

ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING

SEP 16 2009

Special Education Services

[REDACTED]  
Student

vs.

Case No. [REDACTED]

2008-0362

[REDACTED]  
School District

ANN BREEN-GRECO, Hearing Officer

**DECISION AND ORDER**

This matter is before the undersigned Hearing Officer for a due process hearing concerning the Parents' assertion that the Student has been denied a FAPE. The Hearing Officer has jurisdiction to hear and decide the matter under 105 ILCS 5/14-8.02a, 34 C.F.R. 300.506-509, 23 Ill. Admin. Code 226 Subpart G, and the Individuals with Disabilities Education Act, as amended, 20 U.S.C. 1415 et seq. ("IDEA"). The parties were informed of their rights pursuant to these statutes.

**PROCEDURAL BACKGROUND**

On March 27, 2008, the Hearing Officer sent the District and Parent the pre hearing notice to set the pre hearing as required by Illinois Administrative Code 226.640(a)d. The pre hearing was set for May 16. On May 22 the Hearing Officer re-set the timelines because Parent's attorney needed to review the Student's file in order to file an amended complaint. The parties set a resolution session for May 30.

After the resolution session, the parties requested a continuance in order to continue to attempt to resolve the matter. A pre hearing was set for August 19. The following continuances were also granted: parties again requested a continuance to work on a settlement agreement and the pre hearing was set for September 10 and then re-set for October 1; the parties were working on determining an appropriate placement for the Student and the pre hearing was re-set for October 29; parties were still working on settlement, with respect to Homebound services and placement, and the pre hearing was re-set for November 19; the parties were still looking at possible placements and the pre hearing was set for December 15; the parties were working on a new settlement draft and the pre hearing was set for January 12, 2009; the parties were working on two provisions for the agreement and the pre hearing was set for February 10; the parties were in "phase 1" of settlement which included a consultation and the pre hearing was set for March 19; the parties were waiting for the consultant's recommendations and the pre hearing was set for

April 17; the parties were discussing the recommendations and the pre hearing was set for May 4.

On May 4 the Hearing Officer convened a conference call and recommended a brief continuance to allow the parties to discuss requested relief. The pre hearing was set for May 6. On May 5 the Parent's attorney sent a letter objecting to the continuance of two days. On May 6 the Hearing Officer convened a conference call. The parties were unsure if the case could be settled. Dates were set for pre hearing and hearing. In the order issued regarding this matter, the Hearing Officer stated: "It is noted that the District's attorney objected to setting the date for the hearing after the school year ends because of unavailability of witnesses. However, the District's attorney is not available for hearing prior to the end of the school year because of other hearings. Statutes require that the matter be set for hearing, even though the parties are still attempting settlement. If the parties settle the matter, the dates can be cancelled." The Hearing Officer also noted that the statute does not allow for an extension of the 45-day timelines due to the unavailability of witnesses based on a teachers' contract, which is the reason for the witnesses' unavailability. The pre hearing was re-set for May 12. On May 12 the District requested a continuance and Parent did not object. The parties agreed on May 29 for the pre hearing. On May 29 the parties agreed that they were continuing to discuss settlement and requested a two week continuance. The parties agreed on June 12 for the pre hearing.

The pre hearing was held on June 12 by phone. On June 15, 2008, the Hearing Officer issued a pre hearing conference report confirming that the parties agreed on June 25 at 9:00 a.m. for a continued pre hearing. At the June 25 continued pre hearing, the Hearing Officer offered June 29 and July 27 as hearing dates but one of the attorneys was not available. The parties confirmed June 30 as the first date of hearing and did not agree on other dates. Subsequently, the parties confirmed July 27, August 3 and 26 for hearing dates. The hearing proceeded on those dates. The parties conducted closing arguments on August 26 and offered the Hearing Officer a transcript of the proceedings. Based on calculating when the transcript would be available to the Hearing Officer, the parties waived the ten-day requirement for issuance of a decision and set September 14 as the date for the decision to be issued. The decision is issued on September 14.

### **ISSUES AND RELIEF REQUESTED**

Parent asserts that the District failed to provide: (1) sufficient related services (2) appropriate assistive technology; (3) appropriate transition plan; (4) progress reports; (5) inadequately addressed the Student's behavioral needs; (6) failed to have a regular education teacher attend the Student's IEP meetings; (7) attempted to change the IEP to take away the Student's individual aide; (8) failed to provide an appropriate IEP; (9) failed to provide an appropriate placement; (10) failed to provide a FAPE.

Parent as relief seeks payment for an Applied Behavior Analysis (ABA) home program, based on [REDACTED] recommendations, consisting of up to 30 hours of instruction per week on the Student's goals; seven hours per month of case manager consultation; fifteen hours of

consultation per year by [REDACTED] initial workshop to train instructors and set up the Student's ABA program. Additionally, Parents seek two years of compensatory services and an independent assistive technology evaluation.

## **FINDINGS OF FACT AND ANALYSIS**

The District has the burden of presenting evidence that the special education needs for the Student have been appropriately identified and that the special education program and related services proposed to meet the needs of the Student are adequate, appropriate, and available. 105 ILCS 5/14-8.02a(g-55). The Parents, however, have the burden of proof regarding the request for a due process hearing involving a denial of FAPE based on the United States Supreme Court ruling in *Schaffer ex rel. Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) which was analyzed with respect to the relevant Illinois statute (the Illinois School Code) by the Northern District. *Kerry M v. Manhattan School Dist. and the Illinois State Board of Education*, U.S. District Court, Northern District of Illinois, IDELR 194 106 LRP 58547 (September 2006).

The District contends that the District's IEP is an individualized program appropriately tailored to address the Student's needs in that a therapeutic day program would allow him to be educated in the least restrictive environment (LRE). The Parents contend that the District has denied the Student a FAPE and the Student requires an at-home program as recommended by its consultant, [REDACTED] based on 30 hours of ABA per week.

The Student will turn 22 in December 2009. He is designated as severe/profound/autism/other health impaired, and physically handicapped. He attended classes at the current placement for the 2006-2007 school year with his teacher, [REDACTED] who co taught with [REDACTED] in the severe and profound class. [REDACTED] testified that she had reservations as soon as she knew the Student was coming to the school because she knew his history from [REDACTED] School. His twin brother had been there at the same as the Student and the Student would become agitated when he saw his brother. Mother, however, denied it would be an issue because the Student and his brother were to be placed at [REDACTED] a residential home. However, neither his brother nor the Student went to [REDACTED] Prior to this current placement he was attending [REDACTED] School.

[REDACTED] testified that she attempted to implement the [REDACTED] School IEP goals to the best of her ability but often the Student arrived late or was not there. [REDACTED] prepared his report card on November 9, 2006, which reflects that she evaluated the Student on the standard program for the class and not on his [REDACTED] IEP goals. P Ex D11. [REDACTED] the LRE facilitator for [REDACTED] and attendance administrator, testified that progress reports should be based on IEP goals.

On November 13, 2006, a referral was made for Behavior Intervention Specialist (P Ex B13) based on his behavioral profile, described by [REDACTED] as: physically aggressive, self injurious behavior, lack of self control (not having the ability to stop), transition difficulties. The District

enlisted the services of [REDACTED] for assistance, particularly with his aggressive behavior and biting. [REDACTED] testified that he was a danger to himself and other. Both Parents and the co teachers felt that a number of the [REDACTED] suggestions were useless (such as suggesting that when he tried to bite someone to give him an apple to bite). The teachers were already using a number of techniques suggested by [REDACTED] without success. Additionally, according to [REDACTED] she "...was forever following up on the [REDACTED] person...and a second person was brought in." As time went on, according to [REDACTED]'s testimony, the IEP goals were not accomplished.

On December 4, 2006, a new IEP was developed for the Student to revise his goals because they could not be implemented. P Ex C200-207. However, he met goals for sorting. P Ex C206. [REDACTED] felt there was difficulty engaging the Student and different resources were needed. P Ex C162. Additionally, [REDACTED] testified that he had medical issues based on doctors not knowing what medication would help. Safety concerns were expressed during the IEP meeting because the Student was hitting staff and hurting himself. He was not involved in the classroom curriculum. Parents indicated they were following up with his doctor about medication. P Ex C163. The Student was designated as requiring paraprofessional support. P Ex C166. Extended School Year Services (ESY) were recommended. P Ex C165. There was no transition plan attached to the IEP and no regular education teacher attended the meeting. C162. No independent functioning goal is listed. P Ex C169.

