

Case Number: 2012-0126

[REDACTED] vs. [REDACTED]  
Hearing Officer: Michael Risen

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

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## Impartial Due Process Hearing Decision Cover Page

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District Name [REDACTED] Phone: [REDACTED]

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Superintendent [REDACTED]  
Address [REDACTED]  
Represented by [REDACTED]

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

### Date and Timelines

Date of Written Request: 09/30/2011  
Date of Pre-hearing Conf: 12/16/2011

Date of Hearing: 03/01/2012  
Date of Decision: March 7, 2012

### Summary of Decision

The Parent filed this complaint alleging three procedural violations related to the District's placement of the Student in a 45-day drug treatment program. The alleged procedural violations included the failure to provide prior written notice and to provide the purpose of a proposed IEP meeting, which included a consideration of a change of placement. The District cross-filed seeking to have the District's recommended placement for a therapeutic day school declared as the Least Restrictive Environment (LRE) for the Student. The undersigned found that the Parent failed to meet the burden of proof on all three issues, thereby denying the requested relief. The undersigned found that the District met the burden of proof that the proposed placement was the LRE for the Student. The undersigned ordered the District to take the appropriate steps to work with the Parent to implement the proposed private therapeutic day placement.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)  
) ISBE CASE NO. 2012-0126  
)  
) Michael Risen  
) Impartial Due Process  
) Hearing Officer

**BACKGROUND**

- 1) On September 30, 2011, the Parent filed this request<sup>1</sup> over a dispute between the Parent and District regarding placement of the Student. The Student is a 17-year-old male whose primary disability is identified as Other Health Impaired (OHI) based on diagnoses of intermittent explosive disorder, ADHD, depressive disorder, oppositional defiance disorder, with a secondary eligibility of emotional disturbance based on diagnosed dysthymic disorder.
- 2) On December 16, 2011, the Pre-Hearing conference was completed. The District submitted the required disclosure documents<sup>2</sup> prior to the Pre-Hearing conference, and the Parent did not submit any documents.
- 3) On December 22, 2012, the District submitted a cross-filed due process complaint notice (DPCN) seeking to have the hearing officer declare that the Least Restrictive Environment (LRE) for the Student is a private therapeutic day school. This DPCN was joined with the Parent's DPCN. Since the Parent's complaint alleged a failure to provide a Free Appropriate Public Education (FAPE), the District bore the burden of persuasion "that it is providing or has offered a free appropriate public education to the student in the least restrictive environment..."<sup>3</sup>
- 4) On February 23, 2012, the Parent failed to meet the 5-business-day deadline that ended at 5:00 PM. The impartial hearing officer (IHO) had provided the Parent with eight reminders relative to the responsibility to present properly filed witness/document lists for both the pre-hearing conference and this deadline.<sup>4</sup> For example, on October 6, 2011, December 16, 2011 and January 17, 2012, the IHO provided the Parent with a Word document and directions to fill in the blanks for each

<sup>1</sup> HO FW pp. 3-8

<sup>2</sup> See HO documents pp. 41-45.

<sup>3</sup> 105 ILCS 5/14 8.02a (g-55).

<sup>4</sup> See HO documents pp. 18, 19, 40, 61-63, 64, 70, 101, 105, and 106.

document that would have enabled the parent to effectively file properly completed witness and document lists. The IHO also offered the opportunity for assistance with completing the forms if the Parent had any questions. The Parent did not respond to any of these reminders or offers of assistance. The District did not acquiesce to the Parent's request to have extra time to file the required disclosure documents. The District timely filed witness and document lists prior to the expiration of the 5-business-day rule on February 23, 2012 at 5:00 PM. Therefore, only the District's documents and witness testimony was admitted into evidence at the hearing. The IHO afforded both parties the right to present opening and closing statements, to cross-examine all witnesses, and to have the opportunity for rebuttal questioning of all witnesses.

