and covering it with his sweatshirt "hoodie." When angry or frustrated, [REDACTED] yells, rips up his or other students' work, throws things, and knocks materials of his and others' desks. Additionally, [REDACTED] behaviors in the hallway and with his locker were so inappropriate -- he threw things and head butt his locker, for example -- that he has lost his locker privileges. [REDACTED] testimony is confirmed by [REDACTED] out of control record, which describes numerous incidents of each of these and other behaviors. (*Id.*)

[REDACTED] testified that [REDACTED] behaviors and missed instructional time have begun to hinder his academic progress. In math, the District's curriculum based measures indicate that as a fifth grader, [REDACTED] was measured to be performing at the 25th percentile. (See Math Present Level of Performance, Ex. 8 at p. 44) By December of his 6th grade year, however, [REDACTED] had dropped to the 16th percentile among his peers. (12/17/09 IEP, p. 1, 5, Ex. 14) Another measure, the Discovery Education Assessment, also showed that [REDACTED] is losing ground in math. When tested at the beginning of the year [REDACTED] met or exceeded standards in all but one of the six areas measured. On a subsequent test, however, [REDACTED] scored below standards in three of the six areas. (Discovery Education Math Assessment, p. 411, Ex. 6) In reading, Fitzgerald testified that [REDACTED] appears to have made some progress as measured by the Discovery Assessment and various curriculum based assessments. She does not consider his minimal progress to be meaningful, however, or reflective of his ability. (See Discovery Education Reading Assessment, p. 412, Ex. 9; CBM Reading Comprehension and Fluency Graphs, pp. 413 & 414, Ex. 10)

[REDACTED] rejected the suggestion that [REDACTED] negative behaviors and lack of academic progress [REDACTED] be an indication that he is overwhelmed by the difficulty of his schoolwork. To the contrary, [REDACTED] stressed that she has observed [REDACTED] to be capable of doing 6th grade work when he chooses to apply himself. The crux of his problem, as [REDACTED] sees it, is that [REDACTED] is very resistant to doing schoolwork. This attitude -- and its accompanying behaviors -- has become entrenched. Moreover, to the extent that [REDACTED] has any difficulty learning the material, [REDACTED] stated that the team has appropriately addressed [REDACTED] learning needs. [REDACTED] is provided with small group instruction in each of the academic areas and receives additional reading instruction through its Power Up program for 40 minutes per week. To help students organize their work, [REDACTED] routinely uses graphic organizers. In math, [REDACTED] is allowed to use a calculator and a math notebook of concepts. (See Ex. 14 at pp. 5, 10) [REDACTED] also modifies [REDACTED] by shortening them and breaking them into smaller components to lessen his negative responses to schoolwork and to foster success.

[REDACTED] participated in the December 17, 2009 IEP meeting in which the team determined that [REDACTED] is the least restrictive environment for [REDACTED] [REDACTED] made clear that she agrees with that decision because [REDACTED] negative behaviors have not improved in his current placement, and because they are precluding him from making meaningful academic progress. In response to a question by [REDACTED] she also noted that [REDACTED] have been more successful at [REDACTED] if the family had been more supportive of the incentive program, i.e., by rewarding [REDACTED] at home when he had a good day at school, and by withholding rewards when [REDACTED] received referrals at school.

██████████ is an ED social worker at ██████████. She testified that she and another social worker are responsible for working with the 25 or 26 students in the ED program. ██████████ is one of ██████████ students, and she has worked closely with him since he began attending ██████████ last fall. In particular, ██████████ testified that she provides ██████████ with 60 minutes per week of individual and group social work services to address his two IEP goals. The first goal focuses on helping ██████████ to express his anger non-aggressively. The second goal requires ██████████ to promptly follow the teacher's instructions. ██████████ testified that she also implements ██████████ behavior intervention plan. Consistent with his IEP, the BIP targets ██████████ refusal to follow instructions and inappropriate classroom behaviors such as yelling, threatening and throwing objects. (See Ex. 14 at 15-17)

