

Case Number: 2011-0365

[REDACTED] vs [REDACTED]

Hearing Officer: Stacey Stutzman

AUG 01 2011

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: 773-553-1000
Superintendent [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

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

Date and Timelines

Date of Written Request: 05/05/2011
Date of Pre-hearing Conf: 06/22/2011

Date of Hearing: 07/19/2011
Date of Decision: 07/29/2011

Summary of Decision

Parents of three year old developmentally delayed boy requested hearing on issues of denial of FAPE due to District's failure to evaluate and identify Student and develop an IEP for implementation by his third birthday in February 2011 at which time his Early Intervention services ended. They also challenged the sufficiency of related services, including occupational therapy and speech/language therapy, reflected in the IEP ultimately developed for Student in June 2011, as well as District's failure to provide for ESY and compensatory services in that IEP. They requested orders for compensatory services and for additional minutes of speech/language and occupational therapy in Student's June 10, 2011 IEP which has not yet been implemented by the District.

HELD: for Parents

ORDERED: 1. Student shall receive 90 minutes per week of speech/language services in his public preschool program, including 60 minutes of direct individual services outside of the classroom during his regular school day; 2. Student shall receive 60 minutes per week of O.T. services in his public preschool placement; 3. Student shall receive 18 weeks of compensatory services at District expense to include 60 minutes of private speech therapy, 60 minutes of private O.T., and 300 minutes of private developmental therapy per week.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) ISBE CASE NO. 2011-0365
)
) [REDACTED]
) Impartial Due Process
) Hearing Officer

DECISION AND ORDER

This matter is before the undersigned impartial hearing officer for a due process hearing concerning Parents' request for orders that District provide compensatory educational services for their three year old son with developmental delays due to the failure of District to evaluate and identify Student and develop an IEP for implementation upon Student's third birthday and failure to provide for comp ed and ESY services in the ultimate IEP, and also for orders that Student's IEP be revised to include additional minutes of speech/language and occupational therapy. The hearing officer has jurisdiction to hear and decide this matter under *105 ILCS 5/14-8.02a(g)(2008)*. The parties have been advised of their hearing rights under *23 ILAC 226.625(2007)* and *34 CFR 300.512(2006)*. The undersigned Hearing Officer has also advised the parties that there are and have been no conflicts which have prevented her from conducting a fair and impartial hearing and rendering a fair and impartial decision in this cause.

Procedural History

Through their attorney, Parents submitted a Request for Due Process Hearing, dated and received by District on May 5, 2011, requesting that District evaluate Student, who turned 3 years old on February 5, 2011¹, and find him eligible for special education and develop and implement an IEP to include an appropriately structured preschool program with social work, speech/language, and occupational therapy services. Parents also requested compensatory services for the lack of programming since Student's third birthday. District counsel submitted District's written Response on May 18, 2011, beyond the 10 day statutory timeline, admitting that Student had not yet been evaluated by the District, and advising that evaluations were currently scheduled, that eligibility was anticipated pending the completion of evaluations, and that an IEP meeting was scheduled for June 2, 2011. Therein, counsel argued that District's failure to provide services to Student since he turned three was unintentional and would not result in irreparable harm to Student. District counsel also stated in his Response that his own schedule prevented the scheduling of a resolution session until the week of May 30, 2011, beyond the 15 day statutory timeline.

The parties participated in a settlement conference on June 6, 2011, the date originally scheduled for the Pre-Hearing Conference, and jointly requested continuance of the Pre-Hearing Conference to June 16, 2011. Parent's counsel then requested continuance of the Pre-Hearing Conference to June 22, 2011 to allow her time for review of the IEP and preparation of a dissent to that IEP, and the Pre-Hearing was held on that date as scheduled. A copy of the Pre-Hearing Conference Report dated June 22, 2011 is incorporated into the record as *Hearing Officer Exhibit A*.