In Section 12, Specialized Instruction, of the IEP, the Present Level of Performance (PLOP), according to [REDACTED] testimony, is a description of the Student's level--"(He) is able to express many of his needs and uses pictures to transition through the school day"-- and this carries over to other goals as well. P Ex C169. His goals do not contain specific PLOPs. [REDACTED] testified that present levels on an IEP should be global rather than specific to a goal. However, [REDACTED] testified that PLOPs should match with specific goals. If a student receives related services, specific minutes should be stated on the IEP.

The Student, according to [REDACTED] needs prompt to stay on task and with this support he completes work but he needs hand over hand assistance for stamping or writing. P Ex C170. He is resistant to this and difficult to engage.

[REDACTED] testified that the Student can follow one step direction and is capable of doing more than was seen at school, if he was able to be engaged, but because of behavior cannot make progress. The Functional Analysis and Behavior Intervention Plan (P Ex C177) reflects as Expected Behavior Changes that the Student would reduce injurious actions. A baseline was done, which reflected inconsistencies, according to [REDACTED] P Ex C178. If the Student engaged in hitting or biting, he was to be removed from activity; if he was not calmed down, the staff was to call Mother. If he calmed down, staff would refrain from trying to engage him in activity.

Another IEP meeting was convened January 12, 2007. P Ex C156. The revision to the IEP reflected the Student's medication would be given at home and nurse services were changed to consultation. [REDACTED] testified that as of January 27, 2007, benchmarks were not met because there was no time to work with the Student. P Ex D8.

The Student's next IEP was started May 25 and completed June 13, 2007. C152, C123. His fourth quarter report card of June 10, 2007, reflected that he was present eight days and absent thirty two. P Ex D3. No new behavior plan was put in place because the [REDACTED] plan was included. [REDACTED] testified as to his continuing erratic attendance, which affected his ability to attain goals. P Ex C124. At this time, according to [REDACTED] members of the team were questioning whether another placement might be more appropriate but because the family was in crisis and working with doctors, Parents thought that over the Summer things might get better. It was brought up at this meeting that the Student was not receiving homebound services, but the Parents wanted to first address the medication issue and review this again in the Fall. The placement adopted was: removal from the general education classroom for instructional special education services from 61-100% of the time. P Ex C135. The Student was found eligible for ESY. P Ex C126. He was also designated as requiring paraprofessional support. P Ex C127. The services to be given were autism, speech, nurse, PE, and speech language, all as consultative, and no designated minutes. P Ex C136. [REDACTED] the autism itinerant testified that autism services are consultative only and no minutes are required.

The IEP was reconvened November 19, 2007. P Ex C99. Nothing had changed after summer and the Student had not met his objectives from the IEP. P Ex C123 June 13, 2007. No regular education teacher attended the November IEP meeting. The Student's anecdotal record reflected that every day he attended school he came late and sometimes left early. P Ex E 28. He was having a hard time, hitting staff, or himself, biting his hand, hitting his head, and throwing himself around. On one occasion he soiled his pants on the bus, although he is toilet trained, and was sent home. P Ex E29.

[REDACTED] testified that it was "clear to us this is not working out" and the team needed to "work down the continuum" that the District follows and recommend something else. [REDACTED] testified that based on the continuum of services, a student needs day school before the District can discuss residential. No student has gone from [REDACTED] class to residential placement. Parents did not want therapeutic day school because the Student could not make the bus on time. Parents wanted a residential placement. [REDACTED] the evaluation representative/SPH itinerant, stated she would research that to see if it would work. [REDACTED] knew that he needed a more therapeutic placement but did not know what would be best for the Student. Day school starts later and she felt there was potential for the Student to make the bus at 9:00 a.m., although the Student usually came to school at 10:00 a.m. or lunchtime at 11:00 - 11:45 a.m. Parents believed he still would not be able to make the bus on time for therapeutic day school.

The recommendation of therapeutic placement was "taken off the table", according to [REDACTED] because no one was there to give permission. Paperwork for IHIP/homebound services was to be completed. P Ex C105, The IEP was to be continued for proper personnel. On December 4, 2007, a conference notification was sent out. A Division of Rehabilitative Services (DORS) representative was invited but did not attend the IEP. P Ex C36.

The IEP was reconvened January 15, 2008, to meet with appropriate representatives from the District to help with placement but they were not in attendance. The meeting was then convened on February 1, 2008, with [REDACTED] and Specialized Schools and Services (SSAS) representatives, [REDACTED] and [REDACTED]. P Ex C 13, SD Ex 66. [REDACTED] role

is to manage students placed in separate day schools which are privately run. [REDACTED] testified that she had received email from [REDACTED] because the IEP was not completed due to Parents' questions. [REDACTED] was invited to the IEP meeting because the least restrictive environment (LRE) was in question. The District was recommending that he attend therapeutic day school, but Parents wanted residential.

At this meeting [REDACTED] from [REDACTED] was there to discuss the Student's behavior. [REDACTED] observes students prior to placement in therapeutic or residential. [REDACTED] was there on behalf of [REDACTED] regarding residential placement. [REDACTED] was there to establish a baseline regarding the Student attending therapeutic school. There were problems with the Student because he was not able to attend school because of sleep patterns. [REDACTED] felt that the District needed to take the next step in providing LRE on continuum and offer therapeutic day school. [REDACTED] testified that "...the law states we have to follow the continuum." The Student was unable to be in class with the general education population and was in the self contained severe and profound class. However, he had the ability to observe the general education population on the grounds of the school. Nonetheless, he was having difficulty in the lunchroom and hallways. The next step, according to [REDACTED] is a therapeutic school, which is much more restrictive than a general education school.

Parents felt he needed residential placement to meet his needs. The team's perspective involved following the continuum. [REDACTED] testified that they would not know if therapeutic was best unless the Student attempts it. [REDACTED] and [REDACTED] felt the Student needed to attend school and therapeutic was the next placement for him. Parents, according to [REDACTED] were feeling that the Student was not getting what needed in school, therapeutic was a "waste of time", and he should be placed in residential to get what he needed. No consensus was reached.

[REDACTED] testified that [REDACTED] stated the District needed to move on the continuum and the next step is therapeutic day school. [REDACTED] wrote the LRE, recommending separate day placement. [REDACTED] gave information to the family regarding a person to contact for a grant for residential. Mother said they already knew that the Student was not eligible. Parents dissented to the District recommendation. SD Ex 65. [REDACTED] testified that she had to make changes to the IEP for day school but Parent dissented on the paperwork to do day school and to remove the Student's one on one aide. P Ex C49. [REDACTED] testified that the Student had a one-on-one aide to keep him and others safe. His aide was able to remove the Student from an activity immediately when there was a safety concern. [REDACTED] testified that she believes the Student needs a one-on-one aide.

The District sought to remove the aide from his IEP based on a District policy decision. [REDACTED] testified that she assumes that day schools always provide aides automatically. However, [REDACTED] testified that whether separate day schools provide an aide depends on a student's need and that the District determines whether an aide is needed but an IEP need not state a requirement that a para-professional is needed. The therapeutic day school could look at Modifications and Accommodations to determine what type of help a student needs. [REDACTED] residential administrator for public schools, testified that whether a one-on-one aide is provided to a student is based on the IEP. The aide was not removed from the IEP because Parents refused to waive this revision to the IEP.

In February 2008 the Student was approved for Intermittent Homebound services. On days he could attend school he would. Otherwise he would receive Homebound instructions.

█ prepared a work sheet required for sending a student file to █ for recommendation for separate day placement. P Ex B2. His disabilities were listed as “severe/profound/autism/other health impaired, physically handicapped. The worksheet noted aggressive and self abusive behaviors, stating that he “continually poses a physical threat to himself and others.” P Ex B3.

After the IEP █ continued to document the Student’s schedule—late arrivals and absences. P Ex E24,25. █ testified that the Student has not had a re-evaluation since February 2006. It is her understanding that once a due process complaint is filed, everything is “frozen”, meaning that a re-evaluation cannot be done.

On February 22, 2008, Parents filed a complaint and requested a due process hearing. P Ex G53. Parents requested a residential placement. In April the District began Homebound services for the Student.

In June 2008, █, residential administrator for public schools, contacted several potential residential placements for the Student, which are designated by ISBE as servicing severe and profound students. She testified that she has worked for the District 30 years, as a teacher, diagnostic technician, case manager, and educational diagnostician. She currently attends meetings, at the request of a school district, to discuss residential placement. If residential placing is being considered, schools are required to contact the central office and Ms. █ or a colleague would attend the meeting. She sat in on the Student’s first due process when he was four. She did not attend the Student’s February 2008 meeting but reviewed the report.

