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**SPECIAL EDUCATION
SERVICES**

**ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

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In the Matter of a Special Education)
Due Process Appeal Between:)
)
 [REDACTED] ([REDACTED])
By: His Mother and Father ("Parents"))
)
And)
)
 [REDACTED] SCHOOL DISTRICT [REDACTED])
("District") Local Education Agency)
-----)

ISBE Case No. 2010-0498

DECISION AND ORDER

ALAN J. COOK, Hearing Officer:

This matter is before the undersigned for a Due Process Hearing Decision concerning the parents' request that [REDACTED] receive an award of compensatory education. The Hearing Officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02a *et seq.*, 34 C.F.R. 300.507 *et seq.*, 23 Ill. Admin. Code 226.600 *et seq.*, and the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. 1400 *et seq.*, ("IDEA"). The parties were informed of their rights under 105 ILCS 5/14-8.02a.(g.), 34 C.F.R. 509, and 23 Ill. Adm. Code 226 Subpart G.

PROCEDURAL HISTORY

[REDACTED] parents requested a Due Process Hearing in a communication which the District received on June 4, 2010. This Hearing Officer received notice of his appointment on June 9, 2010. After the Hearing Officer contacted the representatives of both parties, it was decided the parties would try to resolve this dispute by participating in a mediation session on June 30, 2010.

Earlier in June, ■ had been placed in the ■ Day School. The parties agreed to continue the case until after evaluations were conducted at this school. A settlement conference on November 10, 2010 was unsuccessful, and additional settlement efforts also proved unsuccessful. The parents sought a continuance until the results of an evaluation at ■ Medical Center was conducted and shared with the District in January, 2011. Both sides agreed a Pre-Hearing Conference would be held on February 1, 2011. The Pre-Hearing Conference was held on that date, and the Hearing Officer sent the parties a Pre-Hearing Conference Report. The parties submitted lists of documents and witnesses for the hearing. Upon agreement of the parties, the evidentiary hearing was conducted on February 23 and 24 and March 3, 2011 in ■ Illinois. At the hearing, the mother represented the parents and the District was represented by Attorney ■. The record was closed at the conclusion of oral testimony. This decision is being issued on March 14, 2011.

BACKGROUND FACTS

■ was born on July 30, 2002. He has three siblings, one of whom is a twin brother, ■ ■ and his brother attended pre-school at ■ Academy in the ■ Public School system without exhibiting unusual problems. When ■ and his brother advanced to Kindergarten for the term 2007-2008 school term, they exhibited significant behavior problems that included leaving the classroom and fighting.

Near the end of this school year, the parents had each of the boys psychologically evaluated at ■ Services (“■” where they began receiving mental health care and counseling services in April, 2008. ■ issued a report on June 4, 2008 that stated each boy had been diagnosed with ADHD and recommended that “each boy be evaluated for special education services.” (Dist. Ex., p. 1) The mother also sent a written request to the school

that was dated June 4, 2008 in which she requested a special education evaluation for each son. (Par. Ex., p. 13)

The school responded by sending the parent a Notification of Referral Decision which was dated June 9, 2008. (Dist. Ex., p. 3) In this document, Case Manager Ms. Castro checked the box that stated "an evaluation is not appropriate at this time," and then requested that various documents and reports be submitted to the school. The parents responded by providing the school with more information in response to this request.

Both boys began first grade as six year olds, and they continued receiving services at [REDACTED] teacher was Ms. D [REDACTED] and she kept anecdotal notes which recorded the behavior problems [REDACTED] had almost daily. The [REDACTED] therapist observed the boys in their classrooms on September 17, 2008. In her October 15, 2008 report (Par. Ex., p. 24, 25), she stated in pertinent part that:

[REDACTED] has extreme social problems. . . He needs help improving his emotional control, oppositional behavior, hyperactivity, and social skills; goals that we are working on in therapy.

[REDACTED] exhibits all of the symptoms that [REDACTED] does, but with less severity. [REDACTED] has more difficulty concentrating, however. . . His tolerance for frustration seems to be low. . .