On July 1, 2011, Parents' counsel submitted a *Motion to Compel Production of Student Records*, based on Parents' request for student records of May 5, 2011 and District counsel's

¹ District's *Request for an Impartial Due Process Hearing Officer* mistakenly indicates Student's birthday as [REDACTED] Parents' Due Process Hearing Request states a birth date of [REDACTED]. Various records in evidence state a birth date of [REDACTED]. At Pre-Hearing Conference, Hearing Officer was advised by Parent's attorney that the correct birth date is [REDACTED]. However, in the Brief submitted for hearing, Parents' counsel identified Student's third birthday as [REDACTED].

agreement to follow up with District staff to procure records at the time of the Pre-Hearing Conference, to which District counsel responded on July 1, 2011. An Order on that motion was entered on July 5, 2011 requiring District counsel to provide all of the requested records to Parents' counsel with an affidavit stating that all records had been produced by July 8, 2011. District counsel submitted some additional records to Parents' counsel and submitted his *Attestation* on July 8, 2011, but did not fully comply with the Order. He tendered additional documents to Parents' counsel after July 8 and before the hearing in this matter. Parents' counsel identified 8 documents in District's disclosure packet of July 12, 2011 that had not been produced.²

Hearing was originally scheduled for June 20, 2011 per the ISBE special education database system. At the time of the Pre-Hearing Conference on June 22, 2011, Hearing Officer offered the date of July 6, 2011 for hearing. However, it was continued to July 19, 2011 at the request of Parents' counsel due to conflicts in her schedule, without objection from District counsel.

The Due Process hearing in this matter was held on July 19, 2011 at District offices. Due to the aforementioned continuances of the Pre-Hearing Conference and the Hearing, this Decision is not being issued within 45 days of the initiation of the 45 day timeline. It is being issued within 10 days of the conclusion of the hearing.

Present for the hearing were attorneys [REDACTED] and [REDACTED] on behalf of [REDACTED] attorney for the District. Also in attendance for the latter portion of the hearing on behalf of Parents, who did not attend, was K.S. of Trilogy Behavior Healthcare. The Hearing was reported by Maureen Woodman, CSR of Wichmann-Klawitter Reporting (312 368-1228).

Eight witnesses testified at hearing. Witness [REDACTED] Manager of District's ESY program, was called to testify on behalf of both parties. Additional witnesses who testified on behalf of Parents were: [REDACTED] Father's Case Worker; [REDACTED] Supervisor of Parents' Caseworkers; [REDACTED] Student's Early Intervention Social Worker from JCFS; [REDACTED] Student's Early Intervention Speech/Language therapist from [REDACTED] and [REDACTED] Student's Early Intervention Occupational Therapist from [REDACTED]. Additional witnesses who testified on behalf of District were: [REDACTED] a physical therapist, O.T./P.T. Clinical Manager for District; and [REDACTED] a speech pathologist, Speech and Language Clinical Manager for District.

The following Parent documents were admitted into evidence³: pages 1-2 (District Enrollment form for Student); 3-6 (IDHS Early Intervention Occupational Therapy Evaluation Report); 7-9 (JCFS Social Work Evaluation Results); 10-12 (JCFS Speech Language Evaluation Report); 13-26 (Early Intervention IFSP); 28-33 (Ages & Stages Questionnaire); 34-36 (JCFS Early Intervention Discharge Evaluation Report); 40-42 (JCFS Early Intervention Occupational Therapy Discharge Evaluation Report); 43-46 (JCFS Early Intervention Speech and Language Discharge Evaluation Report); 47-49 (District Assessment Plan form); 50 (Consent for Initial Evaluation); 51-52 (Authorizations for the Release of Information); 56-66 (Eligibility Determination IEP 6/2/11); 67- 98 (IEP 6/2 & 6/10/11); 99-102 (District Speech/Language Assessment Report); 103-107 (District O.T. Evaluation Report); 108-111 (District Social Work Evaluation Report); 112-117 (District Psychological Evaluation Report); 126 (District Compensatory Education Form); 127 (Summary of JCFS Early Intervention Team Recommendations); 128-130 (Parents' Dissent to IEP); 131-133 (District Extended School Year Memorandum); 161-162 (ISLHA Speech/Language Eligibility Criteria Matrix); 163-166 (Resume of witness [REDACTED]); 167-168 (Resume of witness [REDACTED]); 209-212 (Chronology of events

² Parents' counsel attempts to add District's failure to timely produce Student records as an issue for hearing in their Legal Brief submitted at the time of hearing. However, that issue was not included in the hearing request or the Pre-Hearing Conference Report. Hearing Officer did enter an Order on Parents' Motion to Compel of July 1, 2011 and has reported same in the Procedural History in this Decision in the event that a court considers the award of attorney fees in this case at a later date. All documents provided to and by the undersigned hearing officer in regard to the production of Student records and lack thereof are included in the record for this case.