█ testified that to start the process for residential placement initially a student’s profile is sent to a facility, starting with Illinois first. The facilities keep students to age cycle 21, based on Brittany’s law, and services can be provided until the day before a student’s 22 birthday. Some schools will only take students until they are 21, depending on a student’s age. Facilities also inquire if parents are securing an adult facility and will not take a child for six months if the child is aging out at 22 when a student is designated an adult. The District is not involved in adult placement, but █ encourages parents to apply to adult agencies.

█ selected several residential facilities because she is familiar with the sites and knows “they do nice job.” None of the facilities could accept the Student, some based on his age and some because his medical requirements are too intensive. SD Ex 1-11 She testified that she stopped looking for residential facilities because she “...believes she was told that the family was looking for a day school placement.” SD 10. Mother testified that she contacted more residential facilities than the District did but none would accept her son. █ also searched for a therapeutic day school placement for the Student but she could not find any that would accept him. SD Ex 4.

The Student continued Homebound services. He received six hours of Homebound in April 2008, two hours in May 2008, one hour in June 2008, two in July 2008. After July he received no

instruction until two days before Thanksgiving 2008. He then began receiving homebound instruction from [REDACTED] at the rate of \$56 per hour. [REDACTED] testified that she had no training in autism, but has worked with severe and profound students. She has not provided Homebound to other students. She did one hour a day with the Student and is aware others received more. She did not have access to his IEP and used material the Student's teacher gave her. [REDACTED] had completed the paperwork for Homebound services (P Ex B4) and gave the Homebound tutor material she thought the Student would enjoy, such as books and music. P Ex C50, 51,52,53. From observing the Student, [REDACTED] then developed her own program and gave a summary of what was done with him. P Ex C5.

The Homebound teacher reviewed her timesheets for the period when she provided services. She provided two hours in November 2008, eight hours in December 2008, fifteen hours in January 2009, eleven hours in February 2009, fifteen hours in March 2009, thirteen hours in April 2009, and eighteen hours in May 2009. A tally of his homebound hours reflects that he has received less than one month of school since April 2008, based on a typical 25 hour school week.

[REDACTED] testified that the due process was still pending when it was time for the Student's three-year re-evaluation in February 2009 and it is her "...understanding that everything is frozen and in place at the time of the due process." She did not ask the Parents about doing a re-evaluation of the Student because the school cannot unilaterally initial the re-evaluation while the due process is pending. No IEP was conducted for February 2009.

In February 2009 Mother contacted [REDACTED] regarding a consultation and the District agreed to pay for it. [REDACTED] who has a PhD in psychology, (P Ex A1) has had specialty training in Applied Behavior Analysis (ABA), and worked with [REDACTED]. She did research with him on outcome research of ABA for young children with autism. P Ex A4. She has set up programs in public schools, with ongoing consultation, and currently consults with five school districts for students across the continuum of autism, other lower functioning clients, and a low functioning four year old with disruptive behaviors. As part of her school consultation, she attends IEPs (including for high school students) and is asked to help write the IEP goals.

ABA, according to [REDACTED], is a treatment methodology, empirically based, meant to provide services for persons with disabilities, with a behavior management component—based on measuring behavior and teaching skills to student. Research supports efficacy of ABA in addressing maladaptive behaviors. ABA, testified [REDACTED], can be used to teach vocational skills. Functional behavior analysis is the cornerstone of ABA. The four steps for ABA are: (1) identify behavior to be changed, to provide operational definition of the behavior; 2. identify antecedents/stimuli to behavior; 3. identify presumed functional value of the behavior; and 4. look at environment to see consequences/events after behavior/reinforcement, which maintain behavior. A student must be given alternative behavior and this cannot be done unless one understands the purpose the behavior is serving. ABA programs also teach academic skills, basically using school curriculum but breaking it down to discrete steps.

[REDACTED] reviewed the Student's IEP of February 1, 2008, and in her opinion the antecedent and consequences in the Functional Analysis are not descriptive enough. P Ex C33. She also does not believe it appropriate to have a goal to identify 15-20 body parts with words, because of

the Student's lack of verbal skills. P Ex C21. Daily living skills would be important to work on with the Student but ██████████ noted the absence of goals for grooming and eating. With respect to positive reinforcement, – students with autism must be assessed for current motivation. ██████████ would look at whether goals were implemented. P Ex C 140. She also noted that the same interventions were being used over time, even though they did not create change. P Ex C34. She reviewed the Student's transition goal, post school employment in a sheltered workshop, but she testified that this IEP "would not get him there." P Ex C27.

On March 3 ██████████ conducted an observation in the Student's home. She began by observing the Student, then attempting to interact with him to get a sense of what he could understand, The Student did not want to turn the TV off. It was difficult to get compliance with commands. An assistant in the home had to provide help for the Student to go to the bathroom. The Student was easily distracted and had limited communication skills. He had signs consistent with autism and was compromised in terms of social engagement, which is problematic because there must be compliance to teach him skills. ██████████ testified that she is aware that the Student is not exclusively diagnosed with autism; he has cognitive delays and is on medication. He needs communication skills (he communicates by pushing), either verbal or PECS (a low technology communication device). ██████████ would recommend the total communication approach. A discrete trial can be part of ABA, as instructional protocol to determine if the Student learns new skills. To do this, one can use naturally occurring opportunities in the day to reinforce what is learned in discrete trial.

The next goal is to teach receptive language, which, in the Student, is limited. ██████████ testified that this is important for a 21 year old who has lost out on learning. He needs to learn individual commands out of context, which will be important for a sheltered workshop. It is critical that he understand what is asked of him; if he will be in a sheltered workshop (which is the goal for him when he turns 22), he will need language. The Student does not now have the skills to participate in a sheltered workshop. He has to be willing to comply whether he wants to or not. If he cannot do this, he will be a frustrated adult. To determine what assistive device is appropriate, the Student will need direct speech/language services. P Ex A2.

In addition to communication issues, the Student has compromised motor skills. ██████████ observed the Student get up and then go to the bathroom For fine motor issues, she testified that it is important to have OT and PT and the Student should have direct services in a public school program.

██████████ testified that she would not stop therapy if a person is uncooperative. With ABA, it is ongoing assessment and revision. Of primary importance is a behavioral goal. When the Student is engaged in self stimulatory behaviors, he is not available for learning, i.e., in a sheltered workshop. Instead of spinning puzzle pieces, which is self stimulatory, he needs to be taught to put puzzle pieces together.

She also noted the importance of understanding the functional aspect of the behavior; accordingly, a time out may not be appropriate. If the Student is pushing away to refuse a demand, it is important to teach him replacement behavior instead of pushing. Shaping behavior means reinforcing successive approximation to targeted behavior. The target might be

for the Student to say "no" to a request, but the Student needs steps to shape that behavior. The biggest reinforcement is to honor the refusal. If the primary goal is communication, the Student must be given the opportunity to refuse, then honor the refusal, telling him he needs to do just one thing, then he is done. P Ex C34. A behavior plan can be implemented at home. P Ex C21.

██████████ anticipates the Student will evidence gains. She testified that she has "every reason to believe he will benefit" and function at a higher level if his behavior is under control. He must, however, receive treatment immediately because he is 21 ½ and has been out of the "education milieu."

On March 14 ██████████ issued a report recommending an at home program of 30 hours of ABA services per week to yield the greatest progress. More than one instructor provides the 30 hours per week. There are also opportunities for socialization in the program by bringing in a sibling or peer buddy, or going out into the community. ██████████ will be the consultant and a case manager will oversee the program. She will meet every two months with the case manager. She also believes that given his age he might need 2 years of the program. The fees are: therapist \$112-15 hour, case manager \$75 per hour, and ██████████ \$200 an hour.

The District's autism itinerant, ██████████, testified that five years previously she had trained in ABA and worked with two young children as an ABA therapist. She offered her opinion that the systematic technique of teaching is more effective for academic tasks but did not see the benefit of ABA in social situations or functional life skills.

During the summer of 2009 the Student, although not able to participate in the class during the regular school year, attended ESY. ██████████ testified that when the Student attended her ESY class this summer she did not implement his IEP.

