

Case Number: 2011-0399

[Redacted] vs. [Redacted]

Hearing Officer: Joseph P. Selbka

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

## Impartial Due Process Hearing Decision Cover Page

Instructions: Complete this form and return it along with the decision. The information collected on this form will be used for the purpose of indexing the decision by subject matter as required by 23 Illinois Administrative Code 226-695

District Name [Redacted] Phone: [Redacted]  
Superintendent [Redacted] ki  
Address [Redacted]  
Represented by [Redacted]

Parent Name [Redacted] Phone: [Redacted]  
Address [Redacted]  
Represented by [Redacted] Equip for Equality

**Date and Timelines**

Date of Written Request: 05/19/2011  
Date of Pre-hearing Conf: n/a

Date of Hearing: 06/03/2011 to 6/3/2011  
Date of Decision: 6/13/2011

**Summary of Decision:** In an expedited hearing to determine Student's interim placement, the undersigned found that Student should be placed in an interim summer school placement to allow him to complete his freshman year. The Parent was represented by Equip for Equality. The District proceeded pro se.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)  
) ISBE CASE NO. 2011-0399  
)  
) Joseph P. Selbka  
) Impartial Due Process  
) Hearing Officer

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SPECIAL EDUCATION  
SERVICES

Decision and Order on Expedited Hearing Issues

Facts and Procedural History

1. [REDACTED] ("Student") is a fourteen year old freshman at the [REDACTED] ("District").
2. Student is eligible for special education under the disability term "ED".
3. Student's initial placement was at [REDACTED] in the [REDACTED] Program. The initial placement was set forth in a January 10, 2011, IEP. Student's initial placement was mostly in a self contained special education classroom. However, Student also was mainstreamed for physical education.
4. On March 15, 2011, Student was disciplined for leaving campus and for making racist and sexist comments about fellow students. Student and the District had disagreements over this behavior resulting in Student signing a contract regulating his behavior on March 23, 2011.
5. On April 21, 2011, the District contended that Student swore and damaged some doors on school grounds because the doors were out of order. As a result of this, Student was placed in the equivalent of an in-school suspension for 10 days. The District's in-school suspension program is known as "CIBS." Student's Mother agreed to the suspension.
6. While on suspension in the CIBS placement, the District contended that Student further violated the District's disciplinary rules and Student's behavioral contract by threatening a teacher on May 10, 2011.
7. In response to the incident on May 10, the District permanently changed Student's placement to the in-school suspension until May 25, 2011, and to a therapeutic day school thereafter. Student's Mother disagreed with the District's proposed change of placement.
8. The District conducted a manifestation determination review in regard to the April 21 and May 10 incidents. The District found Student's conduct on both occasions was a manifestation of his disability.
9. Student's Mother filed a due process complaint challenging: (1) Student's current placement; (2) Student's pre-disciplinary placement in the Reach Program; and (3) the

procedural methods through which the District changed Student's placement from the Reach Program to the therapeutic day school and CIBS placement.

10. The District has never contended nor offered any evidence: (1) that Student was involved in physical violence against District personnel or students; (2) that Student brought or used a weapon to school; or (3) that Student brought, sold or solicited to sell any illegal drugs to school.

11. Student's Mother filed her due process complaint on May 19, 2011, within ten days of Student's change of placement to CIBS and the therapeutic day school. The District never filed a due process complaint requesting that a hearing officer order Student to remain in his CIBS placement and/or a therapeutic day school.

12. The undersigned conducted a status on May 27, 2011, informing the parties that the undersigned would only determine the status of: (1) Student's interim placement during the course of these proceedings while the underlying dispute between the Parent and the District is decided; and (2) whether the behavior for which Student was disciplined for was a manifestation of his disability. The undersigned also sent out a prehearing notice governing the expedited portion of the hearing.

13. On June 1, 2011, [REDACTED] appeared on behalf of Student's Mother. Ms. Shapiro made multiple motions to continue the expedited hearing. However, the undersigned denied [REDACTED] motions to continue on the basis that an expedited hearing must be conducted on extremely tight timelines as more fully set forth in the e-mail correspondence between the parties.

14. The undersigned conducted a hearing on June 3, 2011. At the hearing, the parties stipulated that the behaviors at issue in this case were a manifestation of Student's disability.

15. At the hearing, the parties also stipulated that the REACH program would end within a few days of the hearing due to the summer break.