³ District submitted a document book on the Disclosure Deadline but did not use any of its own documents at hearing. District counsel stipulated to the admission of Parent documents pages 47- 52 and 56-107. Parent documents are referenced herein by page number preceded by a "P".

prepared by witness [REDACTED]; and 138-148 (Memorandum from ISBE Deputy Superintendent for Special Education regarding ESY Services)

Parents' counsel submitted a legal brief and copies of three Illinois hearing officer decisions and a copy of *Petrina W. v. Chicago Public School Dist.* 299, 53 IDELR 259 (N.D. Ill. 2009) in support of her clients' position. District counsel did not cite or submit legal precedent in support of his client's position.

Issues

1. Whether District violated Student's right to a free appropriate public education by failing to evaluate and identify Student as eligible for special education and related services and develop and implement an IEP or IFSP no later than his third birthday?
2. Whether the IEP of June 10, 2011 violates Student's right to a free appropriate public education as follows:
 - A. failure to provide speech/language services from a speech/language therapist for a total of 90 minutes per week, including 60 minutes of individual therapy outside of the classroom and 30 minutes per week in the classroom during his regular school day;
 - B. failure to provide occupational therapy services from an occupational therapist in the amount of 60 minutes per week;
 - C. failure to include extended school year services for the summer of 2011; and
 - D. failure to include compensatory services to cover the lack of provision of special education and related services from February 5, 2011⁴, Student's third birthday, to June 10, 2011?

Findings of Fact

The material facts relevant to the above issues based upon the evidence presented at hearing in this matter are as follows: Student was identified as a child eligible for special education and related services in the category of *Developmental Delay* by District on June 2, 2011 pursuant to an evaluation performed by the District on May 18 and 19, 2011, subsequent to the submission of Parent's May 5, 2011 request for due process hearing. (P56-66, 99-117) Student had previously received birth- to -3 early intervention services (hereinafter referenced at *E.I.*), including evaluation and development and implementation of his IFSPs, and provision of direct individual developmental, social work, occupational, and speech/language therapy in the amount of 60 minutes per week each, from the [REDACTED] organization to make Student "school ready". ([REDACTED], P3-26, 28-36, 40-46) At the time of Student's discharge, upon his third birthday, Student had made steady progress but was not yet school ready. ([REDACTED] Since Student was discharged from E.I. services on February 4, 2011, he has been without services [REDACTED]

Parents receive support and services from a community mental health agency (hereinafter referenced as [REDACTED] relative to Mother's diagnoses of depression and autism and Father's diagnosis of paranoid schizophrenia. The Parents'-[REDACTED] caseworkers and their supervisor have assisted Parents in their efforts to secure appropriate services for Student. [REDACTED]

Between October, 2010 and March, 2011, Student's E.I. social worker and Father's [REDACTED] case worker attempted to contact the District's Case Manager at Student's local school to schedule an evaluation for Student. Father completed the paperwork to enroll Student at the school on November 16, 2010 with his case worker's assistance. He was given a consent for evaluation to sign on May 12, 2011 at a Domain meeting, to which he was accompanied by K.S., who was provided with a copy of an assessment plan dated 3/12/11 and printed on 5/12/11 at that time. ([REDACTED], P1-2, 47-50, 209-212)

According to the District's recent psychological evaluation, Student's intellectual functioning, with a full scale IQ of 76, is within the borderline/Slow-learner range. His Verbal IQ of 86, receptively, is within the Low Average range, and his Performance IQ of 70 is within the Borderline/Extremely Low range. However, the psychologist's report notes that the results she