Based on the evidence the Hearing Officer addresses Parents' issues and makes findings with respect to these issues: the District's failure to provide sufficient related services, appropriate assistive technology, adequate transition plan, and progress reports, inadequately addressing the Student's behavioral needs, failure to have a regular education teacher attend the Student's IEP meetings, attempt to change the IEP to take away the Student's individual aide, failure to provide an appropriate IEP and placement, and denial of FAPE

***(1) The District failed to provide sufficient related services.***

In the new IEP developed for the Student at the School, his services for Speech and PT were all changed to consult only, with no goals for OT, PT, or speech therapy in the IEP and no specific amount of minutes listed except for speech--60 mpm. P Ex C176. There is no basis for removing his services. The autism consultations continued as designated. Obviously, the Student had not made progress in the areas for which he had been assigned services. The only apparent reason for removing the services is that service providers could not get the Student to comply. ██████████ testified that, based on her observation, the Student needs these services.

Additionally, [REDACTED] testimony that sometimes the autism itinerant was there and the Student was not there indicates that even the consult minutes were not specific to the Student as required.

The Hearing Officer finds that the Parents have met their burden in proving that the District failed to provide sufficient related services.

***(2) The District failed to provide appropriate assistive technology***

[REDACTED] testified that the Student has a picture schedule for transitioning between classes but [REDACTED] is not aware if the Student had an assistive technology evaluation. He did not bring any devices from his previous school and none were assigned to him at this School. A review of the IEP reflects that, in Modifications and Accommodations, Section 11, it was noted that the Student required assistive technology. P Ex C166. There is no evidence an AT evaluation was done or that he was ever provided AT.

The Hearing Officer finds that the Parents have met their burden in proving that the District failed to provide appropriate assistive technology.

***(3) The District failed to provide an adequate transition plan.***

No adequate transition plan was ever developed for the Student, despite how close he is to “aging out” of education services. Although his Post-School Education is listed as: “the training provided in a sheltered workshop setting” there is no record of any plan that would prepare him for the sheltered workshop setting. P Ex C 134. [REDACTED] found him not prepared for such a setting. Activities are listed as pre-voc training, visiting facilities that offer programs for post secondary placement, but none of this took place. No specific goals and objectives were set to enable him to transition to post school life. The IEP does not move him from school to the team’s stated goal of residential life and work at a sheltered workshop.

The Hearing Officer finds that the Parents have met their burden in proving that the District failed to provide an appropriate transition plan.

***(4) The District failed to provide Parents with appropriate progress reports.***

IDEA regulations require a school to provide Parents a progress report on a student’s IEP goals. 34 CFR 300.320. The District’s special education coach, [REDACTED], testified that a district should provide progress reports based on IEP goals. However, Parents assert that instead of providing a progress report, the District provided a transcript to Parents which is unrelated to his classes, actual performance or the classroom curriculum. His report cards were based on classroom activities not his IEP goals. The progress note did report on his handwriting, but no such goal exists on his IEP. The social studies and science goals reported also failed to match his IEP

goals. As noted in Parents Closing, p. 11, “(The Student’s) November 9, 2006 progress note reports on a social science goal to recognize and shake hands with authority figures. In contrast, (his) IEP indicates a social science goal to indicate his mood through pictures. (compare P Ex D11 to P Ex C203).”

The Hearing Officer finds that the Parents have met their burden in proving that the District failed to provide appropriate progress reports.

***(5) The District failed to address the Student’s behavioral needs.***

When the Student was present his behaviors often interfered with his ability to meaningfully attend class. The District’s response to his behavioral issues included attempts to calm him, remove him from the setting, or call Parents to pick him up and remove him from school. The District enlisted the services of [REDACTED] for assistance, particularly with his aggressive behavior and biting. Both Parents and the co teachers felt that a number of the [REDACTED] suggestions were useless. The teachers were already using a number of techniques suggested by [REDACTED] without success. The District offered no evidence of any other attempts to develop behavioral techniques. His IEP does not contain behavior goals as required by the behavior plan form. The District’s actions in calling the Parents to pick up the Student affirm that there was no appropriate intervention in place for moderating his behavior. While the District asserts it is not required to seek outside services, it is, however, required to address the Student’s behavior in order that he can participate in class. If that requires outside services, after exhausting all others, then the District is required to provide them.

The Hearing Officer finds that the Parents have met their burden in proving that the District failed to provide appropriate progress reports.

***(6) The District failed to have a regular education teacher attend the Student’s IEP meetings.***

IDEA regulations require that a general education teacher attend a student’s IEP meeting if the student is or may be participating in general education. The Student’s co-teachers admitted that because the Student participated in a general education agricultural class a general education teacher should have attended his IEP meeting. However, although a District IEP notice form reflected that a general education teacher was invited to his meeting (P Ex. C63), there was no regular education teacher at his IEP meetings. Nonetheless, in view of the fact that the Student had not been in a regular education placement and Parents were not seeking one, based on his impairments, there is no determination that failure to have the regular education teacher at the IEP meeting was a substantive failure which of itself would preclude the IEP team from making an appropriate decision regarding the Student’s placement.

The Hearing Officer finds that the Parents have not met their burden in proving that the District’s failure to have a regular education teacher attend the Student’s IEP meetings would have a substantive impact on the team’s ability to develop an appropriate IEP.

***(7) The District attempted to change the IEP to take away the Student's individual aide.***

When the District made the placement recommendation for a separate day school placement, it sought to remove his aide from his IEP. Parents objected to the revision and the change was not made.

The Hearing Officer finds that the Parents have not met their burden in proving that the District's unsuccessful attempt to remove the Student's aide of itself had an adverse impact on the Student.

***(8) The District failed to provide an appropriate IEP***

Parents assert that the Student's IEPs written at his current placement were not appropriate because they were based on that class program, not on his individual needs. At the December 2006 IEP meeting, ■ changed his goals to fit them within her program and testified that all the students in her class have similar goals. The Student's goals do not contain specific Present Levels of Performance (PLOPs). ■ testified that present levels on an IEP should be global rather than specific to a goal. However, the District's witness, ■, who trains case managers for the District, contradicted this testimony, testifying that PLOPs do need to be specific to a goal. Dr. ■ testified that PLOPs are important as a baseline against which to measure whether progress is being made.

The testimony of ■, and the Homebound tutor all support a finding that the IEPs were not appropriate and were not implemented. Although ■ testified that his IEP could not be implemented because he was not at school much, it was not implemented even when he was at school or receiving Homebound instruction. ■ did not implement his IEP when the Student was in her ESY class. ■ testimony reflected that IEP meetings were convened frequently because the Student's goals could not be met based on his erratic attendance and behavior issues. However, as noted above, it was the responsibility of the District to seek appropriate behavior techniques to be incorporated into his IEP so that he could be engaged.

Because the staff at the classroom did not develop appropriate techniques with respect to his behavior, they could not implement his IEP. The number of IEP meetings convened does not constitute development of an appropriate IEP, as the District argues. The fact that Parents could not get Student to school despite their best efforts does not mean that the District had no responsibility for his education. Based on his frequent absences and lateness, the District included IHIP/Homebound Services for the Student in the IEP. However, the Homebound tutor was not given his IEP and thus had no IEP to implement. She developed her own plan based on her observation and working with him. Progress reports written by ■ and the Student's proposed Homebound plan (P Ex C8) indicate that he made no progress on his IEP goals and objectives in three years.

Evidence also demonstrates that no IEP was developed in February 2009 despite IDEA's requirement for an annual IEP. 1414(d)(4)(A); CFR 300.346b. Nor was the three year required

re-evaluation done because of the misinterpretation of “stay put” as meaning that no re-evaluation could take place because a due process complaint had been filed. Without an updated evaluation, an IEP could not be appropriately developed.

The Hearing Officer finds that the Parents have met their burden in proving that the District failed to provide an appropriate IEP.

***(9) The District failed to provide an appropriate educational program/placement***

Federal and state statutes and administrative rules require that school districts ensure that a continuum of placement options is available to meet the needs of children with disabilities for special education and related services. 34 CFR 300.39 and 115, 23 Ill. Admin. Code 226.300. The continuum includes instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions. There is no requirement, as District personnel testified, that a continuum must be followed. The District planned to move the Student to a therapeutic day school setting but offered no evidence that such a setting would enable the Student to access his education and make academic progress. The only justification offered was that it is the next step on a continuum.

Over the course of more than a year, Parents informed school personnel of the difficulties of the Student’s sleep patterns which they were attempting to address through medical intervention. Because the Student could not sleep at night, he could not get to school on time or at all. Consequently, he missed attendance in his classes. The District was aware of the problems, as testified to by the co teachers and as reflected on IEPs. No one at the school sought to blame Parents for the Student’s lateness and absences. However, when [REDACTED] personnel attended the IEP they blamed Parents for his tardiness and lack of attendance. In testimony, [REDACTED] and [REDACTED] denied this baseless accusation and confirmed that Parents did everything possible to ensure their son’s attendance at school.