In addition to implementing ██████████ IEP, ██████████ meets with ██████████ whenever he receives a social work referral. During those contacts, which can last anywhere from five minutes to several hours, ██████████ works with ██████████ to try to help him deescalate his negative behavior. She also re-teaches appropriate behaviors. According to ██████████ it is not unusual for students to receive several referrals when they are new to the program. Over time, however, students' referrals generally decrease. Unfortunately, this has not proved to be the case for ██████████. Though he has been in the ED program for more than six months, he continues to receive several referrals a week. Indeed, a school record documenting her contacts with ██████████ shows that, in addition to weekly IEP minutes, ██████████ met with ██████████ more than forty times from September 1, 2009 to January 7, 2010. (IG 2009-10 Triangle Entries, p. 79-80, Ex 15) The same report shows numerous other instances when ██████████ contacted ██████████ parents. (*Id.*)

Based on her observations, ██████████ testified that when ██████████ is angry, he acts before he thinks. Though ██████████ has tried to help ██████████ learn how to respond appropriately, she believes that ██████████ is still reactive most of the time. Indeed, ██████████ stressed that overall, she has not seen any improvement in ██████████ behavior. She fears that he will fall behind in his academics because he misses so much instruction time. For these reasons, ██████████ believes that ██████████ needs the more restrictive placement of ██████████ at this time. ██████████ in reaching this decision, ██████████ stressed that she has exhausted every strategy she knows to help ██████████ succeed at ██████████. Moreover, ██████████ noted that ██████████ has indicated a willingness to go to ██████████ because he understands that he needs more help to improve his inappropriate behaviors.

██████████ is the Dean of Students at ██████████. ██████████ testified that he has spoken with ██████████ on numerous occasions on issues related to his inappropriate behavior. ██████████ believes that most of ██████████ discipline issues revolve around his refusal to do work, which then escalates into more serious behaviors. According to ██████████ the team has considered the possibility that ██████████ may be overwhelmed by the schoolwork and has addressed that possibility by decreasing the amount of work that ██████████ is required to do. This strategy has not been effective in lessening ██████████ inappropriate behaviors, however. Indeed, a disciplinary report presented by ██████████ described a serious incident last December in which ██████████ became incensed when asked to complete a Language Arts assessment. (Student Discipline Summary Report, 12/4/09 Incident, p. 312, Ex. 16) ██████████ not only refused to complete the work, but without permission, also tried to use the teacher's phone to call his father. When the teacher directed ██████████ to return to his desk, he proceeded to rip his test booklet and other ██████████ apart. He threw his pencil at the white board and erased content on the white board. ██████████ called his father again and demanded that ██████████ come pick him up. ██████████ then ripped up a class project, as well as a poster created

by his classmates. He also pulled the teacher's computer table from the wall. He continued this destructive behavior until the principal arrived and removed him from the class. (*Id.*)

• [REDACTED]  
[REDACTED] has been the principal of [REDACTED] for six years. He provided helpful testimony about the school and its program, and whether it is an appropriate placement for [REDACTED]. According to [REDACTED] is a public therapeutic day school that serves approximately 130 students in grades 6 through 12. Noting [REDACTED]'s concerns, [REDACTED] stressed that none of the students has a heavy gang affiliation, nor is physical aggression a prevalent issue among [REDACTED] students. Rather, the typical student has some type of chronic, maladaptive behavior that must be addressed.

According to [REDACTED] [REDACTED] students are taught the same curriculum as the rest of the [REDACTED]. This is particularly important since one of the primary goals of [REDACTED] is to equip students with the skills they need to successfully return to their home schools. In addition to academics, teachers and staff at [REDACTED] follow the same social skills curriculum (16 behaviors) that is used in [REDACTED] ED program. (*See Ex. 4 at 395-97*) Like [REDACTED] [REDACTED] also maintains an incentive program to motivate the students to work towards improving their behaviors. When asked to describe how [REDACTED] differs from [REDACTED], [REDACTED] stressed that the [REDACTED] program is more controlled, and places even more emphasis on fostering appropriate behaviors among its students. For example, forty percent of a student's grade is based on the student's success in demonstrating the 16 core social skills. In addition, [REDACTED] imposes a [REDACTED] requirement that students complete their schoolwork each day. If a student's work is not completed by the end of the day, he or she must stay after school until it is finished. This policy, according to [REDACTED], is [REDACTED] effective. While some students resist it at first, they quickly learn to finish their school work during school hours to avoid staying after school. That the policy is successful is evidenced by the fact that, on any given day, no more than 5-10 students are required to stay after school to finish their work.