⁴ See discussion regarding Student's date of birth at footnote 1 above.

obtained were a minimal estimate of Student's potential and should be used with caution due to his speech and language difficulties. (P114) She also notes that his "cognitive abilities were considered 'age appropriate with emerging skills.'", based on the report of his E.I. developmental therapist. (P112) His adaptive functioning within the Communication domain is low for his age group, with receptive and expressive abilities equivalent to a one year old. (P117) Adaptively, his socialization skills are equivalent to a 1 to 2 year old and his fine motor skills to that of a 2 year old. (P117)

Student's receptive and expressive language delays are moderate to severe. His limited functional verbal expression severely limits his ability to interact with peers and adults. His language comprehension and expression improved during the course of his E.I. speech/language therapy, and he would not have progressed without the therapy he received in that program. (██████████)

Between Student's discharge from the E.I. program in February 2011 and the District's evaluation of May 19, 2011, Student did not make progress in his receptive and expressive language skills. With the provision of services, he would have progressed during that time. (██████████ P100-101)

The provision of only 30 minutes per week of speech/language therapy in the pre-school classroom, as called for in Student's current IEP, will not allow him to make progress on his language goals. The IEP goals for language arts and math are actually speech/language goals and should be addressed by the speech therapist. He requires 61-90 minutes per week of speech/language therapy, due to the severity of his disorder. (██████████) At least 60 minutes of his therapy must be provided individually outside of his pre-school classroom in a quiet environment with the least amount of distraction due to Student's distractibility. (██████████) Although 30 minutes of Student's speech therapy should be provided in the classroom to address functional skill development by targeting and imbedding classroom activities, the classroom teacher herself cannot provide the necessary therapy as part of the regular day. (██████████)

Student should have had 60 minutes per week of speech/language services as part of an ESY program over the summer of 2011, as he has not been working on any language related activities. He should receive 60 minutes per week of speech/language therapy to make up for what he has not received since his third birthday (██████████)

Student has significant sensory processing delays, and his fine motor delays are in the severe to profound range and present a safety concern. He does not use appropriate grasp, and cannot organize spatially or attend to task. Student's sensory processing deficits impact his motor planning, including the use of right and left arms and hands, which effect his toilet training and his ability to adjust his clothes. (██████████) Student did make progress in both grasping and visual motor integration with the occupational therapy services provided to him in his E.I. program. He would not have progressed without that therapy (██████████) He made minimal progress, approximately one month, between the time of his discharge from the E.I. program in February and the District's O.T. evaluation of May 19, 2011. He would have made greater progress with the provision of occupational therapy services during that time, based on his past trajectory. (██████████)

The District's O.T. evaluation results confirm that Student is in the severe to profound range, in the bottom 4 % on the relevant bell curve. (██████████) He requires 60 minutes per week of direct O.T. service just to acquire an appropriate grasp, and the IEP provision of only 30 minutes per week is therefore insufficient. He requires more goals than appear on the current IEP to access the curriculum. He is at a standstill of progress and needs to learn how to utilize his hands and body and should have had ESY in his IEP. Compensatory O.T. services in the amount of 60 minutes per week from a private provider in Student's home or daycare setting are necessary to make up for the lack of services since his third birthday. (██████████)

Student made slow and steady progress in his social and emotional development while in the E.I. Program, and he would have continued to progress with placement in a special education early childhood program addressing his social and emotional needs. Based upon the sub-scales of the Vineland Social-Emotional Early Childhood Scale administered when Student was age three upon his discharge from E.I. services, Student still had significant delays in play and leisure and interpersonal relationships. However, he had progressed from a 26% delay to 0% delay in his

copied skills. His E.I. social worker recommended that he be placed in a structured special education classroom program with a low student to teacher ratio and with appropriately experienced and credentialed staff to address his significant developmental delays and that he continue to receive speech and occupational therapy. [REDACTED]

At the time of the District's social work evaluation, consisting of interviewing Parents and Student and reviewing records, on May 18, 2011, per parental report, Student was attending a home day care with two other children and enjoyed the company of the children and the daycare family. (P109) The District social worker referenced Student's communication delays as a possible cause for Student's tantrums and frustration tolerance, and also recommended placement in an early childhood program that would address Student's developmental and social-emotional needs. (P108-111)

