

Case Number: 2009-0208

[REDACTED] vs. [REDACTED]  
Hearing Officer: Joseph P. Selbka

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

## Impartial Due Process Hearing Decision Cover Page

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

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

### Date and Timelines

Date of Written Request: 12/02/2008  
Date of Pre-hearing Conf: 02/10/2009

Date of Hearing: 05/18/2009 to 5/21/2009  
12:00:00 AM  
Date of Decision:

### Summary of Decision

Following a partial settlement, the parties requested the hearing officer to determine whether the Student's current placement in a therapeutic day school was the least restrictive environment for the student. Student's parents contended that a residential placement was the least restrictive environment. We found that the Student's placement was the least restrictive environment, and that a residential placement would be too restrictive.

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ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)  
) ISBE CASE NO. 2009-0208  
)  
) Joseph P. Selbka  
) Impartial Due Process  
) Hearing Officer

**HEARING DECISION, OPINION AND ORDER**

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This matter comes before us pursuant to the hearing request of Student's parents, [REDACTED] and [REDACTED] ("Student's Father", "Student's Mother", collectively "Student's Parents"), on behalf of their son, [REDACTED] ("Student") against [REDACTED] School District No. 73.5 ("School District"). We have jurisdiction to hear this matter pursuant to 105 ILCS 5/14-8.02(a) *et seq.* and 23 Ill.Admin.Code 226.000 *et seq.* The parents are represented by [REDACTED] and the District is represented by [REDACTED]

**I. Procedural History**

Student's Parents filed a due process complaint on December 8, 2008. A prehearing conference was held on February 10, 2009. On or about March 23, 2009, the parties settled part of their claim for compensatory education. After a series of agreed motions to continue, the hearing was ultimately held on May 18 and 21, 2009. The parties further agreed to June 8, 2009, to submit their written closing arguments stipulated to a final decision date of June 18, 2009.

**II. Issues Identified and Remedies Requested**

The following issues are before us: (1) whether Student is currently receiving a free appropriate public education ("FAPE") in the least restrictive environment ("LRE")

possible, or whether Student must be placed in a state approved residential facility. In making this determination, we must ultimately rule on the following District arguments: (1) the District is not required to provide any social and emotional services for Student's deviant behaviors which are disruptive at home; and (2) even if the District does have to provide such services, if Student can be accommodated in his current placement and be provided with the required related services, the placement is appropriate.

### **III. Findings of Fact**

1. Student is a Sixth Grader. Student has been found eligible for special education under the category of Emotional Disturbance ("ED"). Student was originally placed at the District's main school, [REDACTED] ("District Main School"). However, pursuant to a partial settlement of this matter during a resolution session, Student has been placed at [REDACTED], [REDACTED], a day school with therapeutic services available.

2. The District's Vice Principal, Student's former special education teacher, and school psychologist testified as to Student's behavior and education at the District Main School. The District Vice Principal has a bachelor's degree in elementary education and a master's degree in curriculum and instruction. The Vice Principal has the proper state certifications for her position. The School Psychologist has a bachelor's in psychology and a master's in school psychology and is certified for her position by the state as a school psychologist. The School Psychologist also holds a national certification as a school psychologist. Student's former special education teacher has taught special education degree and has a bachelor's and master's degree in special education. She also is certified by the State to teach special education. The former special education teacher is also Student's Case Manager.

3. Student has been diagnosed with various psychiatric disabilities over the course of five years, including: Attention Deficit Hyperactivity Disorder, combined type; oppositional defiant disorder; generalized anxiety disorder; attachment disorder; adjustment disorder with mixed disturbance of emotion and conduct; depression; mood disorder, not otherwise specified; bipolar disorder (D46, D78, D 98, D100). Student takes numerous medications to treat his psychiatric behaviors (D66, D75, D79).

4. Student's behaviors at home have often been violent and difficult to control. Moreover, Student's behavior has deteriorated over time. Student has threatened his sister and mother on multiple occasions. Student has attacked family members with a small wooden club. Student has poor impulse control. Student will periodically have episodes wherein he will wish to be killed. Student has threatened to kill his sister and parents. Student has assaulted his mother using his hands and using a knife (D75). Student has tried to choke his mother while she was driving. Student has acted out in sexual ways towards his mother and often swears at both his mother and sister. Student's outbursts are often triggered by trivial restrictions on his behavior such as his parents not making pancakes for him or his parents refusing to go to McDonald's. Student has also

threatened other children and thrown rocks at other children outside of the school environment. Student has also damaged furniture and windows at home.