- 5) On February 24, 2012, the District filed a motion to dismiss for failure to prosecute. The IHO denied the motion due to the District's obligation to address the issues of FAPE<sup>5</sup> alleged in the Parent's DPCN and to address the LRE issue in its cross-filed DPCN.
- 6) On Thursday, March 1, 2012, at 9:00 AM, the IHO convened the impartial hearing at [REDACTED] located at [REDACTED]. [REDACTED] The IHO has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02a *et seq.*, 23 Illinois Administrative Code 226.600 *et seq.*, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, and the IDEA regulations, 34 C.F.R. §§ 300.1 *et seq.* The IHO admitted into evidence District documents and witness lists submitted prior to the expiration of the 5-business-day rule. The record also consisted of documents as detailed in the IHO Exhibit List, as provided to the parties in an email dated February 26, 2012,<sup>6</sup> after no objection from either party. [REDACTED], Mother of the Student, represented the Student (Parent). Also attending was the Student (FW) and the Student's grandmother, [REDACTED]. Upon request and with agreement from the District, the IHO allowed the Student's Grandmother to question witnesses along with the Mother of the Student. Thus, this decision generically refers to both the Mother and Grandmother as the Parent. [REDACTED], Esq., represented the [REDACTED].

<sup>5</sup> 105 ILCS 5/14 8.02a (g-55).

<sup>6</sup> HOFW 112

[REDACTED] (District). The Parent chose to have a closed hearing. A full transcript was completed but unavailable to IHO for the writing of the decision.

- 7) Testifying at hearing were: [REDACTED], Director of Special Education (referred to herein under her initials [REDACTED]), [REDACTED], Assistant Principal [REDACTED], and [REDACTED], Social Worker [REDACTED]

#### ISSUES

- 8) The issues identified in the Parent's DPCN and agreed to during the Pre-Hearing Conference are all preceded by the following statement: *Did the District fail to provide the Student with a Free Appropriate Public Education (FAPE) by:*
- i. *Transferring the Student to a drug rehabilitation program at the [REDACTED] for 45 days without providing prior written notice or the consent of the Parent;*
  - ii. *The Director of Special Education informing the Parent that the Student's placement was changed to the [REDACTED] effective 9/29/11 without providing prior written notice to the Parent and seeking parental input;*
  - iii. *Sending a notification, dated 9/26/11, of the IEP conference, scheduled for 10/7/11, that failed to include the purpose of the meeting which was to consider a change in placement?*
- 9) *The issue from the District's cross filed DPCN: Was the District's proposed placement of the Student in a private therapeutic day school the LRE for the Student.*

#### PROPOSED RELIEF

- 10) Should the Parent prevail at the hearing, the Parent sought to have the IHO:
- i. *Declare that the Student's placement in effect prior to the Student's placement at [REDACTED] was the LRE for the Student;*
  - ii. *Order that the last agree-to IEP between the District and the Parent become the current IEP for the Student, and that the Parent and District work cooperatively to develop a plan to address the homework completion concerns of the Parent, including making up any work for credit lost during the suspension of the Student during the first semester of the 2011-12 school year;*
  - iii. *Order the District to provide the necessary psychological therapy, counseling, and other mental health services necessary to ameliorate the diagnoses that were the basis for the Student's IDEA classifications;*
  - iv. *Order the District to complete a Functional Behavior Assessment (FBA) of the Student and develop and implement a Behavior Intervention Plan (BIP) for the Student.*

11) Should the District prevail at the hearing, the District sought to have the hearing officer:

- i. *Declare that the Student's placement in a private therapeutic day school is the LRE for the Student.*

### FINDINGS OF FACT

- 1) In the Fall, 2010, the Student quit the football team<sup>7</sup> over a dispute about playing time. Soon thereafter, the Student's behavior incidents began to increase.<sup>8</sup>
- 2) On April 1, 2011, the Student faked his death on Facebook. In response, the District provided counseling to the Student to enable the Student to understand the consequences of his actions.<sup>9</sup>
- 3) On April 6, 2011, the District paid for an independent educational evaluation by [REDACTED]  
[REDACTED].<sup>10</sup>
- 4) On April 20, 2011, the District convened an IEP meeting.<sup>11</sup> At the meeting, the District and Parent agreed to place the Student in the District's Anchor program. A self-contained program for students with emotional disturbance, Anchor consists of three separate classrooms, each staffed by a teacher and a teacher aide. The Anchor program includes individual and group counseling and serves approximately thirty students.<sup>12</sup>
- 5) On July 29, 2011, the District held a second EP meeting.<sup>13</sup> At the meeting, the District agreed to Parent's requested placement of regular education with social work support.<sup>14</sup>
- 6) September 22, 2011, The Student's teacher sent the Student to the Dean's office for being late to class and smelling of marijuana.<sup>15</sup> When the Dean confronted the Student, the Student engaged in gross misconduct resulting in a suspension of five (5) days.<sup>16</sup>