In addition to an incorrect interpretation regarding making a continuum available, the District’s insistence that it needed to follow a continuum and seek a therapeutic day school for the Student completely ignored their own understanding that Parents were unable to get their son to school and the District offered nothing to substantiate a belief that Parents would better succeed in getting him to a therapeutic school when they could not get him to his current school.

In the February 2008 IEP the District maintained its position that the Student should be placed in a therapeutic day school. However, the District did not identify a therapeutic day school which would accept the Student. Parents asserted that the Student should be placed in residential. In June 2008, the District’s residential administrator for public schools contacted several potential residential placements for the Student. None of the facilities could accept the Student, some based on his age and some because his medical requirements are too intensive. Mother contacted more facilities than the District contacted but none would accept her son.

This evidence supports Parents' assertion that the District delayed a search for a residential placement until it was unlikely that schools would accept the Student based on his age, because he would no longer be eligible for any of these facilities when he turned 22. The District also searched for a therapeutic day school for the Student and none would accept him. The District in fact did not offer any placement to address the Student's needs. Parents then sought a different form of placement. Based on her observation, which the District agreed to pay for, ██████████ concluded that the Student will function at a higher level if his behavior is under control. In her opinion the Student would benefit from an intense ABA program and she recommends 30 hours of ABA per week at home for at least two years. ██████████ testified that she has "every reason to believe he will benefit. He must, however, receive treatment immediately because he is 21 ½ and has been out of the "education milieu."

The Hearing Officer finds the consultation and recommendations to be reliable. The District had the opportunity to cross examine ██████████ and to otherwise challenge the consultation and recommendations but did not do so. The only District witness to testify about ABA, ██████████, has very limited experience in this area and her testimony in this regard is not given any weight. Additionally, ██████████ provides consultation to five school districts in Illinois. It is also noted that the District failed to do the three year re-evaluation which should have taken place in February 2009, with an IEP scheduled to review the results. Accordingly, ██████████'s observation is the most current information on the Student. The District has also objected to the cost of the ABA program. However, that is not a factor in this case, inasmuch as the District offers no other placement for the Student. As noted, the District asserts a therapeutic day school is the appropriate placement but none was found that would accept the Student. Additionally, the costs, as Parents noted, may be less than the cost for Homebound instruction. Parents closing, p. 8.

District's assertions that this placement would not be the Student's LRE are not availing. The District in fact offered no specific therapeutic day school or residential placement to the Student because none were available. The LRE is not meant to be used as an argument against offering a student the only placement that could provide some reasonable educational benefits as mandated by *Rowley*. Although the District asserts that *Rowley* does not require the District to provide maximum benefit to the Student, there is no attempt by Parents to maximize his potential nor did ██████████ indicate that this could be accomplished.

The Hearing Officer finds that Parents have met their burden in adducing evidence that the District failed to provide an appropriate placement.

***(10) The District failed to provide the Student a FAPE.***

The District asserts that the District staff developed an IEP for the Student and "continually updated ... and evaluated it...(and) convened the team... no less than 8 different dates, where no less than 16 different District staff members and specialists attended those meetings." Accordingly, the District asserts it did not act in an unreasonable manner in attempting to enable the Student to receive the educational and vocational benefits that the School has to offer. Citing

*Alex R. v. Forrestville Valley Community Unit School District*, 375 F.3d 603, Seventh Circuit, July 15, 2004, the District argues that the 7<sup>th</sup> Circuit states that the question in a Due Process case is not whether the District's efforts ultimately "led to a favorable outcome" but whether the IEPs were reasonably calculated to provide the Student with a FAPE. *Alex* at 616. D closing, p. 2. The District also cites the 7<sup>th</sup> Circuit's discussion on Behavior Intervention Plan (BIP), noting that the courts points out IDEA does not use the term Behavior Intervention Plan but requires an IEP team to consider strategies when appropriate to a student. *Alex* at 614,5. D closing, p. 2. The District states that the Court noted the strategies in *Alex* included positive behavioral interventions and supports which the District contends were all discussed, for this case, in testimony and the Student's IEPs.

Several factors, however, distinguish this case from *Alex*. The Hearing Officer notes that the Student's teachers are competent and caring and their testimony is credible. Accordingly, the Hearing Officer relies on their testimony that what was available to the Student was not working to allow him to access education benefit. Whether some techniques worked initially or some of the time is not a standard on which to base a finding that an IEP was reasonably calculated to provide education benefit. What matters is that once the IEP is developed it must be implemented and that if no progress is made, the IEP must be revised and a district must offer services to meet a child's needs. The District's argument that it held numerous meetings with numerous staff to discuss and revise an IEP does not offer a basis for a finding that the IEP meets the *Rowley* standard. The teachers testified as to their concerns that he needed "something more."

Although the District argues that the "District should certainly not be held accountable for circumstances outside of school and outside the 4 corners of the [redacted] complaint" the District also acknowledges the complexity of the Student. The teachers and Parent testified that the Student was unable to arrive on time or sometimes not at all for school, and, accordingly, no educational benefit could be derived by the Student. Staff acknowledges Parents were working with doctors to find appropriate medication that would allow the Student to have an appropriate sleep pattern to enable him to wake up and get to class on time. Additionally, when he was in class his behaviors prevented learning and staff frequently called Parents to return to school to pick him up. That action does not reflect, as the *Alex* Court noted was required, that the team "considered" strategies such as positive behavioral interventions and supports. D Closing, p. 3. Calling Parents to pick up the Student reflects that appropriate strategies had not been considered and those considered were obviously not working.

While staff may not be required by IDEA to utilize "outside" sources" staff was required to do what was necessary to consider appropriate behavior interventions. In this case, that might have required that staff "consider" outside sources. The Hearing Officer does not require that the District have a BIP that "could not have fallen short of substantive criteria that do not exist, and (therefore) not substantively invalid under the IDEA" as stated in *Alex* at 615. In this case the Hearing Officer determines that appropriate behavioral interventions were not considered, not that a BIP should have been developed to meet particular criteria. Thus, this case is distinguished from *Alex* on the basis that the Hearing Officer makes no finding that the District

was to develop a specific BIP. The finding is that it did not consider appropriate strategies. It is not a Parent's burden to find those strategies.

The 7<sup>th</sup> Circuit in its determination that the question is not whether the District's efforts ultimately led "to a favorable outcome" (*Alex* at 616) never suggested that the IEP should not be implemented. That matter also distinguishes this case from *Alex*. The Student's teacher in this case testified as to her concerns from the beginning of the Student's admittance to the class that the setting would not be appropriate. The Student's teacher admitted his [REDACTED] IEP was not followed when he came to the school because it was not "realistic." His goals were changed in the December 2006 IEP. However, it was also admitted in testimony that those new goals were not met and a number of more revisions were made to the IEP. His teacher believed he needed "something more."

This led to another IEP meeting to discuss the "next step" on the continuum", which was therapeutic day school, but without a specific determination that it would meet his needs. In fact, the very problem that prevented the Student's success, the complexity of the Student's situation combined with the fact that Parents had difficulty in getting the Student to class because of his sleep pattern, would still remain if he were in therapeutic day. It is noted that the Student had a twin brother also in the class with the Student and Parents were able to get him to school. Each child is unique. Whatever circumstances prevented the Student from attending class are unique to him and the Supreme Court emphasizes in *Forest Grove Sch. Dist. v. TA* that a program must be developed for a child's unique needs. *Forest Grove Sch. Dist. v. TA*, . 2009 U.S. LEXIS 4645 (June 22, 2009). The District offered no evidence that in fact the therapeutic day school was a placement unique to the Student's needs and that there was one available that would accept the Student.

Parents for a lengthy period of time raised their concerns that the Student needed residential, which would alleviate the main obstacle to his accessing education benefit—that Parents could not get him to the School. In February 2008 the District asserted that it must comply with policy in following a continuum and thus the placement would be therapeutic day. Parents dissented and filed for due process. In June 2008 the District began a search for a residential placement. By this time, most schools rejected him because he would "age out" when he turned 22 in December 2009 or because of the complexity of his situation.

Equally important, although the District stated he required placement in a therapeutic day school, there is no evidence that any day school would accept him. This does not support a determination that the District acted reasonably in continuing to insist that he needs therapeutic day school even when one is not available.