16. The parties stipulated that Student will not be able to complete his freshman year as a result of his inability to attend his REACH placement in May, 2011. The parties stipulated that, over the summer, Student would receive: (1) five hours of direct tutoring per subject for English, biology and world history. Student shall thus receive 15 hours total of direct tutoring in English, biology, and world history; (2) Student's math final may be retaken at the Student's discretion upon receipt of his final grade; (4) Student will take his physical education final examination on June 6, 2011, at 9:00 a.m. at the District's Alternative School; (4) Student will be able to take final examinations after the tutoring is completed for each subject at any time before August 20, 2011; (5) Timing of the tutoring and administration of the finals are to be determined at Student's discretion, except that the tutoring and finals shall be at normal school hours at the [REDACTED] [REDACTED] (6) Student shall be able to keep one set of books at home until he

completes his final exams. At that point, the books will be returned to school; (7) Student shall stay home from school for the rest of the regular school year.

17. The parties stipulated that the following summer placement would be able to make up for the time in the REACH program which Student missed and insure that Student is able to finish his freshman year.

### **Conclusions of Law**

18. A parent has a right to challenge any change of placement for disciplinary reasons and have an expedited hearing to determine the interim alternative placement or stayput placement while the underlying dispute between the parent and district is adjudicated. 34 CFR 300.532(a,c). Specifically, for purposes of this case, a parent is entitled to an expedited hearing for any violation of federal regulations 34 CFR 300.530 or 300.531. *Id.*

19. Under the appropriate federal regulations, after a disciplinary incident which results in a removal from the student's placement for greater than 10 days, the District must conduct a manifestation determination conference. 34 CFR 300.530(e). If the conduct which caused the disciplinary infraction was a manifestation of Student's disability, then the District must place the student back to his/her IEP placement unless the parent(s) and district agree to a different placement. 34 CFR 300.530(f)(2).

20. The IEP placement is thus, for most purposes, the "stayput placement" if the parent chooses to file a due process complaint, provided the parent preserves her rights as set forth below.

21. Federal special education law requires that a student remain in the same placement during the pendency of a due process hearing request. 20 U.S.C.A. 1415(J). In this case, the issue is what the student's placement should be for the purpose of the "stayput" requirements.

22. Upon developing an IEP which contains changes in placement, the district may implement the IEP after giving 10 days notice to the parent. 34 CFR 300.503, 23 Ill.Admin. Code 226.520.

23. Because of these regulations, the State Board of Education; in its guide to special education for parents, warns parents that to maintain a placement through "stayput," parents must file for due process within 10 days of a proposed IEP being adopted by the District. Educational Rights and Responsibilities: Understanding Special Education in Illinois, Illinois State Board of Education (June, 2009), See pg. 101.

24. In determining the parties' rights under state and federal special education laws, the undersigned must look at the overall statutory scheme to determine the requirements of the law. *J.J. Garcia v. Board of Education of the Town of Ridgefield*, 558 IDELR 152, 558 LRP 8468 (D.Conn. 1986). In general, a parent should be able to use parental

remedies provided by the regulations or statute to obtain the “stayput placement” of the child allowed by IDEA. *Id.*

25. The stayput placement is determined by the language of the IEP—not the services which a district is providing at the exact moment the due process request is filed. *John M. v. Board of Education of Evanston Township High School District 202*, 502 F.3d 708, 715 (7<sup>th</sup> Cir. 2007).

26. A school district can override the requirements of 34 CFR 300.530(f)(2) and change a student’s placement unilaterally for disciplinary reasons if and only if: (1) the student carried a weapon or possessed a weapon on school grounds; (2) possessed, used solicited to sell or sold illegal drugs on school grounds or during school related activities; or (3) caused serious bodily injury to another person while on school grounds. 34 CFR 300.530(g). Otherwise, to change a student’s placement during the course of due process proceedings, the district must file a due process complaint and prove to a hearing officer that maintaining the student’s IEP placement is substantially likely to result in injury to the student or other persons. 34 CFR 300.532(a).

27. An expedited hearing must occur between 15 and 20 days of the filing of the due process complaint. 34 CFR 300.532(c)(2). A hearing officer has no authority to continue expedited due process proceedings. *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*. 109 LRP 41916 (OSERS 6/01/09). Expedited hearings are also governed by 105 ILCS 5/14-8.02b of the School Code.

28. If a hearing officer finds that the District violated Section 300.530 of the federal regulations, the hearing officer can either: (1) place a student back into his/her original IEP placement; or (2) place the student into an alternative placement if the hearing officer determines that there is a substantial likelihood that return to the original IEP placement will result in an injury to the student or to others. 34 CFR 300.532(b)(2).

29. In general, an interim placement should last a maximum of 45 days, but the parties can agree to a longer interim placement. 34 CFR 300.532(b)(2)(ii); 34 CFR 300.533.