Student's eligibility IEP meeting was convened on June 2, 2011, at which the results of District's psychological, social/emotional, O.T., and speech/language evaluations were reported. It was noted in the IEP document that Student's Hearing and Vision screening results were not available. An IEP for Student was begun but not completed at that meeting. A summary of the Student's I.E. providers' recommendations for Student's IEP programming and services was provided to the IEP team. Those recommendations included, among others, the following: 1) placement in a highly structured full day special education classroom with sufficient credentialed staff to address Student's significant developmental delays; 2) Speech/language therapy in the amount of 90-120 minutes per week, including 60 minutes individual therapy to support and develop functional language and comprehension; 3) Occupational therapy in the amount of 60-90 minutes per week to address bilateral skills, object manipulation/grasp, and visual motor skills; and 4) individual social work services in the amount of 60 minutes per week, plus 15 minutes per week consultative services, to address frustration tolerance, attention, and expression of feelings. Among the documents provided to [REDACTED] who accompanied Parents, at that meeting was a District *Compensatory Education Form*, upon which was reported as follows:

Student is eligible to receive compensatory services.... service(s) were interrupted, delayed, or not provided.... Goal(s) which were not met due to an interruption of service ... will be addressed during Compensatory Service:...

The form in question included Student's name and was labeled "Compensatory Education for (Student)(Student's I.D. Number)" and also had a check mark in the box "Other" by the reason for the compensatory education, i.e. the interruption of service. [REDACTED]

An IEP was finalized for Student at the reconvened IEP meeting on June 10, 2011. (P67-98) That IEP provides for the following placement and services:

- 750 minutes per week of direct special education and related services in a separate class, which the document indicates is a half-day preschool program, no further program specificity provided. (P92)
- included in that 750 minutes are the related services of speech/language and occupational therapy in the amount of 30 minutes per week each to be provided within the Student's classroom. (P92-93)
- Consultation of the O.T. and the SLP to the teacher in the amount of 15 minutes per month each.(P92)
- Consultation of the social worker to the teacher in the amount of 15 minutes per week and to the community agency in the amount of 30 minutes per month.(P92)
- transportation with an aide and a car seat due to significantly reduced intellectual development or problem solving skills, significantly delayed expressive language skills and inability to communicate his wants and needs, and inattention and self-directed behaviors representing a safety concern; (P96)

The IEP implementation date was designated as June 10, 2011. (P76-90) However, it did not include ESY or compensatory services for Student to address District's lack of programming for Student since February 5, 2011. Parents were advised at the IEP meeting that ESY could not be provided during summer 2011 because Student had not been in school to allow District to collect data regarding whether he had regressed as the result of not being in school. The team did not consider other factors relating to critical skills or special or unusual circumstances, such as the fact that Student had been without services since February 2011, that he had emerging cognitive skills, or that he required services before the beginning of the regular school year in September to address his significant language, sensory, and fine motor deficits in order to meet his IEP goals. Parents' counsel attempted to discuss compensatory services during the meeting. However, District counsel advised that it would not be discussed, and the team advised that it was not their place to make that determination. [REDACTED]

Parents' attorney submitted a dissent to the IEP on June 21, 2011. Therein she noted, inter alia, Parents' disagreement with the IEP team's decision to provide only 30 minutes per week of speech therapy in light of [REDACTED]'s determination of his need for 90 minutes, stating that the speech pathologist should be the primary service provider on Student's language goals, and also the refusal to designate the speech minutes as group or individual and to provide 60 minutes of direct individual minutes out of the classroom; provision of only 30 minutes, rather than [REDACTED] recommended 60 minutes, of occupational therapy services per week; the refusal to provide ESY; and the refusal to consider provision of compensatory services. She also requested that the IEP be revised to reflect that Student will be out of the general education setting for his entire 750 minutes per week, the equivalent of a ½ day program at 2 ½ instructional hours per day in a 5-day program, rather than 43% as noted in the IEP. [REDACTED]