Additionally, this case is distinguished from *Alex* in that the Court in *Alex* did not determine that an IEP was not implemented or that no IEP was developed in compliance with law on the basis of a three year re-evaluation, as is the case with this Student.

The District also relies on *Beth B. v. Van Clay*, 282 F.3d 493 (7<sup>th</sup> Cir. 2002) and *School District of Wisconsin Dells v. Z.S.*, 2002 WL 1396524\*5 (7<sup>th</sup> Cir. 2002) to assert that *Rowley* standards

were intended to provide school districts with flexibility in educational planning with respect to methodologies and thus deference is given to state and local schools on matters of educational policy. The District asserts that accordingly there is no requirement to utilize outside resources or experts in educational planning and no requirement for Parent training. The District also relies on *Lachman v. Ill. St. Bd. of Ed.*, 852 F.2d at 297 (7<sup>th</sup> Cir. 1988) that an IEP that is reasonably calculated and can provide an appropriate education will not be deemed inappropriate because parents believe a better education program exists. These cases are not availing in support of the District. The *Wisconsin Dells* Court stated that: “In reviewing a school district’s offer of special education and related services, ‘[f]ederal courts must defer to the judgment of education experts who craft and review a child’s IEP, so long as the child receives some educational benefit...’ ”

In this case the Hearing Officer finds the child has not received educational benefit. This is not a case of a Parent wanting a methodology different than the one the District is proposing or Parents believe a better education program exists. In this case, the District failed to meet its burden that it offered appropriate services to the Student that are available. While the District cites *Beth B* and *Wisconsin Dells* to argue that the *Rowley* standards were intended to provide districts with flexibility in educational planning, the District itself has not been flexible, but rather has adhered to its own misinterpretation of a continuum requirement. The District has insisted it must follow a continuum rather than have the flexibility to select a placement to meet the Student’s unique needs and to utilize outside resources or experts, not because it is required by a specific statute or regulation but because the Student may require such outside resources or experts to assist in developing an IEP that meets the Student’s specific needs, after a district has exhausted its own resources.

Parents’ ABA consultant did a March 2009 observation. From her survey she determined the Student needed an intense ABA program. In light of the fact that the District did not convene an annual IEP or do a three year re-evaluation, this is the most current information on the Student available. It is noted that the District had a responsibility to convene an IEP and do a re-evaluation. This requirement is not dependent on whether a parent would agree to attend an IEP or would consent to a re-evaluation. In this case, no evidence is offered that the District set an IEP and provided notice to Parents or attempted to do a re-evaluation and could not get consent.

District also cites *OToole v. Olathe District School*, 144 F3d 692, 701-02 (10<sup>th</sup> cir. 1998) that an IEP is a program of two portions—written and implementation and that implementation is an ongoing dynamic activity. D Closing, p. 4. The Hearing Officer in this case, as noted above, determines that the appropriate strategies were not considered for the Student’s behavior issues and that IEPs were not implemented, based on testimony of the Student’s teachers, either when he was in class, or at ESY, or for Homebound tutoring. Thus, the Hearing Officer relies on the testimony of the School’s teachers in determining a lack of implementation of the IEPs.

The District asserts that Parents were trying medications, having problems with the Student’s sleep patterns and it “wasn’t doing any good to keep him at school.” D Closing, p. 4. These are not circumstances, according to the District, that create fault and a denial of FAPE on the part of the District. The District also asserts it cannot be held accountable when it was not reasonably afforded the opportunity to implement its methods and strategies because the Student was

brought “inconsistently or late” to the School. The issue is not attempting to find fault but it is the District’s responsibility to work on finding solutions that enable the Student to access his education. The fact that Parents were working to seek solutions in order to enhance his ability to be able to attend the School did not relieve the District of its responsibility to work with the Parents to develop methods to ensure that the Student had access to education benefit even when he could not attend. In fact, the District offered and Parent accepted Intermittent Home/Hospital Services so that he could attend school when he was able but to get Homebound services when he could not. At some point it was clear to everyone that the Student was not able to attend the School and that the only way he could access his education was through home services, which were provided. Those home services were not based on his IEP because the Homebound tutor was not given his IEP. Nonetheless, the District maintains that the Student needs therapeutic day school as his LRE because that is the next step on the continuum, not because it, based on factual information, would allow him to receive his statutorily required education. It offered the day placement in the first half of the 07-08 school year, which was rejected by the Parents who requested residential.

While the District correctly asserts that the law mandates placement in the LRE and mainstreaming to the maximum extent appropriate, that is not at the expense of FAPE. “Under the IDEA, children with disabilities must be mainstreamed with non-disabled peers to the extent possible.... (mainstreaming) was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums.... In implementing the LRE mandate, each school district must maintain a continuum of program options which range from regular classrooms with supplementary aids to separate schools and residential facilities. See 34 C.F.R. 300.551(b)(1). Thus, the regulations contemplate that mainstreaming is not required in every case.” *Board of Education of Murphysboro Community Unit School District v. Illinois State Board of Education*, 41 F.3d 1162, 1168 (7th Cir. 1994).

The District could offer no factual basis for assuming a therapeutic day placement would succeed when Parents could not get him to school. His only means of accessing some education benefit in the last year and a half has been through home services and the ESY of 2009, even though his IEP was not being implemented in those settings. Notably the District did not object to the testimony of [REDACTED] on the ESY in the summer of 2009, although in the District’s view that would be outside the purview of the “four corners of the [REDACTED]” It is also noteworthy that the District cited the testimony of [REDACTED] regarding ISBE imposing “strict and comprehensive justification” for placing a student in a residential facility, especially directly from a general education population, despite the fact that her testimony involved discussion of the District’s search for a residential placement for the Student which was subsequent to filing of the due process complaint.

The District asserts that it must be offered the opportunity to try less restrictive alternatives before recommending a residential placement and that the home program proposed by the Parent is the most restrictive. However, the District’s position is unavailing. A placement must be based on an appropriate assessment/evaluation of a Student’s needs to determine what will address those needs. The District planned to move the Student to a therapeutic day school

setting but offered no evidence that such a setting was available or that it would enable the Student to access his education and make academic progress.

In fact, the District's "continuum" argument is undermined not only by the Seventh Circuit as cited in *Murphysboro* above but also by a recent United State Supreme Court opinion, *Forest Grove Sch. Dist. v. TA*, . 2009 U.S. LEXIS 4645, (June 22, 2009). In *Forest Grove Sch. Dist. v. TA*, . 2009 U.S. LEXIS 4645, page 7 (June 22, 2009), the Supreme Court, noting the school district's position was "at odds with the general remedial purpose underlying IDEA...and similarly conflicts with IDEA's 'child find' requirement", declared that "when a school district unreasonably failed to identify a child with disabilities it would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services" if an appropriate remedy was not available. *Forest Grove*, page 7. Although that was a child find case as distinguished from this case, the principle is applicable to both situations. In *Forest Grove*, a private specialist advised the parent that the child would "do best in a structured, residential learning environment" and parents then enrolled him at a private academy that focuses on educating children with special needs. *Forest Grove*, page 3. In this case, the Student's Parents appealed the decision denying him a residential placement and filed for a due process hearing but have not yet put in place the home ABA program recommended by Dr. [REDACTED]

This Hearing Officer's finding that the District acted unreasonably in not offering him a placement unique to his needs but rather insisted his placement be based on an incorrect interpretation of the continuum of services requires a remedy to meet the standard enunciated in *Forest Grove*: "the express purpose of the Act is to 'ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs.' Sec. 1400(d)(1)(A)." *Forest Grove*, page 7.

The District asserts that "while a home program as described by [REDACTED] might even maximize (the Student's) potential...that is absolutely not the standard of law that school districts are held accountable under IDEA and certainly not what the [REDACTED] should be ordered to fund or provide." D Closing, p. 5. However, neither Parents nor Dr. [REDACTED] asserted the home program would maximize the Student's potential. Dr. [REDACTED] testified that she has: "...every reason to believe he will benefit. He will function at a higher level if his behavior is under control." But she cautioned that he must receive treatment immediately because he is 21 ½ and has been out of the "education milieu."

The District also cites *Thompson R2-J School District v. Luke P*, 540 F.3d 1143 (Tenth Cir. 2008) at 1146, 1149-51, as a similar case but where the Court disagreed with Parent's request for residential. The Court, although it was "sympathetic to the Parents", refused to impose a standard on the school district that did not exist, stating that IDEA calls for reasonably calculated IEPs, not substantive outcomes. However, any reasonable interpretation of the Court's meaning must reflect that a reasonably calculated IEP is meant to provide an outcome that would afford a student educational benefit, as mandated by *Rowley*. In this case, the IEPs did not provide educational benefit, despite caring and competent staff who acted with empathy.