5. Student has been hospitalized on approximately sixteen occasions since September, 2005 (D123). Student's hospitalizations have resulted from his behaviors at home. Student and his parents have attempted numerous therapy and medical options in attempts to mediate Student's behaviors at home.

6. Student's behaviors at home have affected his education in the following ways: (1) Student has been absent from school due to his repeated hospitalizations for approximately 33 days in the 2008-2009 school year at the District Main School and [REDACTED]; (2) Student is often unable to complete his homework because of behavioral issues at home; and (3) Student will sometimes be unable to attend class and/or be tardy for class due to outbursts at home. Student's Parents also contend that Student has problems maintaining friendships and social relationships generally in school. District personnel and [REDACTED] testified that Student does seem to have friendships and normal social relationships at school.

7. Two of Student's treating psychiatrists have recommended that Student be placed in a residential facility "for his safety and others' safety" and "to address his behavioral and psychiatric needs." (D46, D125). Student's psychiatric records containing these recommendations were provided to the School District.

8. Student's Mother testified that Student acts differently at home than at school<sup>1</sup>. Student's mother believes that Student acts differently at school because school is a contained environment; there are many school staff members at school so that the environment is much more restricted than at home; there are not the emotional issues at school which are associated with the home environment; Student is not and cannot be contained in the home environment in the way in which Student can be contained at school; and rewards and punishments are not as well codified at home than at school.

9. Student does not exhibit many of these deviant behaviors at school. Student's disciplinary problems at school generally are for failing to follow directions at school. Student will often have to be redirected during class. School personnel at the District Main School and [REDACTED] personnel have not observed Student being verbally or physically aggressive when Student fails to follow directions in class. At school, Student occasionally rough housed with his peers, but school personnel have not observed aggressive behavior by Student with his peers. Student has slapped fellow students in the back of the head and poked fellow students with a pencil. School personnel believe Student's roughhousing was done largely to obtain the attention of his fellow students rather than in anger. Student has social friends and partners at school. Student's Parents have offered no evidence based on personal knowledge to the contrary.

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<sup>1</sup> There are no references to the transcript because the parties chose not to order a transcript in this matter. Therefore, our decision is based upon our recording of the hearing and hearing officer notes taken during the hearing.

10. At the District Main School, Student was never violent or physically or verbally aggressive. Student has never acted out in a sexualized manner at school. Student has never threatened to physically harm school district personnel. Student has, however, threatened to vandalize the school principal's car. Student never has actually vandalized any school property. The District's vice principal testified that Student was able to process and develop strategies for dealing with the school environment while attending the District Main School. The Parents presented no evidence to the contrary regarding Student's ability (or lack thereof) to cope with the school environment.

11. The District's special education teacher on occasion asked Student's class to leave the classroom so that Student and the school's social worker could process through Student's behavioral issues and calm Student without the class present. School District personnel testified that this was a strategy for accommodating Student. The Parents offered no evidence refuting the District's explanation.

12. At the District Main School, Student was making academic progress. Student was reevaluated on or about December 17, 2008 (A242a-A242H). District personnel, based upon Student's class work and curriculum based assessments believed Student was making progress in the classroom. Moreover, Student had improved on curriculum based assessments in reading and math, to wit: the MAP tests in reading and math; the R-CBM test, a reading fluency test; and built-in progress system in the "Language! Program," a reading program Student participates in (A223). Student was mainstreamed to the Main School's math program. All of these facts and assessments show that Student was making good academic progress from Fall, 2007 to late 2008 (A223). All benchmarking data showed Student was making academic progress. Student's special education teacher and the vice principal also testified that Student was making good academic progress from observing Student in the classroom and from a review of Student's classroom work.

13. At the District Main School in December, 2008, Student was making progress in regard to social and emotional functioning. Student was making progress on his point sheet which measures social and emotional functioning progress (A239). The points sheet was created by Student's teachers which rates targeted behaviors on a daily basis.