ESY services were delivered in the District for other students beginning on June 22, 2011. District counsel contacted District's ESY Program Manager, E.B., on June 28, 2011, regarding Student. [REDACTED] identified a school for provision of ESY services for Student as the result of that contact. On June 29, 2011, E.B. contacted the District's Bureau of Transportation regarding the provision of bus service for Student to the ESY school. Bus service was coordinated to begin July 7, 2011 to pick Student up and drop him off at his home. Student's ESY was to begin on July 7 and last for 4 weeks. Bus service could not be provided to or from Student's home daycare because the daycare has to be requested and approved during the regular school year, and Student had not been placed during the regular school year, and no exceptions are made. The pick up and drop off locations must be the same. [REDACTED] did not contact Parents or their case workers regarding ESY because when cases come to her from the District's attorney, the attorney contacts the parents. [REDACTED]

District counsel left a message for [REDACTED] the week of July 4, 2011 regarding ESY for Student, but K.S. was on vacation at that time. Upon her return she left 2 messages for the principal at the school designated for ESY, but her calls were not returned. Because Parents were not at home during the day due to Mother's work and Father's therapy, they needed bus service to and/or from Student's home daycare. The only way Parents can personally transport Student is by public transportation. Because of the late date, Parents' inability to visit the ESY school before starting the program, and the restriction on pick-up and drop off of Student at home only, Parents and their representatives decided that they could not accept the ESY services being offered at that time. (K.S.)

Conclusions of Law

At a due process hearing convened pursuant to the provisions of the Illinois School Code, it is incumbent upon the District to present evidence that it has provided or has offered to provide the student in question with a free appropriate public education, commonly referred to as *FAPE*, in accordance with and at the times relevant to the stated issues in the case. *ILCS 5/14-8.02a(g-55)(2008)* An appropriate education is one that is reasonably calculated to provide the student with meaningful educational benefit, as based upon an individual education plan, or IEP, developed by an IEP team, including the student's parents. *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176 (1982) The school district is required to follow procedures that are

designed to allow the parents to participate in the development of the IEP. The applicable procedures are set forth in 34 CFR 300.300-.328(2006) and 23 ILAC 226.110-.350(2007).

The burden of persuasion in a special education due process hearing falls upon the party seeking relief, in this case Parents. *Schaffer v. Weast*, 546 U.S. 49(2005)

Issue No. 1

District violated Student's right to a free appropriate public education by failing to evaluate and identify Student as eligible for special education and related services and develop and implement an IEP or IFSP no later than his third birthday.

Each Illinois school district has what is known as a *Child Find Responsibility* pursuant to 23 ILAC 226.100(2007) and 34 CFR 300.111(2006), which requires that it actively seek out and identify all children from birth through age 21 within the district who may be eligible for special education and related services. In meeting its obligation, it is required to engage in ongoing coordination with early intervention programs to identify children from birth through two years of age who have or are suspected of having disabilities in order to ensure that an IFSP or an IEP is in place for implementation by the child's third birthday. 23 ILAC 226.100(a)(3), 226 ILAC 226.260(2007) When a child has an IFSP in place prior to his third birthday, the district and the parents may agree to continue the use of that IFSP as the child's IEP. 23 ILAC 226.250(2007)

Procedural violations of the special education laws alone cannot be deemed a denial of FAPE unless the evidence proves that the violations impeded the student's right to FAPE, the parents' right to participate in the decision making process, or caused student to be deprived of an educational benefit. Otherwise, a hearing officer's determination of whether FAPE was received must be based on substantive grounds. 20 U.S.C. 1415(f)(3)(E)(2007); 34 CFR 300.513(a)(2006)

The preponderance of the evidence supports Parents' position that District did not meet its child find obligation in this case, with the result that Student was deprived of FAPE. District has conceded that it did not perform a timely evaluation of Student and that it did not provide Student with special education and related services beginning on his third birthday as required, even though he was enrolled in an early intervention program within the District and Parents and their case workers and the E.I. provider attempted to get District to address Student's need for evaluation and placement. District also had the option of simply continuing Student's existing IFSP but did not do so, with the result that no programming was provided for Student beyond his third birthday. All of the testimony presented by Parents' witnesses evidences the need for services to have been provided in a consistent and timely fashion.