[REDACTED] testified that he attended [REDACTED] December 17, 2009 IEP meeting. He made clear that he agreed with the team's decision to place [REDACTED] at [REDACTED] given [REDACTED] lack of behavioral progress in the self-contained ED program at [REDACTED]. [REDACTED] also stressed his belief that [REDACTED] will benefit from attending [REDACTED]. [REDACTED] will continue to receive the academic support and social work services specified in his IEP. And, since team members meet twice a week to discuss each student, [REDACTED] progress will be carefully and closely monitored. Finally, [REDACTED] believes the [REDACTED] requirement that students complete their work will be of particular benefit to [REDACTED] since many of his negative behaviors stem from his desire to avoid doing his schoolwork.

[REDACTED] was asked whether [REDACTED]'s opposition to [REDACTED] will likely hinder [REDACTED] progress there. He responded that he has encountered parents in the past who initially were not supportive of the program. Those parents, however, generally became supportive as they saw the program's positive effects on their children.

• [REDACTED]  
[REDACTED] is [REDACTED] father. He is opposed to the team's decision to place [REDACTED] at [REDACTED] and wants [REDACTED] to continue attending [REDACTED]. Though he concedes that [REDACTED] has behavior problems, [REDACTED] insists that his son's behavior is improving at home. [REDACTED] also disputes the District's position that [REDACTED] is falling behind academically. In support, he introduced one [REDACTED] recent report cards, which showed that [REDACTED] received B's and C's in all of his classes for the first quarter of this school year. (11/2/09 to

1/5/10 Report Card for [REDACTED] Ex. 3) For the second quarter, however, [REDACTED] received a C in PE, an F in computer applications, and incompletes in all of his other classes. [REDACTED] insisted that [REDACTED] received incompletes because he had been ill, and that the incompletes have since been changed to A's and B's. Unfortunately, though the District had provided [REDACTED] with copies [REDACTED] report cards and other school records prior to the pre-hearing conference, [REDACTED] did not produce any documentary evidence to support his assertion.

[REDACTED] also believes that [REDACTED] negative behaviors may be due to [REDACTED] problems sleeping. To that end, he has arranged for his son to participate in a diagnostic sleep study at some point in the future. He has not set a firm date, however. (2/15/10 Study Requisition, Ex. 2)

Finally, at several points during the hearing [REDACTED] stressed his frustration with the District's recommendation to move [REDACTED] from [REDACTED] to [REDACTED]. [REDACTED] blames the District for failing to follow through on its assurances that the ED program at [REDACTED] would address [REDACTED] needs. He also insisted that he and his family had done everything that the school had asked them to do. With respect to his assertions about the family's cooperation with the District, there was no doubt that the family is concerned about [REDACTED]. Moreover, the evidence showed that [REDACTED] attended meetings and consistently responded to the District's phone calls about [REDACTED]. At the same time, however, there was evidence showing that [REDACTED] did not fully support the program's behavior expectations and incentive program. He suggested, for example, that [REDACTED] teachers unreasonably expected [REDACTED] to be well behaved 100 percent of the time. He also stated that [REDACTED] would benefit from going on a field trip even without earning the required points. Both [REDACTED] and [REDACTED] testified that students generally achieve greater success in the ED program when their parents reinforce the school's efforts at home.

- [REDACTED]

[REDACTED] is [REDACTED] older brother. He acted as [REDACTED] advocate throughout the hearing, assisting his father in preparing questions and a closing statement. [REDACTED] also testified on behalf of his brother. Like his father, [REDACTED] was a sincere and respectful witness.

