ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

**IN THE MATTER OF**

[redacted]

v.

[redacted]

) **ISBE CASE NO. 2009-0160**
)
) **James Wolter**
) Impartial Due Process
) Hearing Officer

**PROCEDURAL BACKGROUND:**

The parent filed a written due process complaint dated October 23, 2008 [Hearing Officer Exhibit 1 [hereafter (HE 1)]. The complaint was received by the Illinois Sate Board of Education on October 31, 2008. The district filed a response to the complaint on November 3, 2008 [HE 2].The Illinois State Board of Education [hereafter (ISBE)] assigned the case to an impartial due process hearing officer [hereafter (IHO)], by letter dated November 3, 2008 [HE 3]. The parties requested and were granted a continuance to participate in mediation. Mediation was not successful and the parties agreed to conduct a Pre-Hearing Conference by teleconference on December 19, 2008 and the hearing dates were set for March 10, 11, 12, 13, 16, and 17, 2009 [HE 4]. The IHO conducted the due process hearing on March 10 and 11, 2009 but had a medical emergency on March 12, 2009 and pursuant to an email dated July 22, 2009, the parties agreed to continue the case to September 24, 2009 [HE 5]. However, that IHO was unable to return to work on that date [HE 6] and this hearing officer, James A. Wolter, was assigned to the case by letter dated September 23, 2009 [HE 7]. This hearing officer contacted the parties on September 24, 2009 and the Due Process Hearing resumed on September 29, 30, October 27, 29, November 2 &3, 2009 [HE 8]. The parties requested and were granted an additional two days, November 23, 2009 and December 2, 2009 to present witnesses and closing statements. In addition to hearing the testimony on those dates, this hearing officer reviewed the transcripts from March 10 & 11, 2009.

The due process hearing exceeded the 45-school day timeline for conducting a due process hearing for several reasons. As indicated above, the hearing was recessed from March 12, 2009 to September 24, 2009 in anticipation that original IHO would continue the case. However, even if the medical emergency had not occurred the due process hearing would have exceeded the 45-day time because the parties participated in mediation, the parents filed a motion and were granted time to observe the district's proposed 2008-2009 IEP placement, witnesses were not available on some dates, and the attorneys' busy schedules extended the due process hearing dates. This hearing officer also contributes to the delay because he was not available on November 16, 2009. It is noted that the student's education was not jeopardized during this delay because she attended a private special education day school of her parent's choice and the district

continued to make special education and related services available to the student in her neighborhood public school for the 2008-2009 and 2009-2010 school years.

The parents elected to have the due process hearing closed and elected not to have the student present at the due process hearing.

Legal counsel represented the parents and legal counsel represented the district at the pre-hearing conference and the due process hearing. The due process hearing took place over a period of ten (10) days contrary to 105ILCS 5/14-8.02a. (g-55) which requires the parties to present all evidence within a period not to exceed seven (7) days. This occurred in part because the issues of the due process hearing were framed in broad rather than specific terms resulting, for example, in the attorneys attempting to discover and the hearing officer having to discern what, if anything, about the student's 2007-2008 and 2008-2009 IEPs, placement and services failed to provide her with a free appropriate public education in the least restrictive environment.

The parties submitted a joint evidence [redacted] packet of 127 documents consisting of 1,223 pages [hereafter, [redacted] 1-1223]. All 1223 pages were placed into evidence. The parents submitted an evidence packet (P) of 29 documents of 250 pages [hereafter P 1-250] that was accepted into evidence. The district submitted an evidence packet (SD) of 9 groups of documents 327 pages [hereafter SD 1-327] that was accepted into evidence. The hearing officer placed 10 documents consisting of 34 pages into the administrative record.

On the third day of the due process, hearing both parties moved to strike portions of the opposing party's evidence documents from the record. The hearing officer informed the parties, that one of the reasons for a mandatory pre-hearing conference and the disclosure of document and witness lists were to consider and rule on any challenges so that the parties could plan their case and to make the due process hearing proceed smoothly. The parties protested that the previous hearing officer was going to rule on challenges to the entry of evidence into the record as they arose. This hearing officer informed the parties that he was not going to do that and insisted that the parties state their objections to any document so that he could rule on all documents that would be admitted into the evidence and the due process hearing could proceed. The parents objected to the inclusion of district emails and notes at SD 261, 262, 263, 264, 265, 266, and 267 because the parent was not a party to that correspondence and had not received copies of it in their request for student records. As a result, SD 261, 262, 263, 264 and 266 were redacted. Since SD 265 and 267 were emails that the parent participated in, they were not redacted. The parent objected to the inclusion SD 16 - 17 and SD 19 - 20. The objection was denied in that SD 16 - 17 is public information and SD 19 - 20 are test scores listed elsewhere. The district objected to P 8 because they would not be able to examine the author of that document. The objection was sustained and the document was redacted from the record. On October 27, 2009, the parent, with concurrence by the district, added [redacted] 1224-1227, (a list of medications prescribed for the student by physicians from [redacted] to the joint evidence packet. On December 2, 2009, at the close of the 10th day of hearings, prior to the parties making their closing statements, the parents moved to place

a document into evidence purported to be an analysis of the reading level of all the books the student had read during the 2007-2008 school year. The district objected because they alleged the list of books were not identical to the actual books the student read. The hearing officer, in keeping with his earlier instructions to the parties and the 5-day disclosure rule, did not admit the document into the record.

Witnesses, with the exception of the mother and the assistant superintendent-retired, were sequestered during the hearing and instructed by the hearing officer not to discuss their testimony with anyone until the due process hearing was completed.

The following witnesses were called to provide testimony on March 9, 2009:*

[redacted] School Psychologist/Counselor
District Educational Consultant

The following witnesses were called to provide testimony on March 10, 2009:*

[redacted] Student's 4th Grade Special Education Teacher
Assistant Principal/Student Services Coordinator

The following witnesses were called to provide testimony on September 29, 2009:*

[redacted] Student's 4th Grade Special Education Teacher
Assistant Principal/Student Services Coordinator
Mother

The following witnesses were called to provide testimony on September 30, 2009:*

[redacted] Private Social Worker for Student and Family
[redacted]
Mother

The following witnesses were called to provide testimony on October 27, 2009:*

[redacted]

The following witnesses were called to provide testimony on October 29, 2009:*

[redacted] (via teleconference)
Mother
Student's 4th Grade Special Education Teacher

The following witnesses were called to provide testimony on November 2, 2009:*

[redacted] Student's 4th Grade Special Education Teacher
[redacted]

The following witnesses were called to provide testimony on November 3, 2009:*

[redacted] 3rd Grade Teacher [redacted]

[redacted] 4th Grade Teacher - [redacted]
Assistant Principal/Student Services Coordinator

The following witnesses were called to provide testimony on November 23, 2009:*
[redacted] Assistant Principal/Student Services Coordinator

The following witnesses were called to provide testimony on December 2, 2009:*
[redacted] Principal - [redacted]
Assistant Superintendent - Retired

* Hereafter, witnesses are listed by job title rather than by name to protect the confidentiality of the student. The specific name of the district school is not used for the same reason. However, the name of the private special education day school [redacted] is used because it is listed in the remedy sought by the parent [redacted] stands for [redacted] Also regular education and general education are interchangeable terms in this document.

The hearing officer has jurisdiction to hear this matter under Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)–(D), 34 CFR 300.511(c), Section 14-8.02(b) of the Illinois School Code [105 ILCS 5/14-8.02c(b)], and 23 Illinois Administrative Code 226.630(a).

**Issues:** The issues of this hearing are:

1. Whether the IEP, Placement and Services provided by the District for the 2007-2008 school year to the Student were reasonably calculated to provide the student a free appropriate public education (FAPE) in the least restrictive environment (LRE)?
2. Whether the IEP, Placement and Services proposed by the District for the 2008-2009 school year for the student are reasonably calculated to provide the student with a FAPE in the LRE?
3. Whether [redacted] is an appropriate placement for the 2008-2009 school year?
4. Whether the student is entitled to compensatory educational services for the 2007-2008 school year?

**Remedies:** The parent seeks the following remedies:

1. The student asks for retroactive reimbursement for all costs related to the parental placement at [redacted] for the 2008-2009 school year and prospective placement at [redacted] as well as compensatory services in the form of one additional year at [redacted]
2. The District asks for a finding that they offered the Student a FAPE and denial of the requests for reimbursement and future compensatory payment to [redacted]

**Findings of Fact:**

1. The student is a 12-year-old female from an English speaking home. She is currently attending [redacted], a private special education day school. Her parents placed her at [redacted] unilaterally at some unspecified time during the summer of 2008 because they were dissatisfied with the special education placement provided to the student by the district during the 2007-2008 school year and in disagreement with the district's proposed special education placement in a special education instructional program within the student's neighborhood school for the 2008-2009 school year. The uncontested testimony of [redacted] during cross-examination was that the student started attending [redacted] on August 25, 2008.
2. The oral testimony and written record indicate the student has faced multiple challenges since early childhood. Her parents have supplemented public school services with private speech/language therapy, private tutoring, private individual/family social work counseling, pediatric/psychiatric treatment, private day school and day camp programs and at least three neuropsychological evaluations. Additionally, the oral testimony and written record indicate the parents have been very involved in and active participants in the student's public education program with the notable exception of an August 25, 200[redacted] and the August 26, 2008 IEP meeting [JE 628].
3. The student was first declared eligible for special education related services on March 22, 2001 at age 3 years 3 months under the eligibility category Speech-Language Impairment [JE 44]. The student had been attending a private pre-school at which time it was noticed she had poorly developed language skills as compared to her peers as well as having other challenges in areas of social development, school behaviors, engaging in social interactions with her peers and electing solitary play during group playtime [JE 73-74]. Subsequently, the student was referred to a half-day special education early childhood program operated by the special education cooperative [JE 88] for the 2001-2002 school year due to limited progress in speech-language and other noted challenges including; difficulty interacting socially, poor eye contact, and constant motion [JE 60-65]. She continued in the special education cooperative's early childhood program through the 2002-2003 school year. The student entered the district's half-day regular education kindergarten for the 2003-2004 school year [JE 138]. The student's IDEA eligibility classification remained Speech/Language Impairment from pre-K through the first half of 1st grade.
4. After conducting a 3-year case study reevaluation while the student was in 1st grade [JE 178-217], an IEP Team meeting was held on January 12, 2005 at which time the district conducted a determination of eligibility [JE 218-215, 223, 224] and determined the student's primary eligibility classification was Cognitive Delay/Mental Impairment with Speech/Language as the secondary classification [JE 176]. The parents, as indicated in the testimony at the due process hearing and the written evidence [JE 242], rejected the determination that the student was eligible for special education and related services under the criteria for Cognitive Delay/Mental Impairment and obtained a full neuropsychological evaluation at [redacted] [JE 289-312] which was presented to the district for consideration at an IEP Team meeting held on March 11, 2005. The school psychologist and other district witnesses testified that the test results of the private

evaluation were consistent with the district's evaluations and consistent with the IDEA classification of Mental Retardation but the district changed the student's primary eligibility classification to OHI and Speech/Language [JE250] to appease the parents. District witnesses testified that they conceded to the parents' desire not to have the student eligible for special education and related services under Cognitive Delay/Mental Impairment because the education team viewed identifying and providing for the student's special needs as the most important aspect of an IEP and the parents were in agreement with the stated student needs, goals and services. The written record indicates that remainder of the January 12, 2005 IEP, specifically the goals, regular education placement and type and amount of special education and related service, remained unchanged [JE 282]. The student's eligibility classification remained OHI and Speech/Language for the remainder of 1st grade through the first half of 4th grade.