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<sup>7</sup> Testimony of DS

<sup>8</sup> SD [REDACTED]

<sup>9</sup> Testimony of SR.

<sup>10</sup> See report at SD pp. 168-169.

<sup>11</sup> SD [REDACTED]

<sup>12</sup> Per testimony of SR.

<sup>13</sup> SD [REDACTED]

<sup>14</sup> Testimony of SR.

<sup>15</sup> Testimony of SR and SA

<sup>16</sup> SD [REDACTED]

- 7) On September 26, 2011, the District sent the Parent a Notice of Conference scheduled for October 7, 2011, for the purpose of reviewing the Student's IEP, conducting a manifestation determination review (MDR), conducting a functional behavior assessment (FBA), completing a behavior intervention plan (BIP), and determining the Student's educational placement.<sup>17</sup>
- 8) On September 30, 2011, Parent filed the DPCN.<sup>18</sup>
- 9) On October 7, 2011, an IEP meeting was conducted.<sup>19</sup> The undersigned finds that the IEP team concluded that the Student's behaviors described herein were a manifestation of his disability. Further, the IEP team and Grandmother agreed (Grandmother emphasized this was contingent on the Mother's future agreement as well) that the Student needed additional special education supports and the District recommended placement in a therapeutic day school, specifically, [REDACTED]. The District set up a visit to the recommended placement with the Parent and the Student. The placement would be supported by the District with door to door transportation, attendance assistance to encourage the Student to attend school that would be provided by District personnel who would ride the bus with the Student, and that the District was willing to support the Student until his 22<sup>nd</sup> birthday.<sup>20</sup> The placement was never implemented as the Parent had filed this DPCN and then disagreed with the placement after visiting [REDACTED].<sup>21</sup>
- 10) The undersigned finds that the District presented uncontradicted testimony that the Student exhibits significant behavior, attendance, and respect issues that have escalated over the past year since the incident of the April Fool's joke in 2011.<sup>22</sup>
- 11) The undersigned finds that the District presented uncontradicted testimony that the Student suffers from a form of depression, known as dysthymic disorder, and other emotional disturbances including paranoia, intermittent explosive disorder, ADHD, and oppositional defiance disorder.<sup>23</sup>
- 12) The undersigned makes a credibility finding that the District has focused its efforts on providing help and support for the Student through the programs and services

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<sup>17</sup> SD 76.

<sup>18</sup> HO FW 3-8.

<sup>19</sup> SD 77.

<sup>20</sup> Testimony of SR.

<sup>21</sup> Ibid.

<sup>22</sup> Testimony of SR, SM and DS.

<sup>23</sup> Ibid.

provided and/or recommended. The undersigned bases this credibility finding on the lack of any evidence to the contrary, the credible and uncontradicted testimony cited by District personnel, and a review of the Student's IEP's as submitted in the District's documents.