14. Student does "shut down" frequently; Student challenges his teachers' authority; and Student has difficulty staying on task and focusing in class (A224, A225, A228). These are inappropriate behaviors which affect Student's learning. Student is able to function in a school setting with clearly defined expectations and with accommodations, goals and social work support. When Student is unable to focus on class work, school personnel are generally able to redirect Student. As a last resort, sending Student to the Vice Principal's office for a short period of time causes Student to redirect towards class work upon Student's return to class.

15. In December, 2008, the School Psychologist administered the BASC II comprehensive behavior rating scale (A242e). Student was rated by some of his teachers as verbally aggressive, but not physically aggressive (A242e). No significant conduct

problems at school were reported (A242e, A242f). Student, however, rated himself as significantly as having clinically significant problems (A242f).

16. The District's vice principal testified that, at the District's Main School, they were able to educate Student in the Main School building because they were able to help him process through his behavioral issues and learn whatever was being taught in the classroom. As late as a December, 2008, the District did not believe that Student needed a more restrictive placement.

17. The Main School Vice Principal, Main School Psychologist, and Main School Special Education Teacher regard a residential placement as too restrictive because Student is making progress at the District Main School and because Student's behaviors can be accommodated in a less restrictive environment.

18. In January, 2009, Student was moved to [REDACTED] as a result of an agreement between Student's parents and the District reached at a resolution session after this due process complaint was filed.

19. Student's Current Teacher at [REDACTED], Student's Therapist at [REDACTED] and the Director [REDACTED] testified on behalf of the District.

20. Student's Current Teacher has a bachelor's in education and is certified by the State to teach special education. The Director [REDACTED] has a graduate degree in clinical psychology.

21. [REDACTED] is a school designed specifically for emotional disturbed students and children with behavioral issues. Teachers work in small groups with ED students to process through issues when necessary.

22. Students at [REDACTED], including Student, are on a points system in order to encourage Students to behave in socially acceptable manners and behave in ways to succeed at school. The points system is an intervention system wherein students are encouraged to behave properly. Student's behavioral points plan shows that Student is behaving relatively well at [REDACTED] with the exception of failing to complete homework. Student's behaviors in the classroom have improved during the time he is at [REDACTED] although he is sometimes off-task. Student has been making progress in regard to his behaviors in the classroom at [REDACTED]

23. Student has never been violent or displayed physical aggression at [REDACTED]. Student has never engaged in extreme verbal aggression; has never engaged in violent rages or outbursts at [REDACTED], has never engaged in cruel or sexualized behavior at [REDACTED]. [REDACTED] has never sworn at teachers at [REDACTED]. [REDACTED] has never threatened to harm himself or others at [REDACTED].

24. [REDACTED] personnel testified that Student has normal social interactions with other students at [REDACTED]. Student's Parents provided no evidence to the contrary.

25. Student is being provided individual therapy for his issues with his family and home behaviors at [REDACTED]. Student's Therapist at [REDACTED] has a bachelor's degree in psychology and a master's degree in counseling. She is also certified as a counselor by the State. Student is given 90 minutes of individual therapy every week at [REDACTED]. Student also receives group therapy every day for 45 minutes. Student also sees a consulting psychiatrist at [REDACTED]. Student's individual therapist provides therapy in regard to Student's behaviors at home. Student's IEP addresses Student's behavioral issues in the home (A310, A324-325). [REDACTED] primarily uses an "Emotional Intelligence" model wherein Student is taught to be aware of his affective state and to control his behavior using that awareness.

26. [REDACTED] also offers family therapy, and Student's Parents have been offered family therapy, but Student's parents have chosen not to use [REDACTED] family therapy services. Student's Parents have chosen to use their own family therapist.

27. [REDACTED] personnel testified that Student is making progress on IEP goals at [REDACTED] both academic progress and progress in regard to his behaviors in the classroom (with the exception of homework completion). The parents were unable to contradict that testimony. Student is making minimal to moderate progress in regard to his behaviors at home and issues with his family. Student continues to minimize the detrimental nature of his behaviors at home and minimize the reasons he is hospitalized.