Issue No. 2

The IEP of June 10, 2011 violates Student's right to a free appropriate public education because it fails to include:

- A. speech/language therapy sufficient to address Student's unique individual needs.**
- B. occupational therapy sufficient to address Student's unique individual needs.**
- C. Extended School Year Services for the summer of 2011.**
- D. Compensatory services to address the lack of service provision from February 5 through June 10, 2011.**

Special education is instruction conducted in the classroom, home, and other settings specially designed—meaning that its content, methodology, and delivery is adapted-- to meet the unique needs of the specific disabled child. 34 CFR 300.39(2006); see also the discussion in *T.H. v. Bd. of Educ. of Palatine*, 55 F.Supp. 830 (N.D. Ill. 1999) The *IDEA* identifies a number of supports and related services to be provided by the school district as part of a free appropriate public education if necessary to allow a child in need of special education to benefit from special education, including, although not limited to, early identification and assessment of a child's

disabilities, speech-language pathology, audiology, assistive technology devices and services, occupational therapy, counseling services, medical services for diagnostic and evaluation purposes, school nurse and social work services, and parent, staff, and student training. 23 ILAC 226.75(2007); 34 CFR 300.5-.6, .34, .125.(2006)

Issues 2(a) and (b) Speech/Language and Occupational Therapy Services

The preponderance of the evidence in this case supports Parents' contention that the IEP developed for Student on June 10, 2011 did not include speech/language and occupational therapy sufficient to address Student's significant sensory-motor and language deficits. The E.I. providers who testified at hearing were knowledgeable, experienced, and well-qualified to determine Student's related services needs, and their recommendations were based upon having evaluated and worked extensively with Student during his birth to three programming. They were independent of either of the parties to this case and evidenced no reason to be biased for one party or the other. The District, on the other hand, did not call any District personnel to testify on its behalf who had actually evaluated Student or who had been in attendance at either the June 2 or June 10 IEP meeting. Rather, its only witnesses were department supervisors, an SLP and a physical therapist, who had had no contact with the Student and whose only involvement was review of Student's IEP in preparation for the hearing in this matter.

Issue 2(c) ESY

Extended School Year Services beyond the regular school year, or ESY, must be made available to each special education student as needed to provide FAPE. 34 CFR 300.106(2006) Each IEP must include a statement as to whether a child requires the provision of services beyond the district's normal school year in order to receive FAPE and provide a description of the amount, frequency, duration and location of the services to be provided. 23 ILAC 226.230(2007) The Illinois State Board of Education, in an analysis of ESY statutes and case law, has advised Illinois school districts that the decision regarding provision of ESY must be based on the individual circumstances of each child and the child's specific needs and that it cannot be based solely on regression-recoupment analysis. It has advised that reliable sources of information for determining the need for ESY include information, observation, and opinions provided by parents and others having direct contact with the student. (P138-148) Likewise, District has provided its own analysis of the ESY requirements and advises the IEP team to consider not only regression/recoupment but other factors, including the interruption of emerging critical skills that would significantly disrupt a child's progress and other factors that present special and unusual circumstances that would prevent the student from attaining goals. (P131-132)

The preponderance of the evidence in this case supports Parents' contention that although Student needed ESY to receive FAPE, in light of his emerging cognitive skills and the special circumstances which caused a deprivation of special education and related services from February 5, 2011 through June 10, 2011, he was wrongfully deprived of ESY during the summer of 2011. The IEP team's reason for denying him ESY—that because District had failed to evaluate, identify, and place him by his third birthday in violation of its own child find obligation, there was no regression/recoupment data to analyze—was blatantly violative of Student's right to FAPE, and it resulted in an even further deprivation of services to which Student had become entitled in February. Clearly, District counsel attempted to remediate the error by personally attempting to put an abbreviated ESY in place for Student with the ESY Manager at the end of June and beginning of July. However, as Parents contend, that attempt turned out to be too little and too late, as Parents were not given time to find out what the ESY placement entailed nor would the District make any adjustments in the transportation to accommodate the family's specific needs for the reason that pick and drop off at the Student's home daycare address had not been approved during the regular school year, even though it was District that deprived Student from being in attendance during the Spring 2011 term.