The District also asserts that Parents may not utilize settlement discussion or go beyond the “four corners of the [REDACTED].” However, the District made no objection to the testimony of [REDACTED] who described her unsuccessful June 2008 efforts to find a residential placement for the Student, which was what Parent originally requested in the Due Process filed February 2008. By the time this search was conducted, however, the Student could not qualify at most places because of his age. The Hearing Officer is certainly entitled to utilize the testimony of a sworn witness, one who is employed by the District, in making her determination. Additionally, [REDACTED] was not successful in finding a therapeutic day placement for the Student. Accordingly, the District had no placement to offer the Student.

The District did not implement IEPs in class, or in the 2009 summer ESY, and failed to provide the IEP to the home tutor. It did not develop an up to date IEP as required by IDEA nor conduct the required three year evaluation. The District followed a “continuum” rationale that the Student must go to the next step without a fact-based reason or statutory support for this assertion. The District sought residential and therapeutic day placements but none were available to the Student. For all these reasons, the HO finds that the District has failed to meet its burden in identifying required services and ensuring that those services were available to the Student.

Parents have offered an appropriate alternative, [REDACTED] ABA program, which is the only option in light of the District’s failure to offer an appropriate placement. It is noted that the District offered no specific objection to the program, other than cost. With respect to Dr. [REDACTED] ABA program, the Northern District Court of Illinois, in reviewing a case involving one of her programs found that, “The program designed by [REDACTED], [REDACTED]’s parents and the other experts with whom they consulted has carefully targeted [REDACTED]’s specific challenges and capacities. The discrete trials at the heart of the program are constantly refined according to [REDACTED]’s individual progress.” *T. H. v. Palatine Community Consolidated Sch. Dist.*, 55 F. Sup. 2d 830, 844 (N.D. Ill. 1996).

[REDACTED] has determined that the Student should have at least two years of the ABA program. This would provide him with compensatory services past his 22<sup>nd</sup> birthday in [REDACTED]. Where a district has failed to provide FAPE the student may be awarded free educational assistance after the age of 21 to compensate for a school district’s past failure. *Kevin T. v. Elmhurst*, 2002 WL 433061, p. 12 (N.D. Ill.). The Court awarded the student compensatory education until he reached the age of 22. *Kevin*, p. 12. Based on this principle, and in circumstances similar to the Student in this case, the Third Circuit awarded two and a half years of compensatory services to a student to begin when the student aged out of special education. *Lester H. v. Gilhool*, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990). In *Lester H.*, the Court refuted the school district’s argument that “a compensatory remedy requires the court to ascertain Lester’s future educational needs and these needs are not ripe for decision.” *Lester* at 868. The Court found that “This is simply not true. The injury has been done and although the exact contours of the appropriate remedy may not be ascertainable now, Lester’s injury certainly could be, and was, ascertained. Moreover, the court left ample room for the exact contours of the remedy to be shaped by the appropriate authorities at the appropriate time. All the court did was award Lester the number of years needed to restore that which concededly had been denied him and that to

which he is entitled under 20 U.S.C. Sec. 1412(2)(B).” *Lester* at 868. In this case, the Hearing Officer finds that the Student, based on denial of FAPE, is entitled to compensatory services for two years, despite his reaching age 22 in December 2009. The specific compensatory services will be determined through the IEP process, in consultation with [REDACTED], Parents, and District staff at the appropriate time.

### **Rowley Standard**

The United States Supreme Court has articulated a two-prong test to determine whether a child has been given a free appropriate public education under the IDEA. *Hendrick Hudson Dist. Bd. of Education v. Rowley*, 458 U.S. 176 (1982). The first prong is whether the school district complied with the procedural requirements of the IDEA. Second, the Hearing Officer must determine whether the IEP was reasonably calculated to enable a child to receive an educational benefit. That determination is based on whether the District’s IEP for the Student identified his needs/eligibility and offered services to address those needs as required by statute. In this case, the determination that the Hearing Officer must make is whether the Student’s IEP was reasonably calculated to meet the *Rowley* standard.

### **(I)Procedural Requirement**

With regard to the first prong, the Parents assert several procedural violations in the IEP development that precluded access to a FAPE for the Student. However, even if violations occurred, only “procedural inadequacies that result in the loss of educational opportunity constitute a denial of FAPE.” *Evanston Community Consol. School Dist. No. 65 v. Michael M.*, 356 F. 3d 798, 804 (7<sup>th</sup> Cir. 2004); *Board of Ed. Of Township High School District No. 211 v. Michael R.*, 2005 WL 2008919 (N.D. Ill. 2005). IDEA-2004 which became effective on July 1, 2005, also requires that where a procedural violation is alleged, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (I) impede the child’s right to a FAPE; (II) significantly impede the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE; or (III) cause a deprivation of educational benefits. P.L. 108-446, Section 615(f)(3)(E)(ii).

(1)IDEA regulations require a school to provide Parents a progress report on a student’s IEP goals. 34 CFR 300.320. The District’s special education coach, [REDACTED], testified that a district should provide progress reports based on IEP goals. However, Parents assert that instead of providing a progress report, the District provided a transcript to the Student’s Parents which is unrelated to his classes, actual performance, or the classroom curriculum. His report cards were based on classroom activities not his IEP goals. The progress note did report on his handwriting,

but no such goal exists on his IEP. The social studies and science goals reported also failed to match his IEP goals. As noted in Parents Closing, , p. 11, "(The Student's) November 9, 2006 progress note reports on a social science goal to recognize and shake hands with authority figures. In contrast, (his) IEP indicates a social science goal to indicate his mood through pictures. (compare p. D11 to C203)." The Hearing Officer finds that this violation meets the IDEA standards. Without an appropriate progress report Parents are denied the opportunity to meaningfully participate in the decision making process regarding the provision of a FAPE, inasmuch as it would preclude an accurate determination of their son's progress or lack thereof.

(2) IDEA regulations require that a general education teacher attend a student's IEP meeting if the student is or may be participating in general education. The Student's co-teachers admitted that because the Student participated in a general education agricultural class a general education teacher should have attended his IEP meeting. However, there was no regular education teacher at his IEP meetings. In the finding on this Parent issue, No. 6, the Hearing Officer wrote: "... in view of the fact that the Student had not been in a regular education placement and Parents were not seeking one, based on his impairments, there is no determination that failure to have the regular education teacher at the IEP meeting was a substantive failure which of itself would preclude the IEP team from making an appropriate decision regarding the Student's placement. The Hearing Officer finds that the Parents have not met their burden in proving that the District's failure to have a regular education teacher attend the Student's IEP meetings would have a substantive impact on the team's ability to develop an appropriate IEP." Based on this finding, evidence does not support a determination in the circumstances of this case that the procedural violation was sufficiently substantive so as to meet any of the three standards defined by IDEA.

(3)The District utilized administrative policy rather than tailoring the Student's program to his individual needs, in attempting to remove his aide from his IEP when the District made the placement recommendation for a separate day school placement. In the finding on this Parent issue, No. 5, the Hearing Officer wrote: "When the District made the placement recommendation for a separate day school placement, it sought to remove his aide from his IEP. Parents objected to the revision and the change was not made. The Hearing Officer finds that the Parents have not met their burden in proving that the District's attempt to remove the Student's aide of itself had an adverse impact on the Student." Based on this finding, evidence does not support a determination in the circumstances of this case that the procedural violation was sufficiently substantive so as to meet any of the three standards defined by IDEA.

(4)The District predetermined the Student's placement. ■ testified that she prepared the IEP placement page prior to the IEP meeting because she knew therapeutic day school would be the placement. ■ testified that she had received email from ■ because the IEP was not completed due to Parents' questions and ■ was invited to the IEP meeting because LRE was in question. The District was recommending that he attend therapeutic but Parents wanted residential. ■ testified that the District needed to take the next step in providing LRE on a continuum and offer therapeutic day school.