- 13) The undersigned finds that the Student engaged in behaviors on April 1, 2011, September 26, 2012 and on an on-going basis as documented by the District<sup>24</sup> and that these behaviors were a manifestation of the Student's disability. This finding is based on the credible and uncontradicted testimony of the District staff and the report submitted by ██████████<sup>25</sup>
- 14) The undersigned finds that the District provided the Parent with an independent educational evaluation at public expense in an effort to secure independent assessment of the Student's needs and determine if there were any additional recommendations concerning the Student's proper placement and supportive services. The undersigned bases this finding on the uncontradicted testimony of the District staff and the uncontradicted report by ██████████
- 15) The undersigned finds that the District conducted IEP meetings on April 20, 2011, July 29, 2011, and October 7, 2011. The undersigned finds that the IEP's conducted included present levels of performance, transition plan for the Student, Goals and Objectives/Benchmarks that were specific, objective and measurable, included educational accommodations and supports, concerns of the Parent, and MDR, FBA and BIP in each IEP. This finding is based on the uncontradicted testimony of the District staff and a review of the IEP's submitted in the District's documents.
- 16) The undersigned finds that either the Student's Mother or Grandmother attended each of the IEP's submitted as evidence by the District. The Mother attended the July 29, 2011, IEP meeting via teleconference per the notes and signature pages.<sup>26</sup> The undersigned finds that the Mother or Grandmother were allowed to participate as equal partners in the IEP process in all instances reviewed. The undersigned bases this finding on the uncontradicted testimony of the District staff and the "other notes" sections of each IEP submitted.
- 17) The undersigned finds that the following facts dictated the need for the District to examine the Student's current placement:

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<sup>24</sup> SD 184-187.

<sup>25</sup> SD 168 and 169.

<sup>26</sup> SD 77, 102 and 130.

- a. The Student's erratic behaviors over the course of the past 18 months;<sup>27</sup>
- b. The Student's documented and significant behavior incidents on April 1, 2011 and September 22, 2011;<sup>28</sup>
- c. The Student's extreme absenteeism and resulting failure in all but one of his classes during his senior year,<sup>29</sup> and
- d. The evaluation and findings of [REDACTED].<sup>30</sup>

### CONCLUSIONS OF LAW

- 18) State and Federal special education laws are set out in Article 14 of the Illinois School Code, 105 ILCS 5/14-8.02a and the Individuals with Disabilities Education Act, 20 U.S.C.A. 1400 *et seq.* (IDEA).
- 19) With regards to the burden of proof in due process proceedings, the U.S. Supreme Court has held that the ultimate burden of persuasion lies with plaintiff, or person filing the complaint.<sup>31</sup> 105 ILCS 5/14-8.02a (g-55) places a burden on school districts in that the district bears the initial burden of production to show that the needs of the student are identified and that the program services are appropriate and available.<sup>32</sup> If the District meets this initial burden of persuasion, then consistent with *Loch, et al., and Kerry M.*, the burden of proof lies with the parent as the filing party.<sup>33</sup>
- 20) For procedural violations, if preponderantly proven, the IDEA instructs that Districts can only be found in violation of a FAPE if the procedural violations: 1) impede the Student's right to a FAPE; or 2) deny the student educational benefit; or 3) significantly impede the parents' participation in the decision-making process regarding FAPE.<sup>34</sup> The undersigned concludes that the Parent failed to provide any, much less preponderant, proof the allegations that asserted that the District had denied the Student a FAPE by:
  - i. *Transferring the Student to a drug rehabilitation program at the [REDACTED] for 45 days without providing prior written notice or the consent of the Parent;*

<sup>27</sup> SD 184-187.

<sup>28</sup> SD 151 and 188.

<sup>29</sup> SD 182

<sup>30</sup> SD 168 and 169

<sup>31</sup> *Schaffer v. Weast* 546 U.S. 49 (2005).

<sup>32</sup> 105 ILCS 5/14-8.02a (g-55).

<sup>33</sup> "Cf." *Loch, et al., v. Edwardsville SD #7*, 327 Fed.Appx. 647, 2009 WL 1747897 (C.A.7 (Ill.)), p.5 and *Kerry M. v. Manhattan SD #114*, 2006 WL 2862118 (N.D.Ill.),p.5.

<sup>34</sup> 20 U.S.C. § 1415 (I) (4).