Issue 2(d) Compensatory Services

A student is entitled to compensatory education and services where appropriate as relief for the deprivation of a free appropriate public education in accordance with the preponderance of the evidence at hearing. 20 U.S.C 1415(i)(2)(C)(iii)(2004); *Evanston C.C.S.D. 65 v. Michael M.*, 356 F.3d 798, 803(7th Cir. 2002), *Petrina W. v. City of Chicago Dist. 299*, 53 IDELR 259(N.D. Ill. 2010)

The preponderance of evidence in this matter supports Parents' contention that the IEP team should have been permitted to consider the need for compensatory services for Student at his IEP meeting and to include those services in his IEP of June 10, 2011. The team was clearly aware of the potential need to include these services in Student's IEP when the form for same was partially completed and provided to [REDACTED] at the June 2 eligibility conference. That form indicates the need for services due to the delay of the District in programming for Student. It was prevented from doing so by its counsel, however. Had the services been allowed, the IEP could have been implemented immediately in an ESY program. The failure to allow inclusion of comp ed, as well as ESY to provide the comp ed, in the IEP further delayed the provision of needed services to Student.

In the *Petrina W.* case, cited above, the Northern District of Illinois has indicated a preference for the flexible, individualized approach to the determination of compensatory education as set forth in *Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). The Orders below are crafted in accordance with the evidence presented at hearing, and taking into consideration the Student's age and present circumstances, including the fact that his regular school year will begin in early September, at which time he will be attending a public special education preschool program in the District for 2 1/2 to 3 hours each day and will be traveling by school bus to and from preschool. It also takes into account his comfort with his present home daycare environment and the other children in that environment and his comfort and familiarity with his former [REDACTED] providers and theirs with him. For these reasons the orders do not mirror the precise requests for relief of Parents and their attorneys as set forth in the Pre-Hearing Conference Report and Legal Brief in this cause in regard to the request for enrollment in a private developmental play group for five days per week and 60 minutes per week of private social work services.

IT IS THEREFORE ORDERED:

1. That Student's IEP dated June 10, 2011, now scheduled to be implemented by District beginning on or about September 6, 2011, shall be revised as follows for timely implementation:
 - A. Speech/language services shall be provided by a certified speech/language pathologist for a total of 90 minutes per week, including 60 minutes of direct individual therapy outside of the classroom and 30 minutes in the classroom during the regular school day; and
 - B. That Student shall receive 60 minutes per week of direct occupational therapy services from a certified occupational therapist during the regular school day.
2. That Student shall be provided with the following services outside of his regular school day for a period of 18 weeks, beginning no later than August 15, 2011, in compensation for the deprivation of FAPE from February 5, 2011 through June 10, 2011 at District expense:
 - A. 60 minutes per week of private speech/language therapy to be provided in his home or home daycare;
 - B. 60 minutes per week of private occupational therapy to be provided in his home or home daycare; and
 - C. 300 minutes per week of private developmental therapy provided in his home or home daycare.
3. That District shall provide proof of compliance with the above Orders to the Illinois State Board of Education, Program Compliance Division, 100 N. First Street, Springfield, IL 62777-0001 on or before August 26, 2011.

DATED: July 29, 2011



Stacey L. Stutzman
Impartial Hearing Officer

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 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 aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 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 the decision of the impartial due process hearing officer is mailed to the parties.

CERTIFICATE OF SERVICE

The undersigned due process hearing officer certifies that she uploaded this Decision and Order onto the ISBE SEDS and emailed it to counsel for the parties and to ISBE on July 29, 2011, and served copies of the aforesaid Decision and Order upon Parents, Parents' counsel, District's counsel, and the Illinois State Board of Education at their respective addresses by depositing same with the United States Postal Service at Libertyville, IL, certified mail postage prepaid, on July 29, 2011 before 5:00 p.m.



Stacey L. Stutzman
Impartial Hearing Officer