The District's assertion that the District must take the next step on a continuum is erroneous. Federal and state statutes and administrative rules require that school districts ensure that a continuum of placement options is available to meet the needs of children with disabilities for special education and related services. 34 CFR 300.39 and 115, 23 Ill. Admin. Code 226.300. The continuum includes instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions. The requirement is that placement options must be available to meet the needs of a student—not to test out each step on a continuum to experiment as to whether it will address a student's needs. As the Supreme Court held: "The express purpose of the Act is to 'ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs' Sec. 1400(d)(1)(A)." *Forest Grove*, page 7. The District's position that it must follow a continuum, rather than having a continuum of placement options available to meet the needs of children with disabilities, is an affirmation that it pre determined the placement of the Student as a therapeutic day school. The Hearing Officer finds that this violation meets the IDEA standard. The District impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE.

(5)The District failed to complete a Summary of Academic Achievement and Functional Performance at Age 21 in December 2008 as required by law and the Student's IEP. The District did not offer into evidence any proof of a Summary of Academic Achievement. However, there is insufficient evidence on which to make a determination that this violation of itself meets any of the three standards defined by IDEA. Based on this finding, evidence does not support a determination in the circumstances of this case that the procedural violation was sufficiently substantive so as to meet any of the three standards defined by IDEA.

The Hearing Officer finds that the Parents have met their burden in proving that two procedural violations are "Procedural flaws that 'seriously infringe the parents' opportunity to participate in the (individualized education program) formulation process' (and) are the very kind of serious deficiencies that 'clearly result in the denial of a (free appropriate public education)' (*W.G.*, 960 F.2d at 1484)." *Board of Education of the City of Chicago v. Illinois State Board of Education*, 2006 WL 2989289, p. 4 (N. D. Ill). The Hearing Officer finds that the District has not complied with the first prong of *Rowley*.

## **(II) Substantive Component of a Legally Sufficient IEP.**

To determine whether the District complied with the second prong—the substantive component of a legally sufficient IEP—the Hearing Officer must find that the District's IEP for the Student identified his needs/eligibility and offered services to address those needs as required by statute. Parent has stated as issues, the District's failure to provide an appropriate IEP, FAPE, an appropriate placement, sufficient related services, appropriate assistive technology, progress reports, and adequate transition plan; failure to address the Student's behavioral needs, failure to have a regular education teacher attend the Student's IEP meetings; and the District attempted to change the IEP to take away the Student's individual aide.

Parent asserts that the District has fabricated its own FAPE standard in this case in arguing that it has made "reasonable efforts" to provide the Student an education. "*Rowley* requires educational benefit to a student, not merely reasonable efforts by a school district." Parents Closing, p. 1. Parents further assert that even if "reasonable efforts" was the standard, the District did not make reasonable efforts on behalf of the Student. The District according to Parent, (1) did not utilize any outside resources to assist with his behavioral or other educational needs; (2) delayed in changing his placement until he was too old to obtain a private placement; (3) delayed in providing homebound and did not provide any back up for the homebound instructor to ensure that he received 5 hours of homebound per week; (4) did not even provide his homebound teacher with his IEP which precluded any attempt to implement the IEP consistently since he enrolled at the School; (5) looked at only a few day schools and a few residential schools as possible placements from the list of hundreds of schools on the ISBE approved list for him over a period of less than a school year and then stopped looking.

The *Rowley* standard is whether the IEP was reasonably calculated to provide educational benefit. In this case, the District did not do an annual IEP for the Student in February 2009, as required by IDEA. The Student's re-evaluation was also due but not done because, according to the testimony of [REDACTED] when a due process complaint is filed, everything is "frozen." This testimony appears to reflect confusion regarding the stay put placement requirement. Although the placement must remain the same, the District was still required to do an up to date IEP and a re evaluation, neither of which was done. Accordingly, nothing was done to assess the Student's current needs in order to determine if in fact a therapeutic day school would be the appropriate placement. The testimony and previous IEPs refer to a need for the Student to have "something more" than the current classroom setting. This appears to be the basis for the District's proposed placement of a therapeutic day school, in addition to its assertion that it must follow a continuum of placements. The District's assertion notwithstanding, it would be unreasonable to expect the Parents to agree to an exercise which requires more periods of inappropriate schooling which could lead to deterioration. IDEA does not require this of Parents.

Parents have met their burden and the Hearing officer finds that the evidence supports a finding that the District has not complied with the second prong of *Rowley* standard for the substantive component of a legally sufficient IEP. Based on the findings and analysis the Hearing Officer determines that the District has failed to provide the Student a FAPE.

Parents have met their burden in proving that the District failed to provide FAPE. Based on the needs identified by the ABA consultant and her recommendations for intense services, the placement for the Student is [REDACTED] recommended program. Additionally, the Student is entitled to two years of compensatory services to be determined, through the IEP process, as noted above, in consultation with [REDACTED], Parents, and District personnel.

Although the Hearing Officer does not insert this in the Order, it is recommended that the Student's placement include opportunities for socialization at the current school, in the form of community visits, if feasible.

## CONCLUSIONS OF LAW

Based on the evidence, the Hearing Officer makes the following conclusions of law:

- I. The Hearing Officer may consider only those issues identified for this hearing pursuant to Sec. 14-8.02a of The School Code. 105 ILCS 5/14.
- II. The District failed to identify the Student's needs for assistive technology and failed to provide appropriate assistive technology in the classroom setting. 34 CFR § 300.5.
- III. The District's IEP did not meet the standard of being reasonably calculated to enable the Student to receive an educational benefit and the Student was denied a FAPE. *Hendrick Hudson Dist. Bd. of Education v. Rowley*, 458 U.S. 176 (1982).
- IV. The District failed to provide an appropriate educational program/placement and related services with sufficient intensity to meet the Student's educational needs. 34 CFR 300.35, 300.39(a).
- V. The District violated its obligation, in compliance with applicable law, to offer the Student a free, appropriate public education. IDEA 20 U.S.C.A. sec. 1400(d)(1)(A). To meet IDEA requirements, the School Code and implementing regulations, the District must provide the Student with a FAPE in the least restrictive environment (LRE). The Act provides access to specialized instruction and related services individually designed to provide educational benefit. The District failed to identify the Student's needs in light of the disabilities and utilize instruction and related services to meet those needs. 34 CFR 300.101 through 300.103, 105 ILCS 5/14-8.02a(g-55), 223 Ill. Adm. Code 226. 50.
- VI. The ABA program meets the criteria for the Least Restrictive Environment for the Student. 20 U.S.C. Sec. 1412(a)(5)(A); 34 CFR 300.116.

## ORDER:

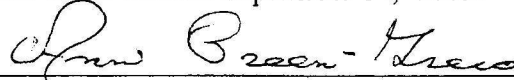
1. The District is to convene an IEP meeting on receipt of this order. Dr. [REDACTED] is to be included in the meeting. If Dr. [REDACTED] is not available, her observation and recommendations are to be considered.
2. The District is to conduct a re-evaluation of the Student.
3. The District is to conduct an assistive technology evaluation.
4. Upon completion of the re-evaluation, the District is to reconvene the IEP meeting to review all evaluation results and recommendations and have appropriate certified staff at the IEP meeting.
5. The District must develop an appropriate IEP with individualized and measurable goals/objectives and accurate present levels of performance based on the Student's eligibility and identified educational needs including appropriate modifications/accommodations, and to maximize all opportunities for socialization and other peer interaction, for the Student.
6. The District is to identify all direct and related services including, but not limited to speech/language, PT, OT, autism.
7. The District will provide appropriate assistive technology based on the evaluation.
8. The District must provide two years of compensatory services, in consultation with Dr. [REDACTED].
9. The District will provide proof of compliance with this order within 30 days of the date of the order.

**RIGHT TO REQUEST CLARIFICATION:** Either Party may request clarification of this decision by submitting a written request for such clarification to the 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. A copy of the request shall be mailed to the other parties 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.

**FINALITY OF DECISION:** This decision shall be binding upon the parties unless a civil action is commenced.

**RIGHT TO FILE CIVIL ACTION:** 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 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 was mailed to the party.


This Decision and Order entered September 14, 2009.



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Ann Breen-Greco, Impartial Hearing Officer

ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING

  
Student

vs.

Case No. 2008-0362

  
School District

ANN BREEN-GRECO, Hearing Officer

**CERTIFICATE AND AFFIDAVIT OF DELIVERY BY MAIL**

The undersigned Hearing Officer certifies that she served copies of the aforesaid Decision and Order upon Parents and District, through counsel, and the Illinois State Board of Education at their stated addresses, through the United States Postal Service at Chicago, IL, by certified mail before 5:00 p.m. on September 14, 2009:



email

Due Process Coordinator  
Illinois State Board of Education  
100 North First Street  
Springfield, IL 62777-0001



Ann Breen-Greco  
Due Process Hearing Officer  
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