- ii. *The Director of Special Education informing the Parent that the Student's placement was changed to the [REDACTED] effective 9/29/11 without providing prior written notice to the Parent and seeking parental input;*

The record lacks evidence that either of these placements ever occurred. Instead, the special education director's uncontradicted testimony was that the only placements that the District considered or recommended for the Student were the [REDACTED] [REDACTED] program, then a regular education program with resource support, and finally the currently recommended private therapeutic day school. The undersigned finds that in all three instances the Parent (i.e., the Mother or the Grandmother) were in attendance at the IEP meetings to discuss the services and placements for the Student. Moreover, the special education director credibly testified that the placement for drug rehab at the [REDACTED] could not have occurred because this program does not accept students for drug-related issues. Thus, for lack of proof of these two alleged procedural violations, the IHO need not, and does not, proceed to apply the IDEA's requisite further standard for denial of FAPE. Similarly, and with respect to the third issue of:

*Sending a notification, dated 9/26/11, of the IEP conference, scheduled for 10/7/11, that failed to include the purpose of the meeting which was to consider a change in placement?*

The undersigned concluded that the District notice<sup>35</sup> and dated 9/26/11 provided the Parent with proper notification of the 10/7/11 IEP conference, thus conforming with rather than committing a violation of the IDEA's pertinent procedural requirement. More specifically, said notification included an "X" in the box next to the statement: "Requires a change of special education and/or related services/educational placement as indicated in the IEP"<sup>36</sup> Further, this same document contains an "X" in the box labeled "Other" followed by the inserted statement: "Private Day Therapeutic Program with Transportation, social Work and Behavior Intervention Plan." Thus, for lack of proof of this alleged procedural violation, the IHO need not, and does not, proceed to apply the IDEA's requisite further standard for denial of FAPE

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<sup>35</sup> SD 76

<sup>36</sup> SD 74.

21) IDEA requires that all students be educated to the “maximum extent appropriate”<sup>37</sup> with the Student’s non-disabled peers. More specifically, the IDEA provides that “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>38</sup> Based upon the factual findings in the paragraphs herein, the IHO concludes that the District reasonably determined that the program and services provided to the Student were no longer enabling the Student to receive educational benefit nor was “education in regular classes with the use of supplementary aids and services...” any longer appropriate, thus making a new IEP meeting appropriate and necessary. Based upon the uncontradicted testimony of the District’s staff and the clinical diagnosis of the independent evaluator paid for at public expense, the IHO concludes that the District’s determination that the Student requires more intensive therapeutic intervention in order to receive educational benefit is warranted. Thus, the undersigned concludes that the District met the required burden of proof<sup>39</sup> and therefore further concludes that the LRE for the Student is a private therapeutic day school.

### ORDER

- 22) The District need not take any action regarding the three procedural issues submitted in the Parent’s complaint.
- 23) All of the Parent’s requests for relief are denied. The District need not take any further action in regard to Parent’s other requests made in the due process complaint.
- 24) Within 14 days of receipt of this decision, the District shall convene and IEP team meeting and coordinate with the Parent the steps necessary to implement the District’s proposed placement at the Hopewell Academy<sup>40</sup> including door to door transportation.
- 25) The District shall provide proof of compliance with this order to the Illinois State Board of Education, Compliance Division, by April 20, 2012.

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<sup>37</sup> 20 U.S.C. §1412 (2) (39).

<sup>38</sup> 34 C.F.R. §300.114(a)(ii).

<sup>39</sup> *Schaeffer*, (2005) Op cit.

<sup>40</sup> Or other ISBE approved private therapeutic day school if agreed to by both the District and the Parent.

### RIGHT TO REQUEST CLARIFICATION

26) Section 14-8.02a(h) of the Illinois 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. The undersigned will 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 email copies of the clarification as an attachment and sent via USPS, 1<sup>st</sup> class, prepaid mail, copies to all parties to who the decision was mailed.

### FINALITY OF DECISION

27) This decision shall be binding on all parties.

### RIGHT TO FILE CIVIL ACTION

28) 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(1) and provided that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.



D. Michael Risen, Impartial Due Process Hearing Officer  
Entered: March 7, 2012

D. Michael Risen  
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**CERTIFICATE OF SERVICE**

The undersigned certifies under oath that on March 7, 2011, the following parties received via email attachment and certified mail, prepaid, return receipt, the attached Impartial Due Process Hearing Decision, to the following parties at the following addresses:

1) [REDACTED]

2) [REDACTED]

3) Mr. Andy Eulass, Esq., Due Process Coordinator  
Due Process and Mediation  
Illinois State Board of Education  
100 N. First St.  
Springfield, IL 62777-0001

D. Michael Risen  
D. Michael Risen  
Impartial Hearing Officer