30. In regard to the burden of proof in a special education proceeding, the Supreme Court has held that the ultimate burden of persuasion lies with the party filing the due process complaint. *Schaffer v. Weast* 546 U.S. 49 (2005). In general, Illinois law has placed a heightened burden on school districts to prove by substantial evidence that the interim placement is appropriate. 23 Ill.Admin.Code 226.655. However, in this case, the Parent is claiming that the District had no authority whatsoever to change Student’s placement. For that issue (and the issue of what remedy Parent is entitled to if she proves her case), the undersigned finds that the Parent must prove her case by a preponderance of the evidence.

#### **Issues to be Decided and Application of Fact to Law**

31. The sole issues to be decided are: (1) whether the District acted properly to permanently change Student's placement<sup>1</sup>; and, if not, (2) what Student's interim placement should be while the underlying dispute between the District and Student's Parent is resolved.

32. The undersigned finds that the District violated 34 CFR 300.530(g) by failing to return Student to his January 10, 2011, IEP placement without the special causes set forth in Section 300.530(g) or the agreement of the Parent.

33. The undersigned finds that the District did not challenge Student's January 10, 2011, IEP placement by filing a due process complaint to change Student's interim placement during the course of the underlying dispute between the parties.

34. The undersigned finds that the Parent filed her due process complaint within 10 days of the District's attempt to change Student's January 10, 2011, IEP placement-- thus preserving Student's right to the January 10, 2011, IEP placement in REACH until the Parent's due process complaint has been adjudicated.

35. In light of the above stated findings, the undersigned finds that the Parent has met her burden of persuasion and is entitled to relief. The District violated the stayput provision of Special Education laws

36. The undersigned finds that Student is unable to complete his studies due to the REACH program expiring, and therefore, Student would suffer an injury by being placed back in his January 10, 2011 IEP placement<sup>2</sup>.

37. The undersigned therefore invokes his discretionary authority to place Student in the stipulated summer placement. Because the parties agreed, the stipulated placement will be in place until August 20, 2011 (past the 45 day deadline).

### **Order**

38. The District will provide Student with the following placement and services over the summer under the following conditions: (1) five hours of direct tutoring per subject for English, biology and world history. Student shall thus receive 15 hours total of direct tutoring in English, biology, and world history; (2) Student's math final may be retaken at the Student's discretion upon receipt of his final grade; (4) Student will take his physical education final examination on June 6, 2011, at 9:00 a.m. at the District's Alternative School<sup>3</sup>; (4) Student will be able to take final examinations after the tutoring is completed for each subject at any time before August 20, 2011; (5) Timing of the tutoring and

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<sup>1</sup> Because the undersigned finds that the District had no authority to change Student's placement during the course of the underlying proceedings, there is no need to evaluate the appropriateness of Student's CIBS placement.

<sup>2</sup> While this section has traditionally been interpreted to refer only to physical injury, the language of the regulation contains no such limitation.

<sup>3</sup> Although this order is being sent out after June 3, 2011, the parties stipulated to this placement and I informed the parties that this was to be a condition of the stipulated order.

administration of the finals are to be determined at Student's discretion, except that the tutoring and finals shall be administered at normal school hours at the [REDACTED] Center; (6) Student shall be able to keep one set of books at home until he completes his final exams. At that point, the books will be returned to school; (7) Student shall stay home from school for the rest of the regular school year. The District shall provide proof of compliance with this order to the Illinois State Board of Education, Compliance Division, by August 30, 2011.

#### **Right to Request Clarification**

39. Section 14-8.02a(h) of the School Code, allows the hearing officer to retain jurisdiction after the issuance of the decision for the sole purpose of considering a request for clarification. A 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 parties and to the Illinois State Board of Education. The request shall operate to stay the implementation of those portions of the decision for which clarification is sought. I shall issue a clarification of the specific portion of the decision or issue a partial or full denial of the request in writing within ten days of receipt of the request and mail copies to all parties to whom the decision was mailed.

#### **Finality of Decision**

40. This decision shall be binding upon all parties.

#### **Right to File Civil Action**

41. Any party to this hearing aggrieved by the final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS 5/14-8.02a(i) that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.

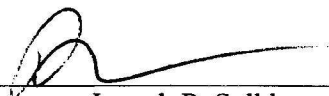
**CERTIFICATE OF SERVICE**

**In the Matter of:** [REDACTED] vs. [REDACTED]  
ISBE Case Number: 2011-399

The following parties have been served a copy of the **Decision and Order on Expedited Hearing Issues.**

[REDACTED]

Ms. Mary Long  
Illinois State Board of Education  
100 North First Street  
Springfield, IL 62777-0001

  
\_\_\_\_\_  
Joseph P. Selbka  
The Hearing Officer

6/13/2011  
Date