5. The parents and the district agree that by December 22, 2006, when the student was in 3rd grade, the student was experiencing a decline in social and academic skills. The 3rd grade regular education teacher testified that there is a significant change in curricular expectations from 2nd grade to 3rd grade. Whereas the curriculum demands in 2nd grade require students to utilize the basic cognitive function of rote memorization of facts and the acquisition of basic learning skills with considerable teacher guidance, the curriculum demands in 3rd grade require students to utilize the higher cognitive function of application of facts and the independent use of skills to complete assignments. The 3rd grade regular education teacher and the 3rd grade special education teacher testified that the student had difficulty adjusting to the increased demands of 3rd grade. It is also noted that the dosage of the student's medication was reduced and she exhibited an increase in anxiety, obsessive behavior, and rude behavior. The parents and school district worked together to assist the student with her struggles. Her homework was simplified to reduce anxiety at home, academic expectations were lowered to reduce anxiety at school [JE 360] and her IEP goals were revised [JE 362-366] but the student gave herself extra homework [JE 761].
6. On March 2, 2007, an IEP was developed for the remainder of 3rd grade and the first half of 4th grade [JE 367-393]. The student's minutes of special education and related services were increased to 930 minutes per week [JE 383]. District witnesses testified, as confirmed by the written record [JE 369, 457, & 614], that the district wanted to provide more special education minutes to the student by having her take science and social studies in special education but the parents and there [redacted] educational consultant insisted the student remain in the regular education science class and the regular education social studies class with limited expectation of academic performance because they thought it would enhance the student's self-esteem. The student's 3rd and 4th grade regular education teachers as well as the student's 3rd and 4th grade special education teachers testified that the special education teacher or the special education aide were in the regular education classes to assist the student, but the student refused to accept their assistance. Pursuant to the parents' request, the special education teacher and aide did not provide the student with assistance in the regular education classes [JE 369, 457, & 614].
7. The parents and district concur that the student experienced academic, behavioral, and

emotional difficulties during the first half of 4th grade. The mother testified that the student came home from school frustrated and upset because of academic and social difficulties she was experiencing at school. District personnel testified that the student came to school upset because of problems she was experiencing at home [JE 770, 780]. The mother testified that at one point, while driving, the student's aggression toward her sibling became so bad that she had to stop the car and subsequently make an emergency visit to the student's psychiatrist. The private social worker testified that she provided counseling to the student and family to assist them with the difficulties they were experiencing at home. The student's 4th grade special education teacher testified that the student also made some progress during this period. On November 12, 2007 a new math goal was written by the special education teacher in collaboration with the parent by telephone because the student had met her March 3, 2007 Math IEP Goal [JE 420-422].

8. On September 12, 2007, the parent gave written consent to the district to provide the student with a 3-year case study reevaluation [JE 549]. Included in the case study, under Social/Emotional Status, the district's educational consultant was to conduct "Behavioral Observations" [JE 551]. The district consultant administered the Autism Diagnostic Observation Schedule (ADOS) Module 3 [JE 1149-1159]. The mother and the school psychologist testified that the school psychologist met with the parent prior to the scheduled January 30, 2008 IEP meeting. The school psychologist asked the mother if she had ever considered the student autistic. The school psychologist shared the results obtained on the ADOS Module 3 and went on to explain that she believed the student's academic, behavioral and social difficulties were characteristic of a child with autism. The mother testified that she was shocked because no one had ever told her that they suspected her daughter might have autism and that she went to [redacted] to obtain additional testing because the she and her husband did not believe their daughter was autistic.
9. An IEP meeting was held on January 30, 2008 to review the 3-year case study reevaluation. The parent, the private speech language therapist and the [redacted] educational consultant attended the meeting [JE 423]. The parent presented the district with a letter from the student's [redacted] psychiatrist who had been monitoring the student's medication [JE 536-537] and a Brief Neuropsychological Evaluation [JE 538-543]. The letter and evaluation stated that the former [redacted] psychiatrist and the [redacted] neuropsychologist did not find the student autistic. The [redacted] psychiatrist's letter states his diagnosis of the student is 1) cognitive limitations 2) problems with attention and focus 3) mood dysregulation with chronic dysthymia and 4) psychotic symptoms that likely stem from a lack of sophistication/capacity to cope with feelings of inadequacy. It is noted that the diagnosis of cognitive limitations is consistent with the district's psychological evaluation and the student's academic performance, that problems with attention are consistent with district testing and the student's school functioning, that mood dysregulation with chronic dysthymia are consistent with the reports of the student's functioning at home and in school and the psychotic symptoms are consistent with the student's report of seeing a nonexistent man in blue and reporting the man was telling her to do bad things [JE 733].
10. The 4th grade special education teacher, school psychologists, assistant principal, and

principal testified that, while the district found the student met the special education eligibility criteria for autism spectrum disorder under IDEA at the January 30, 2008 IEP meeting [JE 439], they listed the student's eligibility criteria as "Multiple Disabilities" [JE 423 & 462] rather than Autism, to placate the parents. The parents consented to having the student take science and social studies in the special education resource room and the student's special education and related service were increased to 1210 minutes per week, which constituted more than 50% of the school day within her neighborhood school. The district staff testified that this change enabled the student to learn in language rich setting with verbal and non-verbal directions, and with minimal distractions where her instruction was broken down into smaller parts and delivered at her level of need with set time limits or challenges for completion, as recommended in the full [redacted] neuropsychological evaluation [JE 16, 17].

11. In addition to the program providing the student with more time in special education, the district witnesses testified that the district restructured the way services were delivered to the student. The structure included among other things, a weekly schedule, daily schedule, a list of steps for each learning task to assist the student stay focused on learning activities and to assist her anticipate what was next. This was consistent with the full [redacted] neuropsychological evaluation that recommended a school program that provided consistent, structured, predictable environment [JE 16] and had structured situations with clear rules for academic tasks including what to do and when to do it [JE 17]. The 4th grade special education teacher testified that the program took a pro-active approach to reduce the student's anxiety and thereby extinguish behavior issues by scheduling pre-determined times for sensory breaks. This was consistent with the full [redacted] neuropsychological evaluation that recommended a school program that provided for a change in pace or task frequently and provided opportunities in the classroom for controlled movement [JE 17]. The 4th grade special education teacher developed a behavior plan in collaboration with the school psychologist that provided for unobtrusive verbal and nonverbal cuing when the student was off task with frequent reinforcement and broke behaviors down into smaller discreet elements as recommended in the full [redacted] neuropsychological evaluation [JE 17]. The special education teacher testified that the student enjoyed her social service project of going to the primary grade classroom at the end of the school day to assist younger children get ready to go home. This is consistent with the recommendation contained in the full [redacted] neuropsychological evaluation that the student be provided a social emotional opportunity to increase her self-esteem through social service activities by helping younger children [JE 17]. The district's speech/language therapist was imbedded in the program to provide language enrichment and the school psychologist was imbedded to promote social functioning through direct instruction to help the student learn to process faces, voices social stories and in social problem solving and coping with negative feelings and interpersonal conflicts as recommended in the full [redacted] neuropsychological [redacted] [JE 17]. The school psychologist provided the student with a [redacted] to assist her develop group social skills as recommended in the full [redacted] neuropsychological evaluation [JE 17] as well as facilitated social interactions with

peers during unstructured time on the playground and in the game room. District staff testified that the January 30, 2008 IEP and resultant special education program for the remainder of the 2007-2008 school year and proposed for the 2008-2009 school year was designed to address the student's educational needs, which include speech/language development, academic support and behavioral/emotional regulation pursuant to the recommendations in the brief [redacted] neuropsychological [JE 42].

12. The parties spent a considerable amount of time at the due process hearing debating whether the student's proposed program was [redacted] even though the name of the proposed program was not an issue specified in the parents' due process complaint. In a response to the parents' dissenting opinion regarding the proposed 2008-2009 placement, the district wrote the phrase "the structured teaching model" [JE 591], however all district witnesses maintained the proposed program was not the Structured Teaching Model as implied by the parents. The 4th grade special education teacher testified that the proposed 2008-2009 school year program was the same program the student had been since the January 30, 2008 IEP meeting. The assistant principal said it incorporated some of the aspects of the Structured Teaching Model as well as other teaching models. The principal testified, over the objection of the parents' attorney, that there is a Structured Teaching Model program within the district that has been in place for about four years but the program the student was in during the 2007-2008 school year and that the student's proposed program for the 2008-2009 school year was not the district's Structured Teaching Model. The principal testified that the student's proposed program was called the Intensive Resource Class. She explained that it was a language rich program where the speech/language therapist and school psychologist were imbedded in the classroom to collaborate and coordinate their work with the teacher. She also testified that the district was able to implement the current [redacted] IEP within the student's neighborhood school.
13. The January 30, 2008 IEP team considered, but rejected, placing the student in a full-time special education class within the regular education school as too restrictive [JE 453]. The parents requested the district to place the student at [redacted] [JE 457]. District staff testified that the parents' request to send the student to [redacted] was not considered because she was being educated in her neighborhood school and they believed she could continue to be educated in her neighborhood school with access to the regular education curriculum and non-disabled peers [JE 453]. District staff testified, as supported by the written evidence, that the parent questioned whether the student required the Self Maintenance goal/times [JE 602, 603] but the parents did not specifically object to any of the January 30, 2008 IEP goals nor did the parents propose any goals that the district refused to add to the IEP. Further, at this time, the parents did not inform the district that they rejected the proposed 2008-2009 placement and were sending the student to [redacted] with the intention of recovering tuition costs from the district. The parent agreed to the student receiving her science class and social studies class in special education for a trial period of two months and the district implemented the new IEP. Subsequently, the parents objected to the district listing Multiple Disabilities as the student's eligibility classification and, again to appease the parents, the district changed the listing of the eligibility

classification back to OHI and Speech/language at an IEP Team meeting on May 28, 2008 [JE 578].