It is my recommendation that both of these children be evaluated for special education services. . . .

In October, [REDACTED] brother was placed in a self-contained special education classroom. However, [REDACTED] remained in Ms. [REDACTED] first grade classroom where he continued to exhibit problematic behavior. The record shows he was very hyperactive, had poor impulse control, was easily agitated, had difficulty following directions, displayed anger and frustration, and often walked out of the classroom. This behavior had an impact on his class work and he was often unable to finish assignments.

On December 18, 2008 the School developed a Functional Analysis/Behavior Intervention Plan (FA/BIP) (Dist. Ex., p. 7,8) that focused on [REDACTED] aggressive behavior and rewarded good behavior with incentives. On January 8 and 14, 2009 the mother sent letters to the school in which she expressed disagreement with the FA/BIP and requested an IEP for her son. [REDACTED] was an inpatient at [REDACTED] Hospital from January 31, 2009 to February 6, 2009 to address mental health issues, and the mother gave notice of this hospitalization to the school.

On February 6, 2009 the school issued a Notification of Referral Decision that stated "an evaluation is not appropriate at this time." The document stated the school wanted to assess his academic abilities, use the services of a behavior intervention specialist, and modify his classroom setting. Around the time, [REDACTED] was transferred to Mrs. [REDACTED] first grade classroom. Mrs. [REDACTED] kept anecdotal records of [REDACTED] behavior in her classroom. He continued to exhibit the same type of problematic behavior he displayed in Ms. [REDACTED] classroom.

A domain meeting was held on May 6 in which the mother gave consent for [REDACTED] evaluation. [REDACTED] grades were four F's and three D's. On May 21, the school gave the parent a notice of a conference to be held on June 4 to determine eligibility and to consider special education services. In advance of the meeting, psychological, social work, and school nurse evaluations were completed. The psychologist noted [REDACTED] had very low academic and behavior scores and that he was rated in the "high risk" category in the spring, 2009 DIBELS assessment. He also recorded that [REDACTED] was eligible for special education services in the Emotionally Disturbed category. (Dist. Ex., p. 40-53)

The meeting was held on June 4, 2009. However, when the principal joined the meeting, the parents objected to her attendance because she was not listed as an attendee on the notification form which provides in relevant part for this situation "you (parents) may request the

meeting be rescheduled to receive proper notification.” The parents proceeded to cancel the June 4 meeting because of the principal’s presence.

█ was assigned to Mrs. █ classroom for second grade in the 2009-2010 school year. He continued to display the same behavior and academic problems in her classroom. The school sent conference notification to the parents on September 28, October 15 and October 28, 2009. The parents asked for an evaluation on October 1, 2009. At a conference held on November 16, 2009, █ was found eligible for special education services on the basis of Emotionally Disturbed, Other Health Impaired and Learning Disabilities. A Functional Behavior Assessment and Behavior Intervention Plan (“FBA/BIP”) was developed. He was not found eligible for Extended School Year (“ESY”) services. (Dist. Ex., p. 84) The team recommended a placement in a self-continued special education classroom, but it decided to accept the parents’ request for placement in general education with a resources program.

On December 3, 2009 the parents sent the school a letter that noted the IEP team’s denial of compensatory services for █ and they renewed their request for these services. (Par. Ex., p. 89,90) An IEP revision conference was held on January 25, 2010 with Dr. █ Special Services Administrator, in attendance. It was decided █ would receive four weeks of ESY “to work on behavior, reading and math skills as compensatory services” and that the setting for these services would be “an integrated █ Summer Program.” (Distr. Ex., p. 115). Another IEP revision conference was held on March 23, 2010 at which a compensatory education form (Dist. Ex., p. 133) was developed. The form stated in relevant part that:

It can’t be determined if the pre-referral process had an adverse effect on the student’s academics versus going immediately to an FIE. Therefore, compensatory services have been agreed upon, and will consist of participation in ESY for four weeks. Instruction will be provided in the case content areas of Language Arts and Mathematics. This is in keeping with the instructional program █ receives during the regular school year.