28. Student is making academic progress at [REDACTED] based upon assessments in class (tests and quizzes) and classroom participation. Student is failing to complete homework at home, but he is able to take time at lunch and study hall to complete his homework.

29. All District personnel and [REDACTED] personnel testified that they can accommodate Student's absences by working with Student when he attends class and Student can make academic progress despite his absences.

30. The [REDACTED] personnel regard a residential placement as too restrictive because Student is making progress at the District Main School and because Student's behaviors can be accommodated in his current environment. [REDACTED] Personnel believe [REDACTED] is the appropriate environment for Student.

### **Inferences and Credibility Findings**

31. We make the inference that Student cannot indefinitely make academic progress if he continues to have excessive absences and tardies and if he continues to fail to complete his homework. We base this inference on the admissions of [REDACTED] personnel and the fact that Student is penalized for not completing homework and that students are generally not allowed to advance to higher grade levels when there are excessive absences.

32. We make an inference that Student's excessive absences, tardies, and failure to complete homework are caused by his deviant behaviors at home. We base this inference on the testimony of Student's Parents to that effect and the fact that Student's absences are often caused by his hospitalizations (which are triggered by behaviors at home).

33. We make a credibility finding on behalf of District personnel and [REDACTED] personnel regarding Student's behaviors in the classroom and academic progress. We base this credibility finding on the fact that the testimony is uncontradicted by any parent witness with personal knowledge.

34. We make the inference that Student is currently making academic progress and progress on his classroom behavioral issues in his current placement and was making such progress in his previous placement at the District Main School. We base this inference on the uncontradicted testimony of school district and [REDACTED] personnel, as well as the results of curriculum based assessments.

35. We make a credibility finding on behalf of the District that Student's family was offered family therapy through [REDACTED] but that the family declined the offer because they currently are receiving family therapy through another therapist. We base this credibility finding on the lack of any testimony to the contrary.

36. We make a credibility finding regarding the Parents' psychiatrists who recommended that Student be placed into a residential placement. We find that the psychiatrists based their opinions on Student's behaviors at home. We base this credibility finding on the fact that there is no evidence in the record based upon personal knowledge that Student exhibits violent or sexualized behaviors at school or behaviors which endanger Student or others at school.

37. We make an inference that Student's placement is reasonably designed to address Student's social and emotional needs in that: (1) [REDACTED] system is designed to make students aware of their errant behaviors in the class and minimize those behaviors; (2) [REDACTED] is providing Student with individual therapy regarding Student's behaviors at home as well as extensive group therapy. Student receives group therapy on a daily basis and individual therapy twice a week regarding his family issues; (3) Student is making progress in minimizing problematic behaviors at school (with the exception of homework as demonstrated by his [REDACTED] point sheet); and (4) Student is making minimal progress regarding his behaviors at home. We base this inference on the testimony of the [REDACTED] Director, Student's Current Therapist and Student's Current Teacher at [REDACTED] as well as the lack of any testimony to the contrary.

38. We also make the inference that the fact that Student is making only minimal progress regarding his behavior at home does not demonstrate that Student's IEP is not designed to provide an educational benefit in regard to social and emotional issues. We base this inference on the fact that all of the Parents' extensive efforts at psychological and psychiatric treatment have failed in curtailing Student's deviant behaviors at home.

As such, minimal progress demonstrates a reasonably designed IEP in light of Student's nearly intractable behavioral problems.

39. We make the inference that the fact that Student's treatment is "fragmented," (being provided by different providers who work for different entities) does not mean that it is any less effective than treatment provided from one source at one place. We base this inference on the lack of any evidence presented in the hearing that treatment from multiple sources is any less effective than therapy received in one place.