[REDACTED] testified that he lives at home and often helps [REDACTED] with his homework. He believes [REDACTED] behavior has improved over the last several months. He conceded that [REDACTED] has had a problem completing homework in the past, but believes that lately, [REDACTED] has been doing a better job of completing his [REDACTED]. When asked how he has been able to get [REDACTED] to finish his homework, [REDACTED] responded that he simply doesn't give [REDACTED] any other choice -- [REDACTED] knows he is expected to finish his homework each [REDACTED]. Notably, [REDACTED]s strategy is strikingly similar to [REDACTED] requirement that students stay at school until their work is done. That the strategy has been successful at home, bodes well for its success at the [REDACTED].

Finally, [REDACTED] asked [REDACTED] whether he understood that [REDACTED] is losing ground academically due to his behavior. [REDACTED] conceded that he is not at school to see what is happening. He also stated that he understands the District wants [REDACTED] to make progress.

- [REDACTED]

[REDACTED] also provided brief testimony about his experiences at [REDACTED]. He was personable and well-behaved. Notably, [REDACTED] admitted that he has had trouble behaving appropriately in the past, but he believes that his behavior has recently improved. He stressed, for example, that he had not received a referral for the last two days. When asked if he could describe why he misbehaves, [REDACTED] stated that he gets mad when the work is hard and he is told to try to do it on his own. He also gets mad when he gets a referral. [REDACTED] said he gets "really mad" when he gets penalties that are [REDACTED] also expressed

frustration with writing because he writes [REDACTED] and can't fit things on the page. He stated that he loves science and wishes he could attend the regular science class more often where they do more experiments. When asked, [REDACTED] candidly admitted that he had [REDACTED] wanted to go to [REDACTED]. Now, however, he thinks it isn't necessary because his behavior is improving.

### CONCLUSIONS OF LAW

Congress created the Individuals With Disabilities Education Act (IDEA) to ensure that all children with disabilities have access to a free appropriate public education (FAPE). 20 U.S.C. §1412(1). A free appropriate public education must be "specially [REDACTED] to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982). A key component of FAPE is the requirement that children be educated in the least restrictive environment. 34 C.F.R. § 300.114(a). In other words, school districts must ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled. *Id.* This does not mean, however, that every child has a [REDACTED] to be educated in a regular classroom. To the contrary, as the Seventh Circuit held in *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir.1988):

Courts have determined that the Act's mainstreaming preference is to be given effect only when it's clear that the education of the particular handicapped child can be achieved satisfactorily in the type of mainstream environment sought by the [parents].

*See also, Wilson v. Marana Unified Sch. Dist. Of Pima County*, 735 F.2d 1178, 1182 (9<sup>th</sup> Cir. 1984) (when education in the regular classroom cannot be achieved satisfactorily due to the nature and extent of a child's handicap, the child may be removed from the regular educational environment).

Deciding what constitutes LRE is the responsibility of the IEP team. 23 Ill. Admin. Code §226.240(a) and (b). Moreover, courts have recognized that in this type of situation, deference should be given to the decisions of trained educators. *Heather S. v. State of Wisconsin*, 125 F.3d 1045,1057 (7<sup>th</sup> Cir. 1997). Finally, because [REDACTED] is the moving party in this case, he shoulders the burden of proof in demonstrating that the IEP team's recommendation was inappropriate. *Schaffer v. Weast*, 126 S. Ct. 528 (2005). In applying the law to the facts of this case, the evidence supports the IEP team's decision to change [REDACTED] placement to [REDACTED] the District's public therapeutic day school.

First, the evidence demonstrated that the District has appropriately attempted to address [REDACTED] needs in the self-contained ED classroom. In particular, [REDACTED] is provided with structure and consistent expectations in a positive environment. Students are frequently taught the behaviors that are expected of them, as well as the skills necessary to perform those behaviors. The District employs an incentive system that rewards [REDACTED] for appropriate behaviors. In addition to its emphasis on improving [REDACTED] behaviors, Ms. Fitzgerald testified that she also addresses [REDACTED] academic needs. She has implemented [REDACTED] IEP modifications, for example, and has provided additional supports, such as shortened [REDACTED] to address [REDACTED] resistance to completing school work. Despite these ample supports, [REDACTED] testified that [REDACTED] continues to manifest negative behaviors with the same frequency and intensity as he did when the school year began.

The evidence also showed that the District appropriately provided [REDACTED] with social work services to address his emotional and behavioral needs. In particular, [REDACTED] testified that she implemented [REDACTED] social work IEP goals. According to [REDACTED] staff implemented [REDACTED] behavior intervention plan, as well. [REDACTED] testified that she also met with [REDACTED] on the numerous occasions that he received referrals, or when he simply requested an opportunity to speak with her. Despite this extensive support -- and exhausting every strategy she knows to try -- [REDACTED] testified

that [REDACTED] behavior has not improved. She has concluded that [REDACTED] is the appropriate placement for [REDACTED]

[REDACTED] and [REDACTED] observations and conclusions about [REDACTED] lack of progress are supported by school records which show that [REDACTED] received nearly 80 referrals in the first 5 months of school. Equally concerning, [REDACTED] behaviors have caused him to be out of instructional control -- unable to participate in classroom instruction -- for nearly 60 hours of school time. Moreover, an analysis of the District's documentation indicates that [REDACTED] behavior has not improved over time, as the Parent contends. Rather, the number of referrals and time out of instructional control have remained fairly consistent from month to month.

The evidence also supports the District's position that [REDACTED] behaviors have begun to hinder his academic progress. As [REDACTED] testified, both curriculum based assessments and achievement testing indicated that, in math, [REDACTED] has fallen from the 25th to the 16th percentile when compared to his peers. Though he has not regressed in reading, the evidence showed that he has failed to make meaningful progress. Given the [REDACTED] amount of time that [REDACTED] is out of instructional control, this achievement gap will likely widen if not addressed.

In contrast to the District's evidence supporting a therapeutic day school placement for [REDACTED] the Parent has failed to meet his burden of proof that such a placement would violate [REDACTED] to be educated in the least restrictive environment. To the contrary, though [REDACTED] insisted that [REDACTED] behavior has recently improved at home, he did not seriously dispute the District's evidence of [REDACTED] continuing negative behaviors at school. It is [REDACTED] school performance, not home performance, that is at issue here.

With respect to [REDACTED] academic performance, [REDACTED] report card does support the Parent's assertion that [REDACTED] has made some academic progress at [REDACTED]. However, that [REDACTED] received B's and C's on his first quarter report card does not disprove the District's assertion that his negative behaviors have begun to hinder his academic progress. To the contrary, the District's assessment data confirms that when compared to his peers, [REDACTED] achievement levels in math have decreased. While he has not yet fallen behind in reading, [REDACTED] has failed to make meaningful progress. If his behaviors are not appropriately addressed, this achievement gap will likely widen.

Finally, it is certainly possible -- as [REDACTED] insists -- that [REDACTED] poor sleep patterns negatively affect his behavior. At this point, however, there is no evidence to support [REDACTED] belief. [REDACTED] has not taken part in a sleep study, nor has there been a diagnosis of any problem. In the event that [REDACTED] is diagnosed with a sleep disturbance in the future, [REDACTED] is encouraged to share that information with the IEP team so that the team can consider its relevance to [REDACTED] educational program.

**Pursuant to the above findings of fact and conclusions of law, it is hereby ordered:**

- 1) The Parent's request for an order finding that [REDACTED] self-contained ED placement at [REDACTED] is the least restrictive environment is denied.
- 2) The District's request for an order finding that [REDACTED] is [REDACTED] least restrictive environment is granted. The District's decision to place [REDACTED] at [REDACTED] complies with the requirements of FAPE, and the IEP team's recommendation may be implemented without further delay.
- 3) The District shall provide proof of compliance with the aforesaid orders to the Illinois State Board of Education, Compliance Division, 100 No. First St., Springfield, IL 62777-001, on or before March 26, 2010.

DATED: March 8, 2010.