Goals which were not met due to an interruption of services will be addressed during Compensatory ESY: The critical skills to be addressed are related to the behaviors which have had an adverse effect on the learning areas of Reading/Language Arts and Mathematics. It was agreed upon to address these critical skills in ESY for compensatory services only.

Shortly thereafter, the parents sent the school a letter on March 25, 2010 in which they stated "Compensatory Services and ESY are separate entities. . . The Compensatory Services should be over and above what he already has a right to receive (ESY)". (Par. Ex., p. 122,23) On April 27, 2010 the parents sent a letter to the school in which they requested that [REDACTED] be given a placement in a Therapeutic Day School. At an IEP meeting held on May 24, 2010 to consider [REDACTED] placement, his placement was changed to a therapeutic day school, and he was given six weeks of ESY. On June 8, 2010 the District sent the parents a notice that [REDACTED] would be attending [REDACTED] Therapeutic Day School [REDACTED] [REDACTED] began attending [REDACTED] June 2010. His IEP was revised at a meeting on September 14, 2010 where a FBA/BIP was developed and he was given six weeks of ESY.

Teachers and staff from [REDACTED] testified at the due process hearing. [REDACTED] still has problems with appropriate behavior, but his behavior appears to be improving. Classroom teacher Ms. [REDACTED] testified [REDACTED] has shown improvement in his reading abilities and is currently at a second grade reading level. Testing results show an improvement in reading since September 1, 2010. However, his Math level has decreased over the same period of time. (Dist. Ex., p. 461-464) The parents have not expressed any complaints about [REDACTED] placement at [REDACTED]

POSITIONS OF THE PARTIES

Parents:

The parents basically argue that the District delayed testing [REDACTED] for special education services. After their request on June 4, 2008 for evaluations for each boy, they point out his

brother was evaluated and placed in special education in October, 2008. They claim ■ should have been evaluated and placed in special education during this same period of time. They note ■ was not found eligible for special education until November 16, 2009.

The parents contend ■ should receive compensatory education for the delay in his being found eligible for special education. They believe compensatory education should not be in the form of ESY, which they understand to be a separate form of service. They ask for an award of one-to-one tutoring for ■ for two hours a week for two years by a certified teacher at no expense to the parents. In the alternative, they seek an award of this nature to be provided by Sylvan Learning Service.

In their pre-hearing statement, the parents claim ■ is entitled to compensatory education for the following failures of the District:

- A. Identify a child in need of Special Education Services and evaluation in a timely manner
- B. Caused a delay in providing services that would provide a child with a free appropriate public education
- C. Incomplete evaluation (Speech, OT, Assistive Technology)
- D. Lack of behavior data maintained, despite behavior being a major factor in ■ making progress
- E. 30-60 minutes of therapy once a week was not provided
- F. Failure to provide/correct documentation, i.e., ■ was moved to a different class due to the teacher transition from teaching a 1st grade class to a kindergarten class. This was not due to his behavior
- G. Missing pages to IEP (father signature was missing from attendance sheet, forged signature on document relating to Compensatory Services which was not provided initially)

District:

The District essentially claims after it received the request for evaluation it took time to engage in school-based problem-solving to determine if ■ could remain in general education, the

least restrictive environment, as long as possible. This process involved testing, pursuing classroom observation, accumulating anecdotal information on behavior, trying interventions and accommodations, obtaining teacher reports, and using a FA/BIP and the services of a behavior specialist. It also changed [REDACTED] teacher to give him a different classroom environment. When these efforts were not successful, it proceeded to evaluate [REDACTED] in May 2009 for an IEP meeting in June 2009. The District contends delay was caused by the parents cancelling the June 2009 meeting and not being available until the November 16, 2009 meeting.

The District points out it offered [REDACTED] four weeks of ESY as compensatory education. It believes this time was a sufficient amount of compensatory services, and it claims ESY can be compensatory education in appropriate circumstances such as in this case. However, his current school, [REDACTED] provides at least six weeks of ESY for all of its students. Therefore, the District believes the offer of four weeks of ESY as compensatory education is met by the summer program at [REDACTED] Therapeutic Day School.

ISSUE

Is [REDACTED] entitled to compensatory education? If he is entitled, what form of compensatory education should he receive and for how long should he receive it?

DISCUSSION, CONCLUSIONS OF LAW AND DECISION

Under Illinois law, the burden of proof is on the school district in a due process hearing to show by a preponderance of the evidence that it provided or offered the student a free appropriate public education ("FAPE") in the least restrictive environment, consistent with procedural safeguards and in accordance with an individualized education program. 105 ILCS 5/14-8.02a. However, as the party filing the due process hearing request the Parents bear the

burden of persuasion on the issues in the proceeding. Schaeffer v. Weast, 546 U.S. 49, 57-58 (2005).

Resolution of this dispute begins with consideration of the two-part inquiry for determining FAPE that is set forth in Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982): “First, has the District complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” The District must identify [REDACTED] needs in light of his disabilities and utilize instruction and related services in an appropriate environment to meet those needs. Sch. Committee of the Town of Burlington, MA. v. Department of Educ. of Mass., 471 U.S. 359, 368, 105 Sup. Ct. 1996, 2002 (1985).

In [REDACTED] case, his parents and the [REDACTED] agency requested an evaluation of the student for special education services. The District responded it needed information to decide on an evaluation. A response to a request for an initial evaluation is discussed in 23 Ill. Admin. Code 226.110. Paragraph c(2) provides: “To determine whether the child requires an evaluation, the District may utilize screening data and conduct preliminary procedures such as observation of the child, assessment for instructional purpose, consultation with the teacher or other individual making the request, and a conference with the child.” On June 9, 2008, the District provided its Notification of Referral Decision to the June 4, 2008 request for an evaluation. The response was given within the 14 days required by Section 226.100(c)(3).

By the end of October, the District had enough information on [REDACTED] brother to find him eligible for special education. It had the same type of information on [REDACTED] but it did not consider him for eligibility at that time. It had information from testing, anecdotal records, observations, agency reports and interventions. [REDACTED] again requested an evaluation for [REDACTED] in its October 15,

2008 report. The District did not give a referral decision for this request. The District has not shown why it did not evaluate ■ at that time. In addition, the parents requested an evaluation in letters dated January 8 and 14, 2009. The District's referral decision was dated February 6, 2009, after the 14 day period for a response. In fact, the school did not send the parents a consent form for an evaluation until May 6, 2009. The delay from November to May prevented ■ from receiving FAPE in a timely manner.

In May, the case study evaluations were prepared for the June 4, 2009 eligibility conference. The parents exercised their right to cancel the meeting when the principal appeared at the meeting without proper notice. Letter to Anonymous, 50 IDELR 259. The meeting was not resumed until November 16, 2009 when ■ was found eligible for services. The District did not show it took steps to reschedule the conference beyond sending the parents two proposed conference dates. ■ evaluation was delayed from June to November without good cause, and this delay contributed to ■ not receiving FAPE in a timely manner. The District's actions and inactions amounted to procedural violations in its provision of FAPE to ■

Compensatory education is an equitable remedy for a violation of FAPE. Evanston Comty. Consol. Sch. Dist. No. 65 v. Michael M., 356 F.3d 798 (7th Cir. 2004). It can be used as a remedy for an interruption of services, or for a delay in receiving services as in this case. Compensatory education can be calculated on a one-for-one basis for the period of denial of FAPE or it can be calculated on a fact-specific basis of what educational benefits the student would likely have accrued through special education if the District had supplied FAPE in a proper manner (Qualitative Approach). Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 205) The preferred approach for determining compensatory education in Illinois is the qualitative approach which involves an individually-tailored effort to determine how much compensatory

education would be needed to help [REDACTED] receive the educational benefits he would have received if he had received FAPE in a timely manner. Petrina W. v. City of Chicago Pub. Sch. Dist. 299, 53 IDELR 259 (N.E. Ill. 2009).

Compensatory education should be beyond what is contained in an IEP. It is services over and above those provided during a regular school day or school term. In this case, the District originally offered four weeks of ESY for [REDACTED] compensatory education. [REDACTED] IEP did not provide for ESY. Therefore, the offer of ESY was for services beyond those specified in his IEP. After [REDACTED] enrolled at [REDACTED] the District's offer of four weeks of ESY was included, and even expanded to six weeks, in the ESY program [REDACTED] provides all its students as a therapeutic day school. However, if ESY is now part of [REDACTED] school year and is listed in his IEP, it is no longer over and above the educational program detailed in his IEP, and it no longer qualifies as compensatory education. ESY is provided to [REDACTED] on a regression/recoupment basis. 34 CFR §300.106. At [REDACTED] it is not provided to make up educational benefits that were lost due to a failure to receive FAPE.

[REDACTED] is still entitled to receive compensatory services, just not in the form of ESY. An award of compensatory education must be based on the record developed in this proceeding. Relevant evidence in this regard was presented by Ms. [REDACTED] third grade teacher at Buckingham. She described Reading and Math indices that tracked [REDACTED] performance in these subjects in her classroom. (Dist. Ex., p. 461-464) [REDACTED] scantron reading level increased by 300 basic points in five months. While [REDACTED] is still below grade level in reading, this testing leads to the conclusion [REDACTED] could have shown similar advancements in reading ability if he had been enrolled at [REDACTED] during the time he did not receive a FAPE. While testing shows his Math level had decreased, this fact shows he needs more intensive services in Math.

Ms. [REDACTED] testified [REDACTED] needed one-to-one instruction on all subjects after school for 45 to 60 minutes a day. She stated this instruction should be given for a period of eight weeks, and then he should be tested for progress. She concluded these eight week periods of instruction should continue until he meets standards. In response to a question from the District's representative, she admitted that most students in her room would benefit from extra one-to-one instruction. However, it must be noted that these services are appropriate for [REDACTED] because he did not receive a FAPE in a timely manner.

The District has not shown that this type of instruction would be inappropriate. It is individually tailored to [REDACTED] needs. However, the intensity of services should be altered to account for his high level of frustration and his poor impulse control. After-school tutoring should be provided two days per week and should continue for a period of two years or until he has reached grade level in his academic subjects, whichever comes first.

As a final point, it must be concluded the parents have failed to prove other issues they raised at the hearing. There was no evidence that Sylvan Learning Center could provide the type of instruction that [REDACTED] needs. There was no evidence produced at the hearing that addressed other issues presented by the parents as listed above in the discussion of the parents' position. This decision addresses the parents' claim that [REDACTED] was not provided a FAPE in a timely manner and deserved an award of compensatory education. This decision sustains the parents' argument for the reasons stated above.

ORDERS

- 1) The position of the parents is upheld. [REDACTED] was not provided a FAPE in a timely manner.
- 2) The student is awarded compensatory education in the form of one-to-one tutoring in all academic subjects by a teacher qualified to teach special education

at no cost to the parents.

- 3) The tutoring will be after school for forty-five minutes for two days a week for a period of two years or until ■ reaches grade level in his academic subjects, whichever comes first.
- 4) After each eight week period, the student will be tested to determine his current academic levels of learning.
- 5) The District shall submit proof of compliance with these orders to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777 within 35 days from receipt of this Decision.

Right to Request Clarification

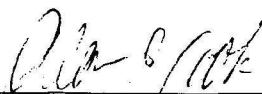
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned Hearing Officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, 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

Right to File a Civil Action

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing who is aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS 5/14-8.02a(i), 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 undersigned Hearing Officer certifies that he served copies of the aforesaid Decision and order upon parent/student and District/Director of Special Education, through their counsel or representative, and the Illinois State Board of Education at their submitted addresses by certified mail by depositing same with the United States Postal Service at Chicago, IL with postage prepaid before 6:00 p.m. on March 14, 2011.



ALAN J. COOK
Impartial Due Process Hearing Officer

Dated: March 14, 2011