#### **IV. Conclusions of Law**

##### **Burden of Proof and The Authority of The Hearing Officer**

40. The Federal and State Special Education Laws are set out in the Individual with Disabilities Education Act, 20 U.S.C.A. 1400 *et seq.* ("IDEA") and Article 14 of the Illinois School Code, 105 ILCS 5/14-8.02a. In enacting IDEA, Congress intended to establish a "cooperative federalism." *Evans v. Evans*, 818 F.Supp.1215, 1223 (N.D. Ind. 1993). Thus, compliance with minimum standards set out by the federal act is necessary, but IDEA does not impose a nationally uniform approach to the education of children with a given disability. *Id.* Thus IDEA does not preempt state law if the state standards are more stringent than the federal minimums set by IDEA. *Id.*

41. In regard to the burden of proof in a special education proceeding, the Supreme Court has held that the ultimate burden of persuasion lies with the party filing the due process complaint. *Schaffer v. West* 546 U.S. 49 (2005). However, the Illinois School Code has placed a heightened burden on school districts. 105 ILCS 5/14-8.02a (g-55). In a due process proceeding, the school district has the initial burden of production to show that the special education needs of the student are identified and that the special education program and related services proposed are adequate, appropriate and available. *Id.* The parents must prove their case by a preponderance of the evidence.

42. In determining whether a placement is proper under IDEA and the School Code, the hearing officer does not need to defer to the school district witnesses. *School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7<sup>th</sup> Cir. 2002)(like Wisconsin ALJ's, Illinois Impartial Due Process Hearing Officers are presumed to be experts on special education law, see 105 ILCS 5/14-8.02c); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167 (7<sup>th</sup> Cir. 1994)(hearing officer characterized as expert witness in determining whether placement is proper).

43. Under federal administrative law, hearsay is admissible as long as it is relevant and material. *Otto v. Securities and Exchange Commission*, 253 F.3d 960, 966 (7<sup>th</sup> Cir. 2001). Expert opinions are admissible if the experts are considered qualified under a relaxed standard similar to the *Daubert* standard used in the federal courts. *Pasha v. Gonzalez*, 433 F.3d 530, 535 (7<sup>th</sup> Cir. 2005).

Moreover, hearing officers can make reasonable inferences from the evidence adduced at trial. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart, supra.* Moreover, any inference a hearing officer makes must be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support our conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

Similarly, to the extent we rely upon expert opinions, the expert opinions must be inferred ultimately from facts in the record. *Mid- State Fertilizer Co. v. Exchange National Bank of Chicago*, 833 F.2d 1333, 1339-1340 (7<sup>th</sup> Cir. 1989)(in litigation, expert opinions must be grounded in facts and inferred from a process of logical reasoning).

44. Illinois law imposes an even more stringent standard on administrative hearings. In addition to the substantial evidence standard, Illinois law requires that administrative decisions be supported by “competent evidence.” Competent evidence is either: (1) evidence which would be admissible in a trial; or (2) inadmissible evidence of such a character which responsible persons are accustomed to rely upon said evidence in serious affairs (which we can only rely upon if admissible evidence is unavailable). *Starkey v. Civil Service Commission of the State of Illinois*, 105 Ill.App.3d 904, 910 (1<sup>st</sup> Dist. 1983) *rev'd on other grounds* 97 Ill.2d 91(1983).

#### **Standards for Determining Whether a Placement is Appropriate**

45. For purposes of this case<sup>2</sup>, the placement is appropriate if it is reasonably designed to provide the student with some educational benefit. *Rowley v. Board of Education of Henrick Hudson School District*, 458 U.S. 176, 206-207 (1982).

46. It is important evidence in determining whether the placement is designed for the student to obtain an educational benefit if assessments of the student show the student is actually making progress in the contested placement. *Rowley*, 458 U.S. at 202-203.

47. The Courts have disagreed as to the extent of a district’s responsibility to provide support services in a situation like this one. The Seventh Circuit position is that for a school district to be required to provide related services by IDEA, the reason for addressing the student’s behavioral problem must primarily be an educational purpose. *See e.g. Dale M. v. Board of Education of Bradley-Bourbonais High School District No. 307*, 237 F.3d 813, 817 (7<sup>th</sup> Cir. 2001). On the other hand, the majority of courts to rule on this issue have held that when: (1) a support service which provides a “necessary predicate for learning;” and (2) the student’s problems stemming from the disability are not segregable from the learning process; then the district must provide the support

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<sup>2</sup> The parents have not asserted any procedural issues with the placement, and therefore that aspect of the *Rowley* opinion is irrelevant to this case.

services pursuant to its statutory duties under IDEA. See e.g. *Dale M.*, 237 F.3d at 818-819 (Ripple, j. dissenting setting out cases holding the majority position); *Independent School District No. 284, Wayzata Area Schools, v. A.C.*, 258 F.3d 769 (8<sup>th</sup> Cir. 2001)(recognizing disagreement with Seventh Circuit position). In the present case, Student's behaviors require the District to provide support services under both tests<sup>3</sup>.

48. The Seventh Circuit has held that support services that allow a student to attend school and/or learn in school are services which have a primary educational purpose and must therefore be provided by the District. *Dale M.*, 237 F.3d at 817 citing with approval *Morton Community Unit school District No. 709 v. J.M.*, 152 F.3d 583,587 (7<sup>th</sup> Cir. 1998) and *Kruelle v. New Castle County School District*, 642 F.2d 687 (3<sup>rd</sup> Cir. 1981).

**Standards for Deciding Whether the Student is Being Educated in the Least Restrictive Appropriate Environment**

49. Under IDEA, the School District has an obligation to educate Student to the greatest extent appropriate with his nondisabled peers. 20 U.S.C.A. 1412(a)(5)(A); *Board of Education of Township District No. 211 v. Ross*, 486 F.3d 267, 277 (7<sup>th</sup> Cir. 2007). Placements which require "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*

50. Similarly, the Illinois State Board of Education and OSEP have set out a continuum of placements which allow for more restrictive placements only if a student can not be placed in a less restrictive environment through reasonable accommodations. 34 CFR 300.115; 23 Ill.Admin. Code 226.300.

51. The Seventh Circuit has "declined to adopt any sort of multi-factor test for assessing whether a child may remain in a regular school." *Ross, supra*. See also *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7<sup>th</sup> Cir. 2002). The ultimate question is whether the education in the student's placement is satisfactory, and, if not, whether reasonable measures would have made it so. *Id.*

In the present case, the School District complies with IDEA by placing Student at [REDACTED]: (1) if a placement for Student at [REDACTED] is providing Student with a satisfactory education; or (2) if reasonable accommodations to Student could be implemented to provide Student with a satisfactory education in a placement at the [REDACTED]. *Id.*

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<sup>3</sup> Because: (1) the Illinois School Code requires an appropriate placement apart from the requirements of IDEA; and (2) the Illinois state courts have authority under the principles of cooperative federalism to require support services to be provided to students under the more liberal majority rule, we will determine the District's responsibilities under both tests. We must regard this issue as unsettled in Illinois given that there has been no determination under the School Code by the Illinois Supreme Court regarding the proper test to provide support services in this situation.

52. In this case, the crux of the Parents' complaint is that the school district is not adequately addressing Student's behaviors at home, and to address such behaviors, a residential placement is necessary. The proper test to determine the least restrictive environment in this case is: whether educational necessity requires the residential placement. *Bensalem Township School District*, 39 IDELR 227 (PA SEA, 2003). To put the matter another way, the residential placement must be necessary to provide the student with FAPE in order to render the less restrictive placement inappropriate. *Sekonk Public Schools*, 42 IDELR 153 (MA SEA 2004). In making this determination, FAPE is not restricted to academic progress, but rather progress on a student's social and emotional goals must be considered as well. *Id.* However, if progress on social and emotional goals can be made in a less restrictive environment, the district is legally required to place the student in the less restrictive placement. *Id.*

53. Under IDEA, a Resolution Agreement on placement between the parties is specifically enforceable. 20 U.S.C. 1415(f)(1)(B). We do not believe that we have the authority to disturb an agreement of the parties specifically allowed by Federal law. We therefore hold that we are estopped from finding the Resolution Agreement Placement violative of IDEA or the School Code. We have authority to review resolution agreements and settlement agreements to the extent necessary to rule upon the issues in a due process complaint. *Linda P. v. State of Hawaii, Department of Education*, 46 IDELR 73 (D. HI. 2006).

#### **The Due Process Complaint and Prehearing Conference**

54. Student's Parents, at the hearing, presented some evidence that the placement in the Resolution Agreement is not being properly implemented. In the due process complaint and at the prehearing conference, improper IEP implementation is not a listed grievance. Parents' counsel has also specifically argued that under no circumstances could the current placement be appropriate. Problems which the Parents wanted to be addressed by a due process hearing officer must be listed in the due process complaint. 34 CFR 300.508(b)(5). Moreover, we lose discretion to allow amendment five days before the hearing begins. 34 CFR 300.508(d)(3)(ii). Moreover, our pretrial order required a specific identification of each and every issue the party intends to introduce at the hearing for a decision (See Notice of Pretrial Hearing Conference and Standing Procedural Order, 2b.). At the prehearing conference, the parties agreed that the only issue to be decided was whether Student's current placement is appropriate. We have a right, pursuant to statute, to clarify issues for hearing at the prehearing conference. 105 ILCS 5/14-8/02a(g-40). As such, we have a right (and perhaps an obligation) to consider all issues not presented in the complaint or at prehearing conference waived. In this case, all issues regarding the proper implementation of the current IEP at [REDACTED] are considered waived.

#### **V. Application of Law to Fact**

55. We find that the Student's current placement and IEP are reasonably designed to provide Student with an academic benefit as demonstrated by the fact that the placement actually does provide Student with an academic benefit.

56. We find that the IEP must address Student's behavior at home because Student's excessive absences and tardies and Student's failure to complete homework will ultimately damage the District's ability to provide Student with an educational benefit. As such, addressing Student's deviant behaviors at home has a primarily educational purpose.

57. Moreover, we find that the IEP must address Student's behaviors at home because, due to the excessive absences, tardies, and failure to complete homework must be corrected by the District as a necessary predicate for learning, and Student's behaviors at home are inseparable from correction of this necessary predicate for learning.

58. We find that student's current placement and IEP are reasonably designed to provide Student with social and emotional services which address his behaviors in the classroom so that Student can receive an educational benefit from his school experience.

59. We find that student's current placement and IEP are reasonably designed to provide Student with social and emotional services which address his behaviors at home so that Student can receive an educational benefit from his school experience.

60. We find that Student can be educated and provided social and emotional related services in his current placement with reasonable accommodations.

61. We find that the District met its burden of production that the placement is appropriate and Student's educational needs are being met.

62. We find that the Student's Parents did not meet their ultimate burden of proof that the current placement is not restrictive enough in that the Student's parents did not prove that Student can not receive an educational benefit from the current placement at Metro Prep. In making that finding, we determine:

a) Student's Parents failed to meet their burden of proof that because Student's treatment is "fragmented" (provided from different providers who work for different entities), it is any less effective than comprehensive treatment from one source. Student's Parents also failed to meet their burden as to the nature of therapy services provided in that Metro Prep does provide comprehensive therapy, and Student's Parents declined to accept it.

b) Student's Parents failed to meet their burden of proof that the District could not provide social and emotional services at Student's current placement with proper accommodations.

c) Student's Parents failed to present any evidence that a residential placement would aid in the provision of social and emotional services.

63. We find that, because of federal law which specifically recognizes and makes resolution agreements enforceable, we are estopped from finding that Student belongs in a less restrictive environment. We find that we are able to review the resolution agreement placement to make a determination in this hearing.

#### **VI. Order**

The School District need take no further action with respect to this due process hearing. All of Students' Parents' requests in their Complaint and otherwise are denied.

#### **VII. Right to Request Clarification**

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

#### **VIII. Finality of Decision**

This decision shall be binding upon all parties.

#### **IX. 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 5/14-8.02a(I) that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.

Joseph P. Selbka  
Impartial Due Process Hearing  
Officer

Date:  \_\_\_\_\_

Joseph P. Selbka  
53 W. Jackson, 1118  
Chicago, IL 60604  
312-788-3310  
Fax 312-788-3311  
[jselbka@sbcglobal.net](mailto:jselbka@sbcglobal.net)

CERTIFICATE OF SERVICE

In the Matter of: [REDACTED] vs, [REDACTED]  
ISBE Case Number: 2009-0208

The following parties have been served a copy of the Decision and Order.

7004 2510 0001 9655 8454

[REDACTED]

7004 2510 0001 9655 8447

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

7004 2510 0001 9655 8492

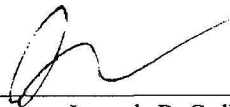
[REDACTED]

7004 2510 0001 9655 8478

[REDACTED]

[REDACTED]

[REDACTED]



Joseph P. Selbka  
The Hearing Officer

  
Date