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Kristine L. Anderson

Impartial Hearing Officer

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**██████████ TO REQUEST CLARIFICATION**

Either party may request clarification of this decision by submitting it in writing to the ██████████ Hearing Officer within five days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party and to the Illinois State Board of Education. The ██████████ 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.

**██████████ TO FILE A CIVIL ACTION**

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this final decision has the ██████████ to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i)(2004), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

**CERTIFICATE OF SERVICE**

The ██████████ hereby certifies that a copy of the aforesaid Decision and Order was transmitted to the parties by U.S. Mail on March 8, 2010.

DATED: March 8, 2010.



Kristine L. Anderson  
Impartial Hearing Officer  
P.O. Box 7065  
Evanston, IL 60204

<sup>11</sup> My use of initials when referring to the Student and his family is intended to preserve the Student's privacy.

<sup>12</sup> [REDACTED] special education teacher, [REDACTED] testified that [REDACTED] receives services pursuant to a dual classification of emotional disability and learning disability. This appears to have been a misstatement, however, because there is no mention of a learning disabilities' diagnosis in [REDACTED] relevant IEP's.

<sup>13</sup> In describing her efforts to implement [REDACTED] IEP goals, it was unclear whether [REDACTED] was referring to the May 12, or December 17, 2009 IEP. Both include social work goals to address [REDACTED] anger and willingness to follow instructions. In [REDACTED] of the Parent's due process complaint, however, the stay-put rule precludes the December 17 IEP from taking effect until a hearing decision is rendered (if at all). Thus, for purposes of this decision, I refer to [REDACTED] May 12 IEP.

<sup>14</sup> Notably, at the hearing the District introduced a copy of [REDACTED] May 12 IEP that did not include a BIP. Though this is of concern, it apparently was an [REDACTED] by the District in preparing its hearing exhibits. [REDACTED] recalled that [REDACTED] did have a current BIP when he arrived at [REDACTED] last fall. Indeed, according to [REDACTED], when the team created a new BIP as part [REDACTED] December 17, 2009 IEP, it agreed that the plan should continue to target the behaviors identified in [REDACTED] previous BIP.

<sup>15</sup> According to [REDACTED] [REDACTED] school and middle school students are kept separate, though they attend the same school.

<sup>16</sup> [REDACTED] testified that this component of the program is [REDACTED] effective. When asked how children are transported home after regular school hours, [REDACTED] explained that parents either pick their children up, or provide permission for the principal to drive their child home.

<sup>17</sup> [REDACTED] introduced [REDACTED] report card, a sleep study requisition and a letter that he wrote to the Hearing Officer on the day of the hearing. (Exhibits 1-3) The District did not object to the admission of these documents even though [REDACTED] did not provide them to the District by the 5 day cut-off date ([REDACTED] was fully apprised of that requirement.) In considering his letter to the Hearing Officer, two issues must be addressed. First, in the letter [REDACTED] suggests that he does not understand the due process proceeding. As noted above -- and as [REDACTED] concedes -- the Hearing Officer provided the Parent with a written explanation of his legal [REDACTED] as well as instructions concerning preparations for the pre-hearing conference. (See 1/21/10 Notice of Pre-hearing Conference) Besides the written notice, the Hearing Officer provided additional guidance to the parties concerning their legal [REDACTED] as well as suggestions on preparing for the hearing in two status conferences and the pre-hearing conference. In each instance, the Hearing Officer invited the parties to ask

questions. In short, [REDACTED] has been fairly apprised of his [REDACTED] and has received a thorough explanation of due process procedures. Second, in the letter, [REDACTED] alleges for the first time that [REDACTED] December 17 IEP contains procedural deficiencies that amount to violations of FAPE. These issues were not raised in the Parent's due process complaint, or at any time prior to the hearing, and I did not consider them in this decision.

<sup>181</sup>

That [REDACTED] was provided with copies of [REDACTED] school records is not in dispute. At the February 10 pre-hearing conference, [REDACTED] confirmed that the District had provided him with two binders of [REDACTED] school records. At the hearing, he confirmed that he had received copies of [REDACTED] 6th grade report cards.