14. On April 23, 2008, another IEP meeting was held for an update to determine how the student was responding to her new special education program [JE 552]. Testimony by parent and district witnesses indicated a discussion of the student's progress was stopped to discuss the student's special education eligibility criteria. The parents objected to the classification of mental retardation and autism and insisted the student did not have "autism" but had a new diagnosis of "mood disorder" and her eligibility criteria should be changed. The parties agreed to proceed with the progress report after the district stated it would consult with the [redacted] and the [redacted] regarding the parent demand that mental retardation and autism not be used as the student's eligibility criteria. The "Multiple Disabilities" criteria remained the special education eligibility category [JE 552]. The student's 4th grade special education teacher reported at the IEP meeting [JE 553] and testified at the due process hearing that the student was making progress academically. The written record indicates that four months into the January 30, 2009 IEP, the student had met 1 of 4 benchmarks for Goal 1, 1 of 4 benchmarks for Goal 2, 1 of 4 benchmarks for Goal 3, 2 of 4 benchmarks for Goal 4, 1 of 4 benchmarks for Goal 5, 2 of 4 benchmarks for Goal 6, demonstrated adequate progress in 3 of 4 benchmarks for Goal 7, demonstrated adequate progress in 1 of 4 benchmarks for Goal 8, met 2 of 4 benchmarks and demonstrated adequate progress in another benchmark for Goal 9, but had not met her physical education benchmarks [JE 557-566]. The 4th grade special education teacher reported at the IEP meeting and testified that the student's behavior improved with the employment of a behavior plan that she implemented [JE567-568]. The special education teacher and assistant principal testified the student does not have problems with boys. The assistant principal and principal testified that the student gets along as well with boys as she does girls. The school psychologist noted the student has peers in the resource room and seeks them out [JE 459].The record indicates and th[redacted] educational consultant testified that the behavior plan lacked a functional behavioral assessment [JE 554]. The district agreed to conduct a functional behavioral assessment and develop a behavior intervention plan base upon that assessment [see JE 583-588]. No testimony or written evidence was presented to indicate that the parents and/or their educational consultant disagreed with the student's IEP goals or any aspect of the behavior plan including target behaviors, definitions, the behavioral goal or the eight specific procedures to achieve the goal. The 4th grade special education teacher testified that the student's behavior improved with the behavioral plan. She added that it provided more structure to her environment and she knew what the classroom demands were and knew what was expected of her as supported by the written evidence [JE 751]. This is consistent with the recommendations contained in the RNBC neuropsychological evaluation [JE 17]. No testimony or written evidence was presented to indicate the parents and/or th[redacted] educational consultant disputed the accuracy of the student's progress report at the April 23, 2008 IEP meeting. However, the record indicates the parents stated they would submit a dissenting opinion [JE 556].

**15.** On May 28, 2008, an IEP meeting was held to review the parents' May 14, 2008 dissenting opinion [JE 578]. The parents' dissent stated that they desired the district remove all references to the student having Autism and Cognitive Impairment from their daughter's school records. The parents believed the proposed 2008-2009 placement was inappropriate because: 1) it was new and untried on the student, 2) the parents were unable to observe the class during the school year, 3) the peer group would be inappropriate because the student would be the only girl with 6 boys, and 4) the "Structured Teaching" model utilized in the proposed program is appropriate for students with Autism which the student does not have. The parents' dissenting opinion requested the district find and support the student attending another school but did not state that the parents were sending the student to [redacted] with the intention to recover tuition costs from the district [JE 579-580]. The district presented the parents with a written response on May 28, 2009 that enumerate the behavioral and test data in support of the Autism and Cognitive Impairment classifications. The district maintained the proposed 2008-2009 placement was appropriate because 1)since January 2008 *the student* has participated in the structured teaching model program and has begun to make progress on her goals while she was regressing prior to the initiation of that program, 2) the proposed program is a continuation of the student's current program except it will have more students and the parents have had an opportunity to visit the classroom and had information about the current program. 3) special education placements are <u>not</u> based on gender and the student is scheduled to be with female students throughout the school day, and 4) the proposed placement is a continuation of the student's current placement which is designed to address specific student needs [JE 581-582] and her schedule would be similar to her *then* current schedule [JE 600-604]. Witness testimony and the written record indicates that a discussion pursued at which time the district once again agreed to concede on the classification of the student's eligibility for special education [JE 593] in the interest of working collaboratively with the parent and the fact that services are provided on the basis of individual student needs [JE 593] rather than eligibility classification. The student's eligibility classification was changed from "Multiple Disabilities" to "OHI (Mood Disorder, ADD, Sensory Issues and Social Issues) and Speech/Language" [JE 578]. The parent asked if the district ever placed students out of that school. The district personnel reviewed the continuum of services available to students and the parents were informed that the district believed the student's special education needs were being met in the district program and could continue to be met within a special education placement in her neighborhood school [JE 596]. The private neurophysiologist testified that she told the district that she thought the student should have a goal to increase her social skills, however this is not supported by the written evidence and the student's IEP did have goals to increase the student's social skills [JE 565]. No substantive evidence was presented to indicate that the parents were in disagreement with student's 2008-2009 IEP goals or had requested the goals be changed in any way or that the amount and type of special education and related services was inappropriate. The parents were presented with the functional behavioral analysis and behavioral intervention plan [JE 583-588] There was no written evidence or testimony indicating the parents or the [redacted] neurophysiologist objected to or

disagreed with the functional behavioral analysis or the behavioral intervention plan. Rather, their concern was over their perception of who the student's peer group would be in the 2008-2009 resource room, that the student might be the only girl in the special education class and their contention that the proposed 2008-2009 special education placement was in a program called the Structured Teaching Model which they contend is used exclusively in the education of students with Autism or Autism Spectrum Disorders. The written record indicates the parents stated they would submit a dissenting opinion and asked for the procedure to follow if they disagreed with the district recommendation [JE 598] but made no mention of sending the student to [redacted] with the expectation of recovering tuition costs from the district. The district provided the parent's rights and explained the procedure for filing a due process complaint [JE 598].

16. On August 26, 2008 the district held an IEP meeting [JE 606 - 628] in response to a letter written by the parent's attorney dated August 18, 2008 asserting it represented a 20 U.S.C. Section 1412(a)(10)(C) notice that the parents intended to place the student at [redacted] on September 2, 2008 and seek reimbursement from the district [JE 790] (it is noted that 20 U.S.C. Section 1412(a)(10)(C) requires a ten *business* day notice). The parents were invited to the August 26, 2008 IEP meeting but did not attend [JE 628]. They sent their attorney's paralegal and the [redacted] educational consultant to represent them [JE 607]. The district described the proposed 2008-2009 placement as a continuation of the program the student had been in for the last half of the 2007-2008 school year but with other students, who had similar needs as the student. It is structured to reduce anxiety and provide opportunities for the student to interact with girls in the regular education curriculum [JE 611]. The district attempted unsuccessfully to ascertain from the parent representatives what it was the parents' desired that [redacted] offered so that the district could incorporate those aspects into the student's special education program within her home school. With the exception of questing the student's need for the "Self-help Goal", which the district pledged to review with the parents because the student had mastered that goal [SE 614 & 617], the parent representatives did not object to or propose any changes to the student's IEP goals. The [redacted] educational consultant stated she would review the IEP with the parent and get back to the district but there in no evidence she did. There was no mention at the IEP meeting that the student had already started attending [redacted] It was learned, subsequent to the August 26, 2008 IEP meeting that, the student had already started attending [redacted] n August 25, 2008.
17. At the Due Process Hearing the parents' attorney contend that the district failed to provide the student with a free appropriate education because the district did not, and still does not, understand the nature of the student's disability (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). In support of this contention, the parents' attorney cited the multiple classifications under which the district has declared the student eligible for special education and related services. However, the contention that the district does not understand the student's needs is contradicted by the parents' own private evaluations which state that the school seems to understand the student's unique needs and implemented services at the level the student needed [JE 16 and JE 408].

The district acknowledges that it has changed the student's eligibility classification but contends the changes in classification were made in an attempt to accommodate the parents' desires. Specifically, the parents were adamantly against having the student eligible for special education service under the classifications of Cognitive Delay/Mental Impairment or Autism [JE 581-582]. Further, district witnesses testified that it was student's special needs, rather than her eligibility classification, which determined the type and amount of special education and related services the district provided for the student and thereby determined her special education placement recommendation. The written record supports this testimony in that, while the district changed the student's eligibility classification to accommodate the parents' desires, the students IEP goals and services remained consistent with her stated educational needs over the sixteen IEPs submitted into evidence from the period March 22, 2001 through August 26, 2008.

18. The parents' attorney also contend the district failed to provide the student with a free appropriate education during the 2007-2008 school year because the student did not make academic progress (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). Specifically, the parents' attorney cited the student's scores on the WIAT-II (Wechsler Individual Achievement Test-Second Edition) administered on October 20, 2006 [SD 0076] and November 11, 2007 [SD 0077]. The attorney contended that a Standard Score of 91 in Word Reading in 2006 as compared with a Standard Score in Word Reading of 87 in 2007 indicates that the student not only failed to make progress in reading but also regressed. The assistant principal testified that she had experience in the administration and interpretation of the WIAT-II and stated that the Standard Scores in Word Reading did not indicate that the student failed to make progress. She explained that the Standard Score was a measure of how the student's achievement compared with the achievement of other students in that grade level. While the student's Standard Score went down, that only indicated that the student did not make as much progress as other students in that grade. The assistant principal added that student's Grade Equivalent Score increase by 2 months, which indicated the student, made progress in Word Reading. The parents' attorney refused to accept that answer, apparently confusing a Standard Score with a Raw Score, and vigorously insisted that a decline in the Standard Score meant the student failed to make progress in Word Reading.
19. The parents also maintain that the student did not make academic progress because the reading level of the book the student was reading at the end of the 2007-2008 school year was lower than the reading level of books the student had been reading (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The parent presented no substantive evidence to support this assertion. The 4th grade special education teacher had testified that the student had made progress in reading during the 2007-2008 school year. This testimony is supported by the progress reported on the student's IEP [JE 620] and weekly progress reports sent to the parents via emails [JE JE 751, 754,756,757,758, 759,761, 765,767769,772, 773,774, 776, 777, and 779].
20. Additionally, the parents content that the district failed to provide the student with a

free appropriate public education because the district reported the student's progress on her IEP Goal #4 inaccurately [SD 0143] (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The Bench Mark of 6/08 stated, "Objective continues. The student needs 1 prompt to initiate checklist. The emphasis next year will focus on independently determining when she needs to wash her hands and do so appropriately." However, the student's checklist from 5/19 to 5/23 indicates the student required 2 to 3 prompts [SD 0146]. The student's 4th grade special education teacher testified that the data from 5/19 to 5/23 indicates the student required one prompt in the morning and one in the afternoon. She maintained the report of 6/08 was accurate as of that date but acknowledged that the statement that the student needed 1 prompt on her IEP Bench Mark could have been stated better. This appeared to be a credible explanation for the apparent discrepancy. She held to her testimony under cross-examination that the student made progress during the 2007-2008 school year and that the proposed program for the 2008-2009 school year was a continuation of the 2007-2008 program. That testimony is consistent with the progress reported for each of the student's IEP Goals and the supporting data consisting of student work samples in support of that documentation [SD 0080-0199].

**21.** At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because it was new and untried on the student (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The district contends the proposed 2008-2009 placement in the Intensive Resource Room program is a continuation of the January 30, 2008 IEP placement where the student made significant gains in achieving her goals while she was regressing prior to the initiation of that program. The district's contention is supported by the testimony of all district witnesses and the written record [SD 0080-0199]. It is noted tha[redacted] case manager testified tha[redacted] adopted the January 30, 2008 IEP for implementation when the student started there on August 25, 2008 and it remained in effect until a new IEP was written at[redacted] on December 18, 2008.

**22.** At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because the parents were unable to observe the class during the school year (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The 4th grade special education teacher testified that the parents visited the class and the student showed them her materials. She also testified that she explained the program to the parents and gave them copies of the student's schedule. Her testimony, as supported by the written record, indicates the parents had an opportunity and did visit the student's class during the 2007-2008 school year [JE 597] and that the special education teacher explained the program and provided the parents with the students weekly and daily schedules at IEP meetings [JE 600-603] . Additionally the written record indicates the teacher provided the parents with information about how the student was progressing in the program on a weekly basis [JE 751,

754,756,757,758, 759,761, 765,767769,772, 773,774, 776, 777, 779] as well as provided the student's private tutor with assignments the student was working on [JE753, 755, 760, 762, 763, 768, 771].The parent and the [redacted] educational consultant testified that the district did not explain what the student's 2008-2009 special education placement would be like. This contention is contradicted by district witness testimony and the written record. District witnesses, including the student's 4th grade special education teacher, testified that the 4th grade special education teacher explained that the proposed 2008-2009 placement would be the same as the student's placement from January through June of 2008. The parents were provided information about the student's new program at the January 30, 2008 IEP meeting [JE 459], they were provided a proposed daily and weekly schedule with the student's 2007-2008 IEP and the parents were invited to, but did not attend, an open house on August 25, 2008 [JE 791] where they could have learned more about the program, met with the parents of the other students, including the parents of a student who had attended [redacted] and got to know about the other students scheduled to be in the program [JE 781] but they elected not to attend that meeting. There is no evidence that the parents visited the student's classroom to observe her being taught in the district program or at [redacted] prior to the parents withdrawing the student from her neighborhood school and enrolling her at [redacted]

**23.** At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because the peer group would be inappropriate because the student would be the only girl with 6 boys (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The district acknowledged that the 5, not 6, other students in the Intensive Resource Class would be boys but that the student would have, as she did during the 2007-2008 school year, amble opportunities for adult facilitated and informal interaction with girls in the special and regular education curriculum [JE 597, 611]. The [redacted] neuropsychologist and the [redacted] educational consultant testified that the student requires a peer group, including girls similar to the student, in her class to learn. They discounted the opportunities the student would have to interact with female students in the regular education curriculum stating that girls the student's age are "clicky" and they would exclude the student from their group. While the testimony and the written record indicates the student has generally had difficulty initiating and sustaining meaningful interactions with peers from the time she was first referred to special education [JE 73-74] until her most recent [redacted] IEP [P 116, 143, 144], the uncontested testimony of the student's 3rd and 4th grade regular education teachers is that the girls in the student's regular education classes have reached out to the student and have volunteered to participate as Peer Buddies in her social group. The principal provided testimony describing the extensive school-wide program cosponsored by the PTO to promote an understanding and appreciation of individual differences in learners. It is note that the mother assisted with school-wide program to promote understanding and appreciation of individual differences in learners [JE 711]. The [redacted] neuropsychologist and the [redacted] educational consultant failed to provide any substantive evidence to support

their claim that 10 and 11 year old girls are "clicky" and certainly presented no basis to make that accusation against the student's classmates. Without substantive evidence, their conclusion is nothing more than an unfortunate and misinformed pedestrian stereotype that attributes social shallowness to 10 and 11 year old girls that flies in the face of the social service provided by young women, in particular the student's Peer Buddies, and ultimately is an insult to the student, whom the testimony and written evidence indicates, enthusiastically helped younger children in primary grades get prepared to go home at the end of the school day.

**24.** At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because the "Structured Teaching" model allegedly utilized in the proposed program is appropriate for students with Autism which the student does not have (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The testimony of district witnesses as supported by the written record indicates this contention is factually incorrect on several counts. First, the proposed 2008-2009 program is called the Intensive Resource Class. The district has a special education program called the Structured Teaching Model but that was not the student's proposed program. The assistant principal provided several hours of testimony over four days. In summary, she testified that the district selected portions of the Structured Teaching model as well as other teaching models to develop a more structured program for the student based upon the information that had been gathered about the student from district and private evaluators. It is noted that photographs of the Intensive Resource Class indicate the room is organized with color-coded areas for individual learning and group learning as well as labels to provide students with visual reinforcement [SD 236-260]. That type of classroom organization is frequently, but not exclusively, found in the Structured Teaching Model. Based upon the student's success in the program, the district decided to make it available to five other students with similar needs. The Intensive Resource Class is not designed exclusively for students with autism or for that matter any particular special education eligibility classification. The district dedicated a specific classroom to the program and called it the Intensive Resource Class. The Intensive Resource Class is a continuation of the student's 2007-2008 program which provided a structured environment that enabled the student to know what to expect and what to look for as well as minimized unnecessary visual and auditory distractions, provided a consistent predictable daily and weekly routine, presented instruction in small sequential steps and was language enriched with visual cues to reinforce verbal communication (as recommendation of the parents' private evaluation [JE 399]). All of the students scheduled for the Intensive Resource Class required that level of structure along with an opportunity to have access to and participated in the general education program with non-disabled and disabled peers. The assistant principal testified that the Intensive Resource Class used with the student incorporated many of the recommendations provided in a report by the [redacted] educational consultant [JE 403-408]. More to the point of this due process hearing, regardless of what the student's program is called, the student's 4th grade special education teacher testified that the

student made significant progress since implementing the new program in January 2008 as documented in the written record [SD 0080-0199]. As a side note, the parents provided no substantive evidence that the Structured Teaching Model is restricted to or exclusively used in the education of students with autism.

25. At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because it contained sensory breaks that the student did not require (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The student's 4th grade special education teacher testified that the sensory breaks were a proactive strategy to provide the student with a break before her anxiety built to a point that she presented a behavior problem. She stated that the student had a menu of sensory activities from which she could choose. The student was encouraged to select one of the items on the menu only two times per day to insure she had a variety of sensory activities. Art and drawing are among the student's strengths and she most frequently selected coloring and drawing during her sensory breaks. She also selected activities that reinforced academic areas such as selecting silent reading, computing and working on a puzzle of the United States, which reinforced mapping skills that the student was working on [JE 741-742]. At other times, the student elected to sit quietly during her sensory break. The special education teacher testified, as supported by the written record, that the sensory breaks during the 2007-2008 school year [JE 600-603] helped the student remain focused and help diminish her episodes of disruptive behavior as supported by the written record [SD 0080-0199].
26. At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because the student had mastered one of the learning activities; making a quesadillas [Sd 229-232] (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The parents claim that the student knows how to use a microwave and knows how to make quesadillas. District witnesses testified and the written record clearly indicates that the quesadilla activity was not a cooking lesson but an activity designed and implemented by the special education teacher, school psychologist and the speech/language therapist to assist the student achieve the third and fourth Benchmark for the Functional Math Goal on her January 30, 2008 IEP [SD 0134]. An examination of the first and second Benchmarks for that Functional Math Goal indicated the student made s'mores [SD 134-220] during the 2007-2008 school year. An examination of the work sheets used in the s'mores activity indicates it was an authentic hands-on multi-sensory learning activity. Some of the math concepts reinforced in the activity included estimating, measuring, fractions, size, shapes, sequencing, placement, temperature, time, and change in property. The s'mores lesson reinforced pragmatic language usage such as verbal pre-planning, following directions, using words to describe and recall physical actions, physical material, a description and differentiation of characteristics and actions, discriminating and evaluating, and practicing safety procedures. District witnesses testified that the objective of quesadilla learning activity was to provide the student with an authentic

hands-on group learning activity that reinforced and enriched pragmatic mathematic and pragmatic language concepts rather than to teach the students how to cook was supported by the written record and consistent with the student's January 30, 2008 IEP [SD 134-220].

**27.** At the close of the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because a general education teacher was not present at the May 25, 2008 IEP meeting [JE 578] (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The parents did not specify or present any evidence on how the failure of a general education teacher's attendance at the May 23, 2008 IEP meeting resulted in a denial of FAPE to the student. The district acknowledged that a general education teacher did not sign in at the May 25, 2008 IEP meeting but countered that, if a certified general education teacher was not present, it was a minor technical error and not a major procedural violation that amounted to a failure to provide the student with FAPE because the parents got what they wanted when the district conceded to the parents' desire to change the student's eligibility classification from "Multiple Disabilities" to "OHI (Mood Disorder, ADD, Sensory Issues & Social Issues)" and "Speech Language" [JE 578]. The district's position is supported by the record of the meeting which indicates the parents' dissenting opinion was discussed [JE 579, 580], the parents and the [redacted] neuropsychologist fully participated in that IEP meeting [JE 589-599] and the student's eligibility classification was changed [JE 578]. It is noted that the parents did not claim that the student was unable to obtain an appropriate education at [redacted] because a regular education teacher did not sign in at the December 18, 2008 IEP conducted by [redacted] [P114].

**28.** At the close of the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education in the least restrictive environment because the student would be educated in isolation from other students (it is noted that this was not listed as a specific issue in this due process hearing but the district did not object to the issue being raised). The parents contend that the [redacted] educational consultant observed the Intensive Resource Class and reported all the desks were isolated and pushed against the wall, which led her to conclude that the student would be educated in isolation to other students. Photographs of the Intensive Resource Class indicate three of the student desks are against the wall [SD 0254-0255] along with three group learning stations [SD 257-260]. However, since the student was not attending the Intensive Resource Class at the time the [redacted] educational consultant observed the program, it was not set up for the student, so any conclusion that the student's desk would be placed against the wall is without foundation. The [redacted] educational consultant's allegation that the student would be educated in isolation is contradicted by the facts. The written record documents that district personnel provided the parents with communications reporting the student's multiple opportunities for group instruction and interaction with peers each school day [JE 722, 726, 735, 757] during the 2007-2008 school year. Further, the student's

January 30, 2008 IEP and proposed daily schedule for the 2008-2009 school year provided for group instruction and interaction.

29. The parents contend, pursuant to the third specified issue of this due process hearing, that [redacted] was an appropriate special education placement for the student's 2008-2009 school year. The parents presented the student's 5th grade [redacted] teacher/case manager and the [redacted] to testify that [redacted] was an appropriate placement for the student. They testified that the student has and is making academic and social progress. The Director testified that the student made slow and steady progress and achieved about 6 to 8 months growth academically but did not say how she arrived at that conclusion and provided no documentation to support the claim [redacted] case manager/teacher testified that she is a reading specialist and that she tested the student in reading at the beginning and end of the 2008-2009 school year and that the student was at the mid-2nd grade level in reading at the start of the year and at about the 2.7 or 2.8 grade level at the end of the year. She stated that for the student this (*a 2 to 3 month increase*) represented significant growth. The Director described the program at [redacted] as designed to enhance all students' executive functioning skills. It uses special notebooks and special binders to help students know what is expected and to help them organize. [redacted] teacher/case manager testified tha[redacted] adopted the January 30, 2008 IEP developed by the district for the student and did not revise the student's January 30, 2008 IEP until December 18, 2008, [PE 114-150] even though she found the student had mastered some of the Benchmarks. [redacted] and [redacted] testified that the student did not present behavior problems a[redacted] did not need a behavioral intervention plan or necessarily require sensory breaks. The district's assistant principal observed the student at [redacted] and testified that a review of the December 18, 2008 IEP developed by [redacted] indicates sensory breaks are built into the student's school day. Specifically, one of the student's needs on the [redacted] IEP states that the student "demonstrates difficulty maintaining an appropriate arousal level for effective engagement in daily class activities" and the IEP Benchmark states, "*The student* will with two verbal cues identify her arousal level correctly, identify a tool that is appropriate to regulate her arousal level, retrieve that sensory tool and utilize it appropriately. If *the student* requires a break outside of the classroom, she will independently and appropriately request this break without class disruption 60% of the time during academic and special classes" [PE 139]. [redacted] testified that the student only need a break at the end of the day when she was tired and allowed to leave class and walk around the school. However, the district's assistant principal observed the student self initiate two activities that the district had listed as sensory break activities when the student put aside her class assignment and colored in a coloring book and when she sat quietly at her desk with hands folded and stared at the front wall. Further, the student recognized her need for sensory tools by asking the school psychologist if she could borrow a squishy ball to help her sit through her sister's long mat mitzvah service [SD 0267] and the mother acknowledged the value of the squishy ball [JE 780].

30. The student's individual/family social worker testified that the student has made a

good adjustment to [redacted] and is not experiencing the problems at school and at home prior to attending [redacted] She testified that she started working with the student sometime around early August of 2008 to prepare her for attendance at [redacted] She acknowledged that she did not observe the student at either the [redacted] or the district school. She testified that she did not know when the parents made the decision to send the student to [redacted]

31. The parents presented the [redacted] educational consultant as an expert witness. The district objected to the witness being designated an expert. The [redacted] educational consultant testified that the district's proposed 2007-2009 placement was inappropriate because it employed the Structured Teaching Model and had an inappropriate peer group for the student because the student would be the only girl in the special education resource room. She testified that the Structured Teaching Model was designed for and used with students who have autism and that the student does not have autism. She also presumed that other students in the proposed 2008-2009 program had autism. It is noted that the educational consultant had no basis for knowing what the eligibility category of the other students was. Additionally, neither the parents nor the educational consultant provided any documentation to support their claim that the Structured Teaching Model is used exclusively for students with autism. The education consultant also testified that she observed the student at [redacted] and the student was learning, interacting socially and not exhibiting the off-task behaviors that the student exhibited in the district program. She stated that the student's homeroom teacher had all the student write a thank you note to a parent who had made a generous gift to [redacted] and that the student had done a "good job" on the assignment. She stated that the student finished before the other students and handed the thank you note to her teacher and then went back to her desk and sat quietly until a boy asked her why he wasn't invited to her birthday party and she responded that it was only for girls. She acknowledged this was an appropriate reciprocal interaction with a boy. When asked what the student wrote on the thank you note, the [redacted] educational consultant replied that she did not see what the student had written. When asked how she could conclude the student had done a "good job" if she had not seen what the student had written, she responded that the teacher had seen the thank you note and presumed the student did a good job. The [redacted] educational consultant testified that while at [redacted] she observed the student in a language arts class where there were three boys and one other girl besides the student. The students were divided into two small groups. The three boys were taught by the instructional assistant and the girls were taught by the teacher until the other girl was removed from class shortly after it began because of behavioral issues. The [redacted] educational consultant testified that the student exhibited no problems after the other girl had left and remained on task for the rest of the period. It is noted that the parents and parents' witnesses spent hours testifying that the student needed other girls in class. Yet the [redacted] educational consultant testified that the student was able to engage in appropriate reciprocal social interaction with a boy in her homeroom and was able to learn in the language arts class when she was the only girl in that class. During her testimony, the [redacted] educational consultant insisted that IDEA now requires that parents observe a proposed placement prior to the district

making that placement. When she was asked, if instead, she meant that the district had to let parents observe a proposed placement, if they desired, prior to making the placement, she remained adamant that the parent had to observe the program prior to placement. The [redacted] educational consultant's inaccurate assertion, undocumented and unfounded assumptions, contradictory statements, diminishes the reliability of her testimony.

**32.** The parents presented the [redacted] neuropsychologist as an expert witness without objection from the district. The [redacted] neuropsychologist testified that she first met the student when the parent brought the student for testing at the [redacted] after being informed, by the school psychologist on or about January 22, 2009, that the school psychologist found the student's behaviors and score on the ADOS Module 3, consistent with student's with autism spectrum disorder. The private neuropsychologist testified that she administered the ADOS Module 2 to the student "to rule out autism" [JE 38-43]. She stated that the ADOS Module 3 that was administered by the district was inappropriate for the student while ADOS Module 2 was appropriate because the student was functioning at the 3-4 year-old level (it is noted that subsequently she stated the student was functioning at the 5-6 year-old level). She also testified that some items on Module 3 were conceptually too socially sophisticated for the student. She further contends the Module 3 was scored incorrectly, stating that she was able to give the student credit for skills she knew the student was able to perform even though she was not present during that testing session. It is noted that only behavior observed by the trained person administering the ADOS during the testing secession is to be credited. She also criticized the district for starting with a higher level Module rather than a lower level Module and working up. Finally she criticized the district's contention that the ADOS was administered to assist in programming for the student [JE 423]. She stated that [redacted] specifies the ADOS is only to be used for diagnostic purposes. It must be noted, that this IHO, as a retired Professor of Special Education who taught a graduate level course in the measurement and assessment of exceptional children for several years, knew that statement was inaccurate. The ADOS is unique in the field of assessment in that it may be used for purposes other than diagnostic by a trained clinician. Specifically, the [redacted] as stating, "The ADOS can also be used for purposes other than making a diagnosis" [HE 9]. The neuropsychologist testified that the student needed to attend [redacted] because she needed a peer group, particularly girls, with similar needs to her own. She provided no substantive data to support this conclusion and most notably was not one of the recommendations concerning school needs contained in her neuropsychological report which states, "It is recommended that *the student* be placed in a school that will meet her educational needs, which include speech/language development, social skill development, academic support and behavioral/emotional regulation" [JE 42]. As indicated in finding of facts above, she thought the student would be excluded by from a peer group by "clicky" girls at her neighborhood school. She acknowledged under cross-examination that she did not observe or otherwise have first hand knowledge of the student's peers at her

neighborhood school. Additionally, when asked if she knew the students in the student's class at [redacted] She testified that she knew students at [redacted] When asked again if she knew students in the student's class, she again avoided giving a direct answer by stating that she knew a student in the student's grade. When she testified that the student had friends in her neighborhood and independently attended and successfully completed a baby-sitting course offered by the park district, she contradicted her own testimony that the student needed to attend a school where all students were disabled because the student was unable to interact with non-disabled peers. The contradictions, inconsistency and inaccuracy undermined the testimony in this instance.

33. One of the remedies the parents listed in their initial due process complaint, but withdrawn at the due process hearing, was the desire to obtain a finding that the student was eligible for IDEA 2004 services and protections under the criteria for learning disabilities and emotional disorders. The parents withdrew that aspect of their due process complaint but spent a considerable amount of time arguing against the student being eligible for special education services under the classification of autism even though, as indicated above, the district complied with the parents' request and did not use that eligibility classification. Each of the parents' witnesses testify that the student did not have autism. The student's [redacted] psychiatrist, consistent with his letter of January 28, 2008 [JE 789], testified that he did not diagnose the student as autistic. He also testified that he made an error in utilizing the phrase "cognitive limitations" when he discussed reports of the student hearing voices, talking back to the voices, and visual hallucinations [JE 788] and should have written instead that the student's limited ability in self-awareness limited her ability to differentiate her internal thoughts from external voices. Other portions of that letter are consistent with the findings of the district in that it identifies the student's challenges as "intellectual function, mood, anxiety, attention and behavior regulation" [JE 788] and again "Diagnostically, I identify her treatment targets as follows: 1) cognitive limitations; 2) problems with attention and focus; 3) mood dysregulation with chronic dysthymia and; 4) psychotic symptoms that likely stem from a lack of sophistication/capacity to cope with feelings of inadequacy" [JE 789]. He testified that he prescribed Abilify, an a-typical psychosis medication used to treat bipolar disorder and schizophrenia in adolescents and adults, to treat the student's mood disorder. The written record indicates that on April 11, 2008 the initial prescription was for 2mg of Ability per day [JE1226] and the dosage was subsequently increased to 5mg tablet per day on November 19, 2008 [JE 1226]. It is noted that this treatment regiment is consistent with the FDA approved treatment regiment recommended by [redacted] for an associated irritability disorder in children [HE 10]. The April 2008 time frame corresponds with the testimony of district personnel that the district also implemented a behavior plan and the student's school behavior and performance improved as reported at the April 23, 2008 IEP meeting, "*The student* is progressing well with her language goals. Mother has also noted increased expressive language at home also" [JE 554]. Additionally [redacted] personnel testified that in the Fall of 2008, the time that the student's dosage was increased, the student did not exhibit the behavior difficulties she had exhibited in the public school and at

home prior to the Spring of 2008. The testimony, as supported by the written record, indicates the district considered the psychiatrist's letter as well as the parents' other private evaluations, reports and recommendations in developing the student's IEPs [JE 289-312, 395-408, and 570-577].

34. The parents contend the student is entitled to compensatory education for the 2007-2008 school year pursuant to the fourth issue of this due process hearing. The facts relevant to the student's 2007-2008 school year have been presented above and need not be repeated here. During the 10 days of due process hearing testimony and the approximately 1,600 pages of evidence, the only evidence regarding tuition costs came in the cross-examination of the [redacted]. The parents provided no signed and date contracts, no dated receipt from [redacted] demonstrating proof of payment, or no dated cancelled checks.
35. The district maintains it provided the student with an IEP, Placement and Services that constitute a free appropriate education in the least restrictive environment during the 2007-2008 school and that the January 30, 2008 IEP, Services and special education placement in the Intensive Resource Class proposed for the 2008-2009 school year was a continuation of that placement and is consistent with the recommendations contained in the [redacted] evaluations as well as district evaluations and is calculated to provide the student with a free appropriate public education in the least restrictive setting.
36. The district's attorney asserted that the parent's request for reimbursement of their unilateral placement should be denied if [redacted] is found to be an appropriate placement because the parents failed to provide the district with the required 10 business day notice that they intended to enroll their child in a private school at public expense (it is noted that this was not listed as a specific issue in this due process hearing but the parents did not object to the issue being raised). The parents' attorneys did not contest the district's assertion that the parents failed to provide the district with 10-business days notice but contend a denial of or reduction of tuition reimbursement is discretionary and not mandatory. The written record indicated the parents' attorney submitted a letter date August 18, 2008 to the district stating that pursuant to the *Individuals with Disabilities Education Act* at 20 U.S.C. 1412(A)(10)(C)(iii)(I)(bb), the parents intend to place the student at [redacted] on September 2, 2008 and seek reimbursement for that placement [JE791-792]. The uncontested testimony of the [redacted] witnesses under cross-examination was that the student started [redacted] on August 25, 2008. This date is less than the 10-business day notice stipulated in the statute.
37. At the close of the Due Process Hearing, the parents requested the hearing officer order that [redacted] be the stay-put placement for the student (it is noted that this was not listed as a specific remedy in this due process hearing but the district did not object to the issue being raised). All of the testimony and written evidence indicate the January 30, 2008 IEP and placement were the last agreed upon IEP and, as indicated above, [redacted] accepted and implemented that IEP when the student started attendance at that school. The least restrictive placement listed on that IEP is in the student's neighborhood school.

## DISCUSSION OF ISSUES AND CONCLUSION OF LAW:

A considerable amount of time was consumed presenting testimony concerning the student's eligibility classification, an issue the parents had withdrawn from this hearing, as indicated in **Findings of Fact # 32**. Yet it remained an undertone that permeated the entirety of this due process hearing. The parents contend that the district erroneously diagnosed the student as being autistic and, based on that diagnosis, proposed a placement designed for students with autism. The district maintains that, although they found the student eligible for special education and related services under the IDEA criteria for autism, they developed the student's IEP, proposed services, and a placement based on the student's identified needs rather than her eligibility classification. This difference in the interpretation of the district's position and actions occurred in part because the parents interchanged the Medical Model of providing Treatment to a patient and its DSM IV diagnostic labels with the Educational Model of Instructing students and its IDEA special education eligibility classifications. The [redacted] psychiatrist's testimony best highlighted the fundamental difference between a Medical Model of Treatment and an Educational Model of Instruction. In the Medical Model, as the psychiatrist testified, the patient's diagnosis dictates the accepted standard level of treatment. For example, the psychiatrist diagnosed the student with a mood disorder. He testified that he prescribed Abilify, an a-typical psychosis medication used to treat bipolar disorder and schizophrenia in adolescents and adults, to treat the student's mood disorder. In the medical model, the diagnosis is validated if the treatment, in this case 5mg of Abilify daily, alleviates the symptoms of the illness and, if the diagnosis is validated, the treatment continues as it has in this case.

By contrast, in the Education Model, the student's IDEA classification as indicated by the testimony of district personnel and the written record was made by a multidisciplinary team including the parents. A group of qualified professionals and the parent of the child determines whether the child is a child with a disability [34 CFR 300.306(a)(1)]. A student may be declared eligible for special education by the IEP team: as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services [34 CFR 300.8(a)(1)]. Since the student's eligibility classification is not an issue in this due process hearing, a discussion of her eligibility classification will not be presented here except to note that the written record indicates the parents were full and active participants in that determination and that the district changed the student's eligibility classification from autism to OHI in accord with the parents' desire.

Another significant difference between the Medical Model and the Educational Model is

that, while a medical diagnosis dictates the standard level of accepted treatment for all patients in the Medical Model, in the Educational Model a multi-disciplinary IEP Team utilizes the IDEA classification system to declare a student eligible for special education services and protections. That is the extent to which the IDEA classification is utilized. The student's eligibility classification does not dictate the student's goals/benchmarks; the amount or type of special education and related services or the student's special education placement.

Rather, the IEP Team, including the parents, determines the student's needs and develops goals and benchmarks to address those needs and then determines the amount and type of special education and related services required to assist the student achieve those IEP goals/benchmarks. The IEP Team lists all of this on the student's individualized education plan and then determines the student's placement, from a continuum of placements [34CFR 300.115] as close to the placement the student would attend if the student did not have a disability and to the greatest extent possible with the regular education population [34CFR 300.116]. Again, the eligibility classification does not dictate the amount or type of special education or related services, nor does it dictate special education placement, nor do student's with the same eligibility classification receive a standard level or identical type of special education and related service. Finally, in the Educational Model, if the student is successful in achieving the goals/benchmarks, the goals/benchmarks are revised along with the rest of the IEP.

An undertone in this due process hearing was the assertion that the district, in actuality, used the Medical Model in determining the student's services and placement. The parent presented no substantive evidence to support that assertion and all of the district witnesses testified, as supported by the written evidence, that the IEP team considered data generated from district assessments and the private evaluations provided by the parents to identify the student's special education needs, and upon those needs determine the type, amount and structure of special education and related services to address those needs and then determine the least restrictive environment that the services could be delivered.

As with most due process hearings, opposing witnesses provide contradictory testimony. The parents contend that the hearing officer should give more weight to the testimony of the parents' witnesses because of their years of experience and advanced study as compared to district witnesses who, the parents claim, have fewer years of experience. The district contends the hearing officer should give deference to the testimony of district witnesses because they have more actual experience with the student in her neighborhood school as opposed to a limited experience in a clinical setting such, as the district claims, as the parents' witnesses. The district also claimed that the courts have consistently given deference to the educational decisions made by educational experts on the scene. With the knowledge that witnesses are human and occasionally may make a mistake or have a lapse in memory, witnesses with appropriate state licensure and first hand knowledge are accepted as credible unless their testimony demonstrates a pattern of inaccurate assertions, undocumented and unfounded assumptions, contradictory statements, and/or

demonstrably false statements. As indicated in **Findings of Fact # 20**, the 4th grade special education teacher recorded the student's progress on a goal in which the student used a self-help checklist in a way that, "could have been better". However, the way the data from the student's progress list was translated and recorded on the IEP Benchmark was not an overt intent to distort the amount of progress made by the student nor did it constitute a pattern of testimony that was misleading or misinformed. Therefore, the 4th grade special education teacher was found to be a credible witness. The district's educational consultant and school psychologist provided testimony that struck the hearing officer as peculiar. They testified that the district administered the ADOS-3 to assist the district in developing a program for the student. While this struck the hearing officer as a peculiar use of the ADOS-3, it is a permissible and possible use, and no substantive evidence was presented to indicate the district did not use the ADOS-3 for that purpose. As indicated in **Findings of Fact # 31**, the [redacted] neurophysiologist testified that the ADOS may only be used for diagnostic purposes is not factually correct. If that were the only error in her testimony, one would view it as a simple error but as indicated in **Findings of Fact # 31 and #30**, the testimony of both she and the [redacted] educational consultant contained inaccurate assertions, evasive answers, undocumented and unfounded assumptions, contradictory statements, and inaccurate statements that diminished the credibility of their testimony at this due process hearing while the testimony of the district's witnesses was consistent with the written record and did not contain a pattern of contradictory or inaccurate statements.

The parents were the moving party in this matter. As such, they had the burden of persuasion in this matter [*Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005)]. However, this burden does not relieve the district of its responsibility to provide the student with a free appropriate public education (FAPE) in the least restricted environment (LRE) [23 Illinois Administrative Code 226.50; 34 CFR 300.101 - 300.103] and in so doing adhere to procedural safeguards afforded student's with disabilities. Indeed the courts have held the local district must do more than go through the motions of providing a student with a disability FAPE. The local district must provide an IEP to a student with a disability [*Forest Grove School District v. T.A.*, 52 IDELR 151 (U.S. 2009)], further the IEP must provide some educational benefit [*Burlington School Committee v. Massachusetts Department of Education*, 556 IDELR 389 (U.S. 1985).

In this case, the district has had an opportunity to implement the January 30, 2008 IEP during the 2007-2008 school year but not during the 2008-2009 school year. The district implemented the January 30, 2008 IEP during the second half of the 2007-2008 school year. The district contends that the proposed 2008-2009 placement was a continuation of the January 30, 2008 IEP. However, the proposed 2008-2009 placement was not implemented because the parents unilaterally placed the student at [redacted] Therefore, the criteria for determining whether the student received a FAPE in the LRE, must be applied to each year separately.

**Each of the four issues raised in the parents' due process complaint is addressed**

**below:**

1.

**Whether the IEP, Placement and Services provided by the District for the 2007-2008 school year to the Student were reasonably calculated to provide the student a free appropriate public education (FAPE) in the least restrictive environment (LRE)?**

The student's special education placement during the 2007-2008 school year was covered by two separate IEPs. The March 2, 2007 IEP covered the first half of the 2007-2008 school year and the January 30, 2008 covered the last half of the 2007-2008 school year. The student's special education program changed significantly from the first half of the school year to the second half of the year. The parents' due process complaint did not specify whether the issues in contention pertained to the first half of the school year, the second half of the school year or the entire school year. As the issue is stated in the Pre-Hearing Conference Report, the issue pertains the 2007-2008 school year in its entirety and that is the way it will be treated in this decision.

The two pronged *Rowley Test,* is the accepted standard in determining the appropriateness of a placement [*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (1982)]. Specifically, 1) did the district comply with the procedures set forth in IDEA? And 2) is the IEP reasonably calculated to provide the student with educational benefit? The parent's due process complaint does not contend that the district failed to comply with procedures set forth in IDEA for the 2007-2008 school year therefore the question of whether the district complied with procedural safeguards for that year is moot. The only question then, is one of educational benefit. The 4-part "*Michael F.* test," may be applied to determine educational benefit, [*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 26 IDELR 303 (5th Cir. 1997)], namely: 1.) Is the program individualized based on the student's assessment and performance? 2.) Is the program administered in the LRE? 3.) Are the services provided in a coordinated and collaborative manner by key stakeholders? 4.) Does the student obtain positive academic and nonacademic benefits from the IEP?

The parents attempted to prove the IEP, Placement and Services provided by the District for the 2007-2008 school year to the Student were not reasonably calculated to provide the student a FAPE in the LRE by introducing new, more specific issues at the due process hearing. As noted in **Findings of Fact #17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, & 35**, the district did not object to the parents raising issues nor did the parents object to the district raising an issue at the due process hearing that was not brought up at the pre-hearing conference. If the district or parents had objected, the hearing officer would had ruled on the objections, however, since no objection was offered, each of the new issues pertaining to the 2007-2008 school year is discussed below.

1.01 At the Due Process Hearing the parents' attorney contend that the district failed to provide the student with a free appropriate education because the district did not,

and still does not, understand the nature of the student's disability. First, as indicated in **Findings of Fact #17**, it is noted that the parents' own private evaluation states that the school understands the students unique needs and implemented services at the level the student needs. That not withstanding, the parents contend that the district's numerous changes in the student's IDEA eligibility classification indicates the district does not understand the student's unique needs. As indicated in **Findings of Fact #4, 10, 13,14, 15, & 17**, the changes were made at the insistence of the parents. District staff made the changes in classification because, in an Education Model unlike a Medical Model, special education and related services are driven by the student's educational needs not the eligibility classification. Further, as indicated in **Findings of Fact #4, 9, 10, 11, 14, 17, & 24** , the student's needs identified by the district are consistent with the needs identified in the parents' private evaluations thereby satisfying Part 1 of the *Michael F.* test, namely the student's special education program was individualized based on the student's assessment and performance rather than a diagnostic label.

The January 30, 2008 IEP team reviewed a continuum of placement to determine the least restrictive environment and selected a placement that enabled the student to be educated in her neighborhood school with and participate in the general education curriculum with non-disabled peers as indicated in **Findings of Fact # 11, 12, 23, & 24**,thereby satisfying Part 2 of the *Michael F* test.

Additionally the testimony as supported by the written record indicates the student's special education related service providers were imbedded in her classes and that they collaborated with the special education teacher and, in turn, all of them collaborated with the general education teachers as indicated in **Findings of Fact # 11, 12, & 26**,thereby satisfying Part 3 of the *Michael F* test.

Finally, as indicated in **Findings of Fact #9, 13, 14, 15, 16, 22, & 27**, the parents, who were full and active participants in the January 30, 2008 IEP, presented no evidence that they objected to any of the needs or goals listed on the January 30, 2008 IEP or asked for the inclusion of needs or goals that the district refused to grant.

1.02 The parents' attorney also contend the district failed to provide the student with a free appropriate education during the 2007-2008 school year because the student did not make academic progress. As indicated in **Findings of Fact #18** , the parents based this allegation on erroneously confusing a Standard Score on the WIAT with a Raw Score. As indicated in **Findings of Fact # 14, 18, 19, 22, 24, & 32**, the student made progress on all her academic and non-academic IEP goals, made 2 months progress in Word Reading on the WIAT and made academic and non-academic progress as reported to the parents on a weekly basis. The question, as in *Burlington,* is whether the progress was more than de minimis. The [redacted] testified,, as indicated in **Findings of Fact 29**, that a 2 to 3

month increase in reading for the 2008-2009 school year was significant progress for the student. Therefore, it follows that the student's 2 months increase in reading for the 2007-2008 school year, was certainly more that de minimis and perhaps significant progress for that school year. This demonstrating that the Part 4 of the *Michael F.* test was satisfied.

1.03 The parents also maintain that the student did not make academic progress because the reading level of the book the student was reading at the end of the 2007-2008 school year was lower than the reading level of books the student had been reading. Not only is this an issue that was not raised prior to the due process hearing, it proved to be an issue without foundation because the parents provided no testimony or written evidence to support this allegation. Further, as indicated in 1.02 above the student made more than de minimis progress in reading during the 2007-2008 school year.

1.04 Additionally, the parents content that the district failed to provide the student with a free appropriate public education because the district reported the student's progress on her IEP Goal #4 inaccurately. As indicated in **Findings of Fact # 20**, the 4th grade teacher testified that, although she could have stated the student's progress better, by the end of the school year, the student had mastered the self-help goal.

FINDING: The facts of this case and the application of the two-pronged *Rowley* test and the four part *Michael F.* test indicate the district provided the student with an IEP, Placement and Services during the 2007-2008 school year that constitute a FAPE in the LRE.

**2.**

**Whether the IEP, Placement and Services proposed by the District for the 2008-2009 school year for the student are reasonably calculated to provide the student with a FAPE in the LRE?**

The district did not have an opportunity to implement the proposed 2008-2009 placement. Therefore, the proposed placement is subject to the two pronged *Rowley Test,* [*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (1982)]. Specifically, 1) did the district comply with the procedures set forth in IDEA? And 2) is the IEP reasonably calculated to provide the student with educational benefit?

The parents attempted to prove this generally stated issue by introducing new, more specific issues at the due process hearing. As noted in **Findings of Fact #17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, & 35**, the district did not object to the parents raising issues nor did the parents object to the district raising an issue at the due process hearing that was not brought up at the pre-hearing conference. If the district or parents had objected, the hearing officer would had ruled on the objections, however, since no objection was

offered, each of the new issues pertaining to the 2008-2009 school year is discussed below.

2.01 At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because it was new and untried on the student. As indicated in **Findings of Fact # 21, 22 & 24**, this issue is factually without merit because the proposed placement for the 2008-2009 school year was a continuation of the student's placement since the January 30, 2008 IEP meeting. While the district dedicated a specific classroom to the Intensive Resource Class and identified 5 more students who had similar needs to the student, the amount and type of special education and related services and the LRE placement were driven by and a continuation of the student's January 30, 2008 IEP. Additionally, as indicated above, the student benefited from that placement.

2.02 At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because the parents were unable to observe the class during the school year. As indicated in **Findings of Fact # 1, 16, 19, &22**, the parents withdrew the student from her neighborhood school prior to the start of the 2008-2009 school year. Therefore, their actions made it impossible for them to observe the student being educated in the Intensive Resource Class during the 2008-2009 school year. But they did visit the student's special education class during the 2007-2008 school year, had reason to know how their daughter was being educated and progressing from weekly reports to them by the 4th grade special education teacher, and did not accept an invitation to visit the Intensive Resource Class prior to the opening of school on August 25, 2008.

2.03 At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because the peer group would be inappropriate because the student would be the only girl with 6 boys. As indicated in **Findings of Fact # 23**, had the parents elected to have the student remain in her neighborhood school she would have been in the Intensive Resource Class with 5, not 6, boys. In addition to interacting with girls in Peer Buddies, the student would have interacted with non-disabled and disabled girls and boys in the general education curriculum throughout each school day. There is no requirement in IDEA or its attending regulation that students be educated with the same, different or transgender peers. The only requirement, and in fact the requirement that lies at the heart of IDEA, is that the local school district must ensure: "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and special classes, separate schooling, or other removal of

children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" [34CFR 300.114(a)(2)(I & ii)]. Additionally, the District shall ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, shall be educated with children who are non-disabled. Further, a student with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum [34 CFR 300.116 (e)]. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily [20 U. S. C. 1412(5), 1413(a)]. To do otherwise would stand all of the Civil Rights legislation on its head. If it were the district denying the student access to the Intensive Resource Class and insisting she attend another school because she would be the only female in the program, it would be analogous to denying a student with cerebral palsy, who otherwise would prosper in a general education curriculum, access to that curriculum because he drools and no other students in the general education population drool. More to the point, no qualified student with a disability shall, on the basis of that disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any district service, program, or activity [42 U.S.C. 12132; 29 U.S.C. 794)]. This issue is without any legal foundation.

2.04 At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because the "Structured Teaching" model allegedly utilized in the proposed program is appropriate for students with Autism which the student does not have. **Findings of Fact # 24**, indicates this allegation is unsubstantiated on one count and factually incorrect on the other. First the parents presented no substantive evidence that the Structured Teaching model is used exclusively in the education of students with autism. Second, the testimony of the principal is that the district has had a Structured Teaching Model program for approximately four years and the student's proposed 2008-2009 placement was in the Intensive Resource Class and not in the district's Structured Teaching Model.

2.05 At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because it contained sensory breaks that the student did not require. **Findings of Fact # 25**, indicates sensory breaks were consistent with the recommendations listed in the parents' private evaluations, were designed to supplement the student's academics and assisted the student in remaining on task. Additionally, sensory breaks are built into the

student's [redacted] IEP and the assistant principal observed the student take self-initiated sensory breaks by coloring and sitting quietly when she observed the student at [redacted] Finally, as a matter of law, the district is required to provide the student with sensory break if by doing so precludes having to remove her from her neighborhood school and placing her in a more restrictive setting [34CFR 300.114(a)(2)(I & ii); 34 CFR 104.4(a); 20 U. S. C. 1412(5), 1413(a)].

2.06 At the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because the student had mastered one of the learning activities; making quesadillas. As indicated in **Findings of Fact # 26**, this allegation rests on the faulty assumption, or possibly the intentional misrepresentation, of the quesadilla activity being a cooking lesson when in actuality it was authentic hand-on multi-sensory language rich activity designed to enhance pragmatic mathematic as well as pragmatic language skills.

2.07 At the close of the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education because a general education teacher was not present at the May 25, 2008 IEP meeting. As indicated in **Findings of Fact # 27**, it is factually correct that a regular education teacher did not sign in at that meeting but the parent presented, nor could the hearing officer uncover, any way in which the parents' full participation in that meeting was impeded or how the actions of the IEP team may have differed. Had the May 25, 2008 IEP meeting been the only IEP meeting that year, and had the student's instruction been primarily in the regular education curriculum, this issue would have taken on more importance. But in this instance, the student's primary providers were present, the parents were full participants and the parents obtained what they were seeking at that meeting. This was, at most, a technical violation that did not raise to the level of a denial of FAPE because there is no substantive evidence that a general education teacher's absence "Impeded the child's right to a FAPE; Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or Caused a deprivation of educational benefit to the child" [34 CFR 300.513(a)(2)(i, ii, & iii)]. The parents were provided a full opportunity to participate in the decision making at the May 25, 2008 IEP meeting, as well as the student's other 15 IEP meetings including an opportunity to participate in decisions concerning the identification, evaluation and educational placement of the student as required by [34CFR 300.501 (b)(1)(I)(ii) &(c)].This allegation does not rise to the level of a substantive procedural violation that would trigger the procedural prong in the *Rowley* test.

2.08 At the close of the Due Process Hearing the parents contend that the district's proposed placement for the 2008-2009 school year was not reasonably calculated to provide the student with a free appropriate public education in the least

restrictive environment because the student would be educated in isolation from other students. As indicated in **Findings of Fact # 28**, the claim that the student would have been educated in isolation during the 2008-2009 school year is factually without merit and based upon one observation of a class in which the student was not present much less enrolled. A conclusion on how a student would be educated and perform in a class based upon one observation of a class in which the student is not present, or registered, is not credible.

FINDING: In applying the *Rowley* test to the district's proposed 2008-2009 placement, there was no substantive procedural violation. The parties dispute whether the proposed placement was reasonably designed to provide meaningful educational benefit. The 10 days testimony and over 1,700 pages of evidence indicate the 2008-2009 placement was a continuation of the student's placement pursuant to her January 30, 2008 IEP. An application of the 4-part *Michael F* test indicates the student derived meaningful educational benefit from that placement. The courts have consistently resisted efforts to supplant their views on the appropriate education of students for that of the trained educational experts most familiar with the student [*Lachman v. Illinois State Bd.* Of Ed. 441 IDELR 156 (7th Cir.); *Beth B. v. Van Clay,* 282 F.3d (7th Cir. 2002)] unless the local educators committed an egregious violation that precluded to student's ability to obtain a free appropriate public education in the least restricted environment [*Robinson v. Oak Park and River Forest High School District,* 213 Ill. App.3d (April 1991]. There was no evidence of such violations in this matter. Additionally, the district has demonstrated that the January 30, 2009 IEP adequately addressed the student's special education and related service needs, both academic and behavioral, pursuant to [20 U.S.C. § 1414(d)(1)(A)(i)(II)]. Therefore, the IEP, Placement and Services proposed by the District for the 2008-2009 school year for the student are reasonably calculated to provide the student with a FAPE in the LRE.

**3.**

**Whether [redacted] is an appropriate placement for the 2008-2009 school year?**

3.01 A school district is required to provide all students with a free appropriate public education in the least restricted environment. In IDEA, as stated in the above discussion, education in the least restrictive environment means, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are non-disabled; and any special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily [34 CFR 300.114(a) (2)(i)(ii)]. The parent presented no substantive evidence that the nature or severity of the disability is such that education in the Intensive Resource Class, with the use of supplementary aids, such as sensory breaks, and services cannot be achieved satisfactorily in her neighborhood school. The primary reason the parents offered for the student not being able to participate

in the Intensive Resource Class within her neighborhood school is that the student would be the only girl. However, being a female is not a disability under IDEA. Therefore, even though [redacted] personnel testified that the student has made progress at the school as have the mother, private individual/family social worker and the private speech/language therapist, [redacted] can only be declared an appropriate placement for the student, thereby obligating the local school district to fund the placement for the 2008-2009 and 2009-2010 school years, if the nature or severity of the disability is such that education in her neighborhood school with the use of supplementary aids and services cannot be achieved satisfactorily. That, as indicated above, is not the case in this matter. The district has demonstrated that the student has benefited from the January 30, 2008 IEP, special education services and placement where she has been educated with non-disabled female and male peers and has access to the general education curriculum for non-academic classes and activities. There is no evidence that the student would not have continued her academic and nonacademic progress had she remained in her neighborhood school.

The United States Congress was intent on requiring parents and school districts to work together to insure students with disabilities had every opportunity to be educated to the greatest extent possible with their non-disabled peers. That is the reason, the 10-business day notice was put into the reauthorized IDEA 2004. The intent was to provide the district with sufficient notice so that the parents and district could meet and work together to develop a program in the student's neighborhood school with the services that the private school has that the parent desires.

The courts have upheld the intent of Congress for student's with disabilities to be educated with their non-disabled peers to the greatest extent possible. Even if the district desired to grant the parents' desire to place the student at [redacted] it legally could not do so. As stated in *Beth B.*, "A student may not be removed from the regular classroom unless their education there, with the use of supplementary aids and services, cannot be achieved satisfactorily." *Beth B. v. Van Clay,* 282 F.3d , 498 (7th Cir. 2002). Thus, if a student's education at a regular public school is satisfactory, "the school district would be in violation of the Act by removing her." *Id.* at 499. As a corollary, removing the student from her neighborhood school when she was benefiting from the placement at that school would be a violation of the Act.

District members of IEP teams are required to consider the results of independent evaluations [34 CFR 300.502(c)(1)]. However, the federal regulations do not require that there be a substantive discussion of such evaluation [*G. D. v. Westmoreland School Dist.,* 930 F.2d (1st Cir. 1991)], nor does IDEA require district to implement the independent evaluator's recommendation for placement [*James and Lee Anne d. ex rel. Sarah D. v. Board of Education of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102.* 109 LRP 45050 (U.S. District Court,

Northern District of Illinois. 2009)]. In this case, the district incorporated the programmatic recommendations contained in [redacted] psychiatrist's letter and the [redacted] neuropsychological evaluations into the student's IEP but did not accept that the student required a private special education day school placement. An IEP team is precluded from simply accepting a placement recommendation without first developing an IEP [*Board of Educ. of Tp. High School Dist. No. 211 v. Michael R.*, 2005 WL 2008919 (N.D. Ill. Aug. 15, 2005)] and then determining the LRE in which that IEP could be implemented [*Beth B. v. Van Clay*, 282 F.3d (7th Cir. 2002)] and indeed "the LRE requirement shows Congress's strong preference in favor of mainstreaming" [*see Beth B.*, 282 F.3d at 497].

FINDING: The facts of the case and applicable law indicate the district's proposed placement for the 2008-2009 school year was the appropriate placement in the least restrictive setting. Therefore, [redacted] cannot not be declared an appropriate placement for the 2008-2009 school year.

**4.**

**Whether the student is entitled to compensatory educational services for the 2007-2008 school year?**

4.01 In order for the student to be entitled to compensatory education for the 2007-2008 school year, the student would have had to have been denied a free appropriate education during that year. As indicated in the preceding discussion and an application of the law, the facts of this case and the application of the two pronged *Rowley* test and the four part *Michael F.* test indicate the district provided the student with an IEP, Placement and Services during the 2007-2008 school year that constitute a free appropriate public education in the least restricted setting.

FINDING: The facts of the case indicate the student received a FAPE in the LRE during the 2007-2008 school year. Therefore, she is not entitled to compensatory education.

**5.**

**Whether the reimbursement for the parents' unilateral placement should be denied or reduced?**

5.01 The district's attorney asserted that the parent's request for reimbursement of their unilateral placement should be denied if [redacted] is found to be an appropriate placement because the parents failed to provide the district with the required 10-business day notice that they intended to enroll their child in a private school at public expense. As indicated in **Findings of Fact #36**, The written record indicated the parents' attorney submitted a letter date August 18, 2008 to the district stating that pursuant to the *Individuals with Disabilities Education Act* at 20 U.S.C. 1412(A)(10) (C)(iii)(I)(bb), the parents intend to place the student at Cove School on September 2, 2008 and seek reimbursement for that placement [JE791-792]. The testimony of the [redacted] was that

the student started [redacted] on August 25, 2008. This date is less than the 10-business day notice stipulated in the statute. If [redacted] were found to be the student's appropriate placement, a denial or reduction in reimbursement would have had to be considered. However, since [redacted] was not found to be an appropriate placement and therefore not eligible for reimbursement, the issue is moot and requires no further consideration.

FINDING: There would have been cause to consider a denial or reduction of tuition reimbursement had [redacted] been found to be the student's appropriate special education placement. However, given that [redacted] was not found to be an appropriate placement and therefore not eligible for reimbursement , the denial or reduction of reimbursement is moot and need not be addressed.

**5.**

**WHETHER [redacted] IS THE STUDENT'S STAY OUT PLACEMENT?**

The parent's desire that the hearing officer find [redacted] the stay-put placement is denied. The parent requested this remedy at the close of the due process hearing. The district did not object to this issue not being raised prior to the due process hearing. The parents did not present any substantive evidence to support their request that [redacted] be declared the stay-put placement. Except as provided in 34 CFR 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 34 CFR 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement [34 CFR 300.518)a)]. This raises the question as to what is the student's current placement. Since the placement at [redacted] was a unilateral 34 CFR 300.148(a) placement that did not conform to 34 CFR 300.148(d)(1)(i & ii), [redacted] cannot, by statute and attending regulations, be considered the stay-put placement. Additionally, to do so would reward the parents for skirting the IDEA regulations. As indicated in the discussion above, the last mutually agreed upon IEP was the January 30, 2009 IEP and the last placement made in full accord with IDEA requirements was the placement stipulated in that IEP.

FINDING: The parent request to have [redacted] declared the student's stay-put placement is without legal foundation and therefore denied. Therefore, the student's stay-put placement is the district's Intensive Resource Class or its 6th grade equivalent pursuant to the student's January 30, 2008 IEP.

**CONCLUSION:**

First, as noted, the parents and district raised issues and remedies at the due process hearing that were not specified in writing prior to the due process hearing. Pursuant to [34 CFR 300.511(d)], "the party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under §300.508(b), unless the other party agrees otherwise". In this instance the parents failed to

provide a prior written description of the facts relating to the problem [34 CFR 300.508(b) (5)]. Since the district raised no objection, the hearing officer took that as tacit approval and, not wanting to delay the due process hearing further, allowed the parties to proceed.

As for the merits of this case, an application of the statute, attending regulations, and pertinent case law, to the facts of this case indicates the district complied with the procedures set forth in IDEA and the district provided the student with a FAPE in the LRE for the 2007-2008 school year and that the January 30, 2008 IEP was reasonably calculated to provide the student with a FAPE in the LRE for the 2008-2009 school year. Therefore:

1. The parent's desire that the hearing officer order the district to provide the student with retroactive reimbursement for all costs related to the parental placement at [redacted] for the 2008-2009 school year and prospective placement at [redacted] as well as compensatory services in the form of one additional year at [redacted] is denied.
2. The parent's desire that the hearing officer find [redacted] the stay-put placement is denied. As indicated in the discussion above, the last mutually agreed upon IEP was the January 30, 2009 IEP and the last placement made in full accord was the placement stipulated in that IEP. Therefore, the student's stay-put placement is the district's Intensive Resource class or its 6th grade equivalent.
3. The District's desire that the hearing officer find that the district offered the Student a FAPE and deny the parents' requests for reimbursement and future and compensatory payment to [redacted] is granted.
4. The district's request that tuition reimbursement be denied or reduced is moot since [redacted] was found not to be an appropriate placement.

**ORDERS:**

1. The district need take no further action with respect to this matter.
2. The student's stay-put placement is the district's Intensive Resource Class or its 6th grade equivalent pursuant to the student's January 30, 2008 IEP.

**Right to request clarification:**

Section 14-8.02a (h) of the School Code, allows the hearing officer to retain jurisdiction after the issuance of the decision for the sole purpose of considering a request for clarification. A request for clarification must be submitted to me within five (5) days after receipt of the decision. The request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the other parties and to the Illinois State Board of Education. The request shall operate to stay the implementation of those portions of the decision for which clarification is sought. I shall issue a clarification of the specific portion of the decision or issue a partial or full denial of the request in writing within ten days of receipt of the request and mail copies to all parties to whom the decision was mailed.

**FINALITY OF DECISION:** This decision shall be binding upon all parties.

**RIGHT TO FILE CIVIL ACTION:**
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 5/14-8.02(I) that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.

**DATE OF DECISION AND ORDER:**
This Decision and Order rendered this 14th day of December2009.

James a. Wolter, EdD.
Impartial Due Process Hearing Officer