

Case Number: 2000-0296

[Redacted] on behalf of [Redacted] vs. [Redacted]
Hearing Officer: Harry A. Blackburn

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

Impartial Due Process Hearing Decision Cover Page

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District Name [Redacted]
Superintendent [Redacted]
Address [Redacted]
Represented by [Redacted]

Phone: 7735531000

Parent Name [Redacted]
Address [Redacted]
Represented by [Redacted] 773-878-4951

Date and Timelines

Date of Written Request: 02/04/2009
Date of Pre-hearing Conf: 04/09/2009

Date of Hearing: 5/26, 5/28—29, 7/1—2,
7/14/2009—8:00 a.m. – 5:00 p.m.
Date of Decision: September 21, 2009

Summary of Decision

The [Redacted] Failed to provide the student a free appropriate public education (FAPE)—District Ordered to place the student at [Redacted] to provide ABA services at the [Redacted] with other appropriate related services; Transportation shall also be provided; The student shall be entitled to an additional 2 years of compensatory education at the [Redacted] and reimbursement for all expenses incurred by the parents for the cost of the home-based program and reimbursement for all expenses incurred for the student's home-based ABA program from the date of May 26, 2009 until the student's first day of attendance at the [Redacted]

SEP 23 2009
Special Education Services

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED] parents

v.

)
) ISBE CASE NO. 2009-0296
)
) Harry A. Blackburn
) Impartial Due Process
) Hearing Officer

Decision and Order

Jurisdiction

This matter is before the undersigned-hearing officer for a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA 2004"). 20 U.S.C. 1400 et seq., 5/14-8.02a et seq., and 23 Il. Adm. Code 226.600 et seq.

The parent, through her attorney(s), filed a due process complaint on January 1, 2009. [REDACTED] (hereinafter the "District") received the complaint and forwarded it to the Illinois State Board of Education ("ISBE") where it was received on February 17, 2009. The undersigned was appointed as hearing officer by ISBE on February 23, 2009, via letter, which the hearing officer received on February 24, 2009. The hearing officer subsequently contacted the parties and arranged for the convening of a teleconference call for discussing resolution or mediation efforts and establishing prehearing conference and hearing date(s).

The initial Individualized Education Program ("IEP") team meeting was conducted by the District on December 12, 2002 finding the student eligible for special education and related services under the categories of physically disabled, speech and language impairment, and severe/profound cognitive impairment.

Several private, independent evaluations, on behalf of the child, were conducted in the areas of a psychological assessment by the [REDACTED]

[REDACTED] a board-certified pediatrician and pediatric neurologist of [REDACTED]

[REDACTED] Educational Consultant [REDACTED]

The Hearing was commenced May, 26, and continued on May 28, 29, July 1, 2, and concluded on July 14, 2009. The parties were granted the opportunity to submit briefs in lieu of closing argument at the hearing. Contents of the respective briefs are incorporated in the following Decision and Order.

Issues Presented and Remedies Sought

MATTERS IN DISPUTE

Whether the [REDACTED] hereafter "District") failed to provide the student a free appropriate public education (FAPE) from January, 2007 to date due to, the following acts and omissions:

- A. Failure to appropriately evaluate the student regarding his needs for educational interventions that would effectively address his functional and communication needs (e.g., applied behavior analysis).
- B. Failure to provide appropriate and necessary educational services resulting from the District's determining and providing services based upon the student's eligibility category rather than upon his unique and individual needs.
- C. Failure to provide the student with individualized and necessary speech-language services and justifying this failure with the assertion that the Illinois State Board of Education limits the amount of speech-language therapy to 90 minutes weekly for students eligible for special education under the category of severe-profound cognitive impairments.
- D. Failure to provide special education instruction based upon the student's unique communication needs and failing to provide a curriculum and instruction that considers the student's lack of functional communication skills.
- E. Failure to offer meaningful instruction in any effective communication methods to the student within the time period stated or anytime during the student's enrollment in the District, resulting in the student failing to learn any functional communication skills until the parents' obtained and paid for services that addressed the student's functional communication needs.
- F. Failure to provide and to implement special education instruction based upon the student's unique functional needs, including failure to provide the student with an appropriate systematic toileting plan.
- G. Failure to provide the student with appropriate instruction to address other self-help skills and activities of daily living.
- H. Failure to provide appropriate behavioral interventions to address significant behavioral concerns including, but not limited to, self-injurious and self-stimulatory behaviors.
- I. Failure to consider the recommendation of the parents' outside evaluator in November, 2007, regarding the use of educational interventions such as Applied Behavioral Analysis to enable the student to learn to communicate functionally and to address his behavioral needs.
- J. Failure to evaluate and to address the student's visual deficits, which resulted in the parents having to obtain and privately fund an outside evaluation that determined the student's distance vision deficits negatively impact upon the student's ability to participate in educational activities.
- K. Failure to provide appropriate therapeutic recreational services despite recommendations by the District's own social worker that the student receive recreational activities to increase his social interactions with peers and participate

in an appropriate amount of recreation. The District, instead, recommended that these services be provided at the parents' expense.

- L. Failure to provide prior written notice regarding the District's refusal to provide educational services recommended by the parents' outside evaluators.
- M. Failure to consider a continuum of placements, including consideration of private special educational facilities that would provide the student with an appropriate educational program that would allow him to progress in all required domains.

Relief being sought by Parents/Student

- A. A determination that the acts and omission describe a failure by the District to provide the student with a free appropriate public education throughout the period of time between January 2007 through the present.
- B. Placement in an ISBE approved private therapeutic facility that will provide for the student's need for an educational placement, program and related services based on an intensive, systematic, and research-based approach used with fidelity.
- C. The maximum award possible for compensatory education services to address the District's failure to provide an educationally and functionally appropriate education plan for the student, including, but not limited to, reimbursement for the program of Applied Behavior Analysis (ABA) therapy previously and currently provided to the student at home and paid for by the parents.
- D. Any additional relief as the impartial hearing officer deems appropriate.

The District's response to Parent's identified issues and relief:

The District, through its attorney, restates what is perceived to be the parents' view of the issues, namely the parents contesting the appropriateness of the IEPs developed for the student and the appropriateness of the services provided under said IEPs. The District's attorney also restates the relief requested by the parents, namely: 1) placement in a private, ISBE-approved therapeutic facility; and 2) compensatory services including reimbursement for ABA services funded by the parents.

The school district maintains that it has, at all times, provided the student with a free, appropriate public education and further maintains that the student's current placement and services is meeting the student's identified needs and that his current IEP is reasonably calculated to provide him with FAPE in the Least Restrictive Environment (LRE).

FINDINGS OF FACT

1. The student, at age 3, began attending the [REDACTED] and remained there until the student turned 8 when he was placed at his current placement, [REDACTED]
2. He is placed in a classroom for children considered to have severe to profound cognitive impairments.
3. The student is not toilet trained and requires assistance to ambulate and wears bilateral leg braces.

4. The student does not speak and until a home based Applied Behavioral Analysis (hereinafter "ABA") program initiated by the parents was established; he had no meaningful mode of communication.
5. The student is currently demonstrating the ability to make his basic needs known using basic sign language in a home based ABA program.
6. The student displays self stimulatory and self-injurious behaviors. He sticks his hand down his throat, often to the point of gagging.
7. The student was diagnosed with developmental delays at approximately 6 months of age during an initial neurological examination. The student's physical presentation includes a considerable number of unusual physical and facial characteristics that along with his neurologic abnormalities suggest a genetic etiology for his condition. There is no definitive diagnosis to explain his developmental delays or physical presentation despite repeated assessments by neurologists and geneticists.
8. Several psychological evaluations of the student were conducted. These evaluations consistently found the student is significantly developmentally delayed. One evaluation conducted by the interdisciplinary evaluation team of [REDACTED] in September, 2002 estimated the student's development at the 8 month level. (PD 412). In August 2007 [REDACTED] of the [REDACTED] [REDACTED] estimated the student's functioning at the 12 month level. (PD 402).
9. Despite the lack of a definitive medical diagnosis to explain his disabilities and his significant delays, all of the medical and psychological professionals who have evaluated the student have offered similar recommendations attesting to the fact that the student is able to learn some functional life skills. (PD 402 and 410).
10. On June 1, 2006, [REDACTED] a board-certified pediatrician and pediatric neurologist of [REDACTED] stated that the student's educational program should consist of intensive training to accomplish independence in at least some life skills. (PD 410).
11. On June 1, 2006, [REDACTED] [REDACTED] both recommended that the student's educational program include ABA services. (PD 402 and 370).
12. [REDACTED] reported, in August 2007, that the student "would benefit from an individualized ABA approach to reduce his repetitive behavior, as well as teach him more adaptive self help and social skills. This approach is critical because he has demonstrated that he does have the capacity to learn new skills, but his repetitive, self-stimulatory behavior is significantly interfering with his progress. (PD 402).

13. On November 19, 2007, [REDACTED] attended a meeting conducted by the District to develop an IEP for the student. At that meeting, [REDACTED] presented her report and recommendations. The District rejected these recommendations. (PD 198).

14. In June 2008, the parents of the student funded a home based ABA therapy program provided by [REDACTED] a graduate student training as a behavioral analyst (i.e., provider of ABA therapy services under the supervision of [REDACTED]). The sessions were conducted twice per week for 2-3 hours each time.

15. IEPs developed for the student by the District have focused on the use of Picture Exchange Communication System (hereinafter "PECS"). (PDs 147, 186, 196, 219, and 227). However, because PECS has not provided the student with any meaningful mode, in the opinion of the parents, of communication, the use of sign language was instituted at home in the ABA program provided at parental initiative and expense.

16. The student worked with [REDACTED] twice each week for 2-3 hours during the summer of 2008. During that time the student learned the sign for "more." He demonstrated the ability to use this sign to indicate his desire for more food. According to the parents, their child's use of this sign is the very first time he has ever demonstrated an ability to communicate any of his needs or desires any point in his life.

17. In July, 2008, the parents again sought ABA services from the District. The District had [REDACTED] conduct an "Observation." [REDACTED] found that an Autism Spectrum diagnosis was not appropriate. However, no information is provided concerning which elements or version of the "Autism Diagnosis Observation Schedule" (ADOS) was used to evaluate the student. Additionally, neither [REDACTED] nor the District addressed the question of whether the student should receive ABA or any other similar or related intensive, systematic and research based approach to address his communication deficits and behavioral issues. [REDACTED] concluded that the student was not eligible to receive any services from the [REDACTED] (PD 57).

18. On September 17, 2008, [REDACTED] conducted an observation of the student at [REDACTED] (PD 385). The observation was conducted from the beginning to the end of the student's school day (i.e. 8:00 a.m.--1:40 p.m.). [REDACTED] recommendations included helping the student acquire the receptive vocabulary he will need to achieve a level of independence which will be meaningful to him. With regard the student's communication, [REDACTED] noted that "Oral language, PECS, and signs are being used. His response to PECS is inconsistent. His response to sign was generally inconsistent, but the method of teaching them lacked the intensity and duration that he had in the home ABA program in which he was making demonstrable progress. (PD 385 at p. 13).

19. On September 9, 2008, the student underwent a developmental optometry evaluation conducted by [REDACTED]. [REDACTED] diagnosed the student with myopia. [REDACTED] recommended that the student be allowed to get closer to visual presentations to compensate for his myopia. He also suggested that the student be fitted for eyeglasses and suggested that the habituation to glasses be considered as a goal for ABA therapy and linked to positive reinforcement. (PD 365). Despite previous

medical information available to the District indicating the student's impaired vision, the District did not assess or determine that the student had vision problems that require specific interventions as part of an IEP.

20. On September 24, 2008, the District conducted an IEP meeting. The parents requested that their son receive one-to-one intensive services, incorporating minimally four hours daily of ABA on the basis of the lack of their son's communication and functional needs not being effectively addressed in the District's educational programs. The parents cited their son's demonstrated progress learning in a home-based program that utilizes ABA. (SD 186). Instead, the District offered to provide the student with twenty minutes of daily ABA (PD 186, 196 and 446). However, the District admitted that none of their staff in the student's classroom at [REDACTED] had any formal training in ABA and would need to schedule training for staff to learn how to implement ABA.

21. On November 4, 2008, a psychological evaluation was undertaken by the student and conducted by [REDACTED] (PD 353). [REDACTED] reiterated what other independent evaluators recommended, namely for the student to receive ABA therapy. (PD 353 at p. 7). [REDACTED] also found that the student's self-stimulatory behavior had not been appropriately addressed by the District (PD 353 at p. 8). [REDACTED] recommended placement in a non-public school setting in order to provide the necessary structure to improve the student's skill development and ability to function, in light of the fact that 20 minutes per day provided at the public school is not sufficient to meet his needs since programs typically include approximately 25 hours per week. (PD 353 at p. 9).

22. On December 14, 2009 and January 14, 2009, the District conducted meetings to address the student's tri-annual evaluation, to develop further his IEP and to consider [REDACTED] report. (PD 148 - 178). During the December 2008 IEP meeting the school social worker reiterated her findings in her report that the student requires activities to increase his social interaction with peers and provide an appropriate amount of recreation at parent's expense (emphasis added). (PD 52). It was also established at the same IEP meeting in December 2008 that the District staff still had not received any ABA training that was rescheduled for the end of January 2009 a fact that led to the conclusion and staff admission that they had been attempting to implement the student's daily ABA program that was part of his IEP since September 2008 without having received any formal ABA training.

23. The parents' private ABA provider [REDACTED] participated in the December 2008 IEP meeting and provided her report on her classroom observation of the staff's attempted implementation of ABA with the Student. (PD 362). [REDACTED] expressed concerns regarding the staff's lack of any training or understanding of how to gather the necessary data that is required to appropriately implement an ABA program for the student. She also expressed additional concerns relating to the District's personnel not effectively or appropriately addressing the student's negative and self-injurious behaviors. During the December 2008, District personnel requested that [REDACTED] guidance on how to implement ABA effectively and to provide her private data sheets to assist them in taking data regarding the student. District staff also requested guidance from the private providers implementing the student's ABA program regarding

what to address and how to implement an ABA program for him in the classroom [REDACTED] offer to help train the classroom staff on paid basis, but the District declined.

24. At the December 2008 IEP meeting, the District rejected [REDACTED] recommendations that the student's educational program should include twenty-five hours of weekly ABA.

25. The District did not accept parent and independent evaluator recommendations to develop and implement a behavior plan to address the student's self-stimulatory and self-injurious behaviors, as well as those behaviors relating to lack of attention to tasks that interfere with learning and acquiring skills.

26. In January 14, 2009, another IEP meeting was scheduled to conclude prior IEP meetings of November and December 2008.

a. The District proposed to implement a timed toileting plan with the student for the first time despite his prior years of education where the District never attempted to teach the student to use the toilet but only changed his diapers when he was soiled.

b. Despite evidence that PECS has ever provided the student with any progress toward developing expressive language or even demonstrating meaningful communicative intent, the District's speech and language therapies stated that she recommended a "total communication" system to teach the student to communicate, incorporating PECS into his speech and language services and the use of total communication throughout his school day.

c. Despite requests of the parents and the recommendations of their private, independent evaluators, the District refused to increase the daily amount of ABA beyond twenty minutes.

d. Although staff requested assistance from Stephanie Schlatter, the parents' private ABA provider, to come to the classroom to assist in ABA training, the District declined to pay for [REDACTED] services.

Burden of Proof

The parents have the burden of proof as they filed the due process complaint. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Under Illinois law, the school district must provide evidence that the special education needs of the child have been appropriately identified and that the special educational program and related services proposed to meet the needs of the child are adequate, appropriate and available. 105 ILCS 14-8.02a(g).

Discussion and Conclusions of Law

Denial of FAPE by the School District

- A. Failure to appropriately evaluate the student regarding his needs for educational interventions that would effectively address his functional and communication needs (e.g., applied behavior analysis).**

An evaluation of the student is the mandatory first step in the provision of special education and related services to a student with a disability. School districts are required to abide with procedures to ensure the evaluation is legally compliant with the requirements of the IDEA. See 34 CFR 300.301 (a); 300.305; 300.306. It is the responsibility of the "state educational agency, other State agency, or local educational agency" to conduct a "full and individual" evaluation of the student. 20 USC 1414 (a)(1)(A). By definition a free appropriate education means at no cost to the parents. See 34 CFR 300.17; see also *Rowley*, 458 U.S. at 188. It is accordingly neither the parents' responsibility to obtain or to fund any evaluations delineated in the required domains. Under Illinois law, vision and communication are two of the eight domains that must be assessed. 23 Ill. Adm. Code 226.75 (emphasis added). Illinois law also requires that the IEP team identify and notify the parents of necessary assessments to evaluate the student each of the eight domains or why none are needed. 23 Ill. Adm. Code 226.110(c)(3)(B).

i. The District failed to evaluate the student with regard to the domain of vision

Every three years, the District is required by law to reevaluate the student with regard to his need for special education. 34 CFR 300.303; 23 Ill. Adm. Code 226.120. There is no apparent evidence that the District complied with its mandate that it screen the student's vision or that the District made any efforts to obtain information regarding the student's vision in 2005 or in 2008. In 2005, District staff noted on the domain sheet that the vision domain was not "relevant." (P.D. 26). However, the sheet also states that the existing information about the student's visual abilities was "pending." (*Id.*). Despite the entry that the visual information was "pending," the section on domain sheet regarding whether any additional information or sources of data was required to complete the evaluation was left blank. (*Id.*).

Since the child was enrolled as a student in the District, he has undergone three tri-annual evaluations in 2002, 2005, and 2008. A review of the "Assessment Planning" (commonly known as "the domain sheet") prepared for the evaluations conducted in 2002 and 2005 indicate that the District did not evaluate the student in the vision domain. In 2002, when the student entered the District, all eight of the domains mandated for assessment by Illinois law were noted as "relevant," on the domain sheet including vision. (P.D. 330). However, the 2002 domain sheet indicates that the District had no existing information regarding the student's visual abilities. (*Id.*). The document indicates that for vision the District would conduct a "vision screening" and would obtain data from "doctors reports, if available." (*Id.*). However, there is no subsequent school report or document or any evidence that the District assessed the student's vision in 2002. Again in September of 2008, the domain sheet noted that the domain of vision was not relevant. (P.D.25). However, the document also stated with regard to the student's reevaluation in the area of vision: "4-15-08 unable. Upon receipt of outside report, functional vision assessment. [REDACTED] (not yet received)." (P.D. 25).

[REDACTED] the [REDACTED] agreed that vision was a domain required to be assessed every three years. [REDACTED] (5/26/09, 67). However, despite such an acknowledgment and the clear dictates of IDEA and Illinois law regarding the District's obligation to assess children in all domains, [REDACTED] could not readily explain the District's failure to assess the student's vision since his enrollment

in the District or even more specifically, since the time he had attended [REDACTED] [REDACTED] testified that vision assessments require "the direction of central office." (*Id.*) She also initially stated that the District had performed a vision assessment of the student in 2008. (*Id.*) [REDACTED] asserted that the District could not do a vision assessment for the student until the parents produced a vision acuity report from a doctor. (*Id.* at 68, 71, 127). But, she further stated that vision screenings are completed by the District so that students are screened for their "vision acuity" and that vision screeners do come to the schools. (*Id.* at 93, 139). [REDACTED] later speculated that "the student could not indicate accurately whether or not he could see something with that vision screening" and therefore required acuity testing which the District would not pay for. (*Id.* 138-39, 143). It was clear, however, regardless of [REDACTED] explanations, that since the student has attended [REDACTED], the District had never appropriately screened or assessed the student's vision.

[REDACTED] also testified that before a student can receive vision services (i.e., related services designed to address a child's vision issues that may interfere with him receiving a benefit from his educational program) from the District, the student must obtain a functional vision assessment from a vision specialist. (*Id.* at 93). She explained the notation on the student's domain sheet for a vision assessment that stated "upon receipt of functional vision assessment" meant that "when the outside report was received, there would be a functional vision assessment." (*Id.* at 71). The mother signed a consent form for the student's tri-annual evaluation on September 24, 2008. (P.D. 24).

An ocular report prepared by [REDACTED] the parents' private developmental optometrist, was, in fact, presented to the District on November 10, 2008. (P.D. 365-66). Even if [REDACTED] explanation that an assessment mandated by IDEA and the Illinois School Code was contingent on the parents paying for and providing a visual acuity assessment was accepted as a reasonable explanation for delaying such an assessment until May 26, 2009, this delay was far beyond the 60 school days the District is permitted to perform required evaluations of special education students. *See* 23 Ill. Adm. Code 226.110(3)(d).

[REDACTED] report specifically documented the student's acuity levels with and without glasses and level of refraction, binocularity, and functional visual deficits. (*Id.* at 365; 367-69). While [REDACTED] stated that glasses would be potentially helpful to the student, [REDACTED] did not find the absence of glasses to be a primary limiting factor regarding the student's visual abilities. (*Id.*) [REDACTED] also recommended that "Habituation to glasses wear may be considered as a goal for his ABA therapy program and should be directly linked to positive reinforcement." (*Id.*) [REDACTED] also recommended that the student needed to sit close to visual presentations due to the student's myopia and astigmatism. (*Id.*) Additionally, the student's visual processing deficits--including the inability to meaningfully choose among "abstract or symbolic visual presentations" significantly affects the student's visual performance. (*Id.*) "Abstract or symbolic visual presentations did not appear to have meaningful or have motivating value to him." (*Id.*) [REDACTED] recommended that "concrete visual presentations" should be utilized in the classroom setting with daily therapy to increase the student's performance in a "field of choices, visual clutter, visual criteria for choice and abstractness of the presentation" as the student's performance also increases. (*Id.*)

The District appears to have disregarded its duty to assess the student's vision during the entire time he has been enrolled as a student in the District. The District appears to have committed further violations regarding the student's right to a free, full and individual evaluation by requiring that the parents first pay for and provide a vision report before the District would even provide a cursory vision screening. Such requirements directly contradict the basic tenet that a student is entitled to special education at no cost to his parents. See 20 USC 1412(a)1(A); 34 CFR 300.101(a); 23 Ill. Adm. Code 227.770(a)(3).

The District's failure to evaluate the student appropriately with regard to his vision demonstrates a clear violation of the student's right to a FAPE. His visual deficits were never identified until the parents undertook the expense of having the student's vision privately assessed. Moreover, the student's visual processing deficits would never have even been identified had the parents not requested that [REDACTED] their privately retained educational consultant, observe the student at school. [REDACTED] immediately recognized the student's inability to view objects placed further than 12" from his eyes. [REDACTED] 5/26/09, 325). There is ample evidence that District staff, in their attempts to use Picture Exchange Communication (hereinafter "PECS") with the student, were well-aware of his inclination to always pick a PEC on his left. [REDACTED] 5/28/09, 114-15, 199). However, the District ignored or failed to connect his lack of progress with PECS with his visual difficulties. (See [REDACTED] 28-9, 192-93, 367-69, 384, 396).

The District's failure to perform mandated vision screenings is a clear procedural violation that constitutes a denial of a FAPE, which also resulted in a substantive denial of the student's right to a FAPE. The IEPs developed for the student were predicated on the mistaken belief the student's distance vision is unimpaired and that he has no difficulty processing visual information. The evidence clearly demonstrates the student cannot benefit from any instructional activities conducted outside his immediate field of vision or a communication system based on two dimensional, abstract representations such as pictures. PECS, by its very definition, depends on the user's ability to process and to use effectively visual information from two dimensional, abstract pictures. The District's continued emphasis on PECS as the method to teach the student to communicate effectively deprived him of the opportunity to learn a functional means of communication.

ii. The District failed to evaluate the student with regard to the domain of communication

Each year, the District's speech and language therapists have completed a "Speech and Language Assessment Summary" describing the student's speech "progress." [REDACTED] 28-41). The Summaries document, in the parents' viewpoint, that the District persisted in using basic augmentative communication devices (e.g., switches) in providing the student with speech and language therapy and instruction. The parents aver that this persistent use of such devices, despite clear evidence that the devices were not effective for the student, demonstrates the District's repeated unwillingness to consider other approaches to teach the student a functional means of communication. [REDACTED] 39, 36, 33, 29).

Even more troubling to the parents, is the evidence of the District's apparent blatant misrepresentations of the student's abilities. The Speech-Language Progress Report dated November 14, 2006, states that "the student can independently exchange a single picture with his communication partner in return for a desired item." [REDACTED] 31)(emphasis added). The assertion that the student could engage in meaningful independent communications using a picture exchange was later completely refuted by [REDACTED] the student's speech and language therapist at [REDACTED] [REDACTED] wrote in a Speech-Language Assessment Summary dated November 12, 2008, that the student has no effective functional communication system and that PECS did not work for the student. [REDACTED].

From the parents' perspective, although the student made no discernible progress in developing any form of functional communication, the District never evaluated the student with regard to the potential effectiveness of sign language as a means of communication. In the summer 2008, when the parents obtained ABA services for the student, at their own expense, such an evaluation finally occurred. [REDACTED]. Even after the parents provided the District with evidence that functional sign was finally providing the student with an effective means of learning communication, the District has demonstrated an apparent continued reluctance to teach the student to communicate using the one mode of communication that has never proven effective for him. District employees instead continued using numerous communication approaches with the student in a confusing and inconsistent manner. Most importantly, the District's approach has not enabled the student to make progress toward developing functional communication. [REDACTED] 05/29/09, 106-08).

While the IEP drafted September 24, 2008, stated "Revise goal for speech to discontinue picture exchange and use functional signs for communication," [REDACTED] disregarded the IEP and elected to use a "total communication" system with the student. [REDACTED] 190; [REDACTED] 113-14, 245, 256-57). [REDACTED] testified "she always really wanted total communication approach" instead including "reaching, vocalizing, eye gazing" as part of the student's "functional communication" system which required guesswork and subjective interpretation on the part of those trying to understand what the student was trying to convey. [REDACTED] 101-02; 111-12, 256-57). Moreover, when questioned if the use of "total communication" (i.e., multiple approaches to communication) was confusing to the student, [REDACTED] stated it "may or may not be" confusing. She also admitted that the success of this approach was not measurable. [REDACTED] 260; See also [REDACTED] 5/28/09, 288-91, 336, 359-60).

Such an approach violates the student's right to a FAPE based on "unique needs" and the IDEA's requirement that the District provide specially designed instruction that is "adapt[ed] as appropriate to the needs of an eligible child. . . the content, methodology, or delivery of instruction, to address the unique needs of the child that result from the child's disability." 34 CFR 300.39(b)(3)(i) (emphasis added). The District's repeated failures to appropriately evaluate the student's communication needs and to provide effective speech and language instruction using the only mode of communication that has proved effective for the student denied him a FAPE.

B. Failure to provide appropriate and necessary educational services resulting from the District's determining and providing services based upon the student's eligibility category rather than upon his unique and individual needs.

The District asserted in its "Opening Statement" and during examinations of District employees that the student has received an appropriate education provided by adequately trained personnel and he has made progress. A significant element of the District's contention that the student has made "great progress" at [REDACTED] is that by November or December of 2007 the staff believed the student appeared happier in the school setting. [REDACTED] 5/26/09, 78). Report cards similarly proclaimed "good" and "great progress," although the student's classroom teacher kept no data on the student's progress on the goals contained in his IEPs and relied upon "teacher observation," in making these assessments. [REDACTED] 75-82; [REDACTED], 208-17). "Without data, one can't accurately determine whether progress is being made, even if very limited progress. . . . you're supposed to have measurable annual goals, and if you don't have a way of measuring them, you just have no way of quantifying progress. You can say I think he's better, but that's not a measurable—one's opinion is not measurable." [REDACTED] 342) See also 34 CFR 300.320(a)(3)(i)(stating an IEP must contain a description of how the child's progress toward meeting annual goals will be measured). In its written argument, the District takes careful aim at attempting to show how carefully the student's IEP revisions were handled, January 12, 2007, June 13, 2007, November 19, 2007, September 24, 2008 and December 12, 2008 Triennial Review. As careful as it appears to be, and taken in its best light, the facts show that the District failed to make the appropriate revisions to coincide with the progress the student was making in the home based ABA program provided by the parent's at their own expense. While the District may have appropriately identified some of the student's shortcomings, it failed to adapt the services and programs necessary to adequately address the student's severe and profound needs, especially in the areas of communication, speech and language and toileting.

District employees also testified, that at the time of the hearing, the student engaged in less self-stimulatory behaviors and screaming, which also indicated progress to [REDACTED] staff. [REDACTED] 88; [REDACTED] 228-29; [REDACTED] 300). Others who had observed the student at [REDACTED], including [REDACTED] who performed two observations during an entire day of Extended School Year classes and a full-day during the regular school year, concluded that fewer instances of screaming demonstrated the student's increasing tolerance for the environment and did not indicate he was receiving an educational benefit. [REDACTED] 300, 341). Moreover, other observers, not employed by the District, all reported that when they saw the student at [REDACTED] he engaged in significant self-stimulatory behaviors and other aggressive behaviors that could have harmed others (e.g., grabbing teachers' clothing). [REDACTED] 322, 324; Sobel, 66-68; [REDACTED] 05/28/09, 356-57; [REDACTED] 363-64, 383, 395). The District's assertion that the lessening of self-stimulatory behaviors demonstrated progress was not correct.

The District argues that the parents' are requesting relief that unjustly encroaches on the District's right to determine educational policy and methodology in its severe-profound classrooms or the right to use an eclectic approach drawing from a variety of educational methods whether peer-reviewed or not. School districts historically have asserted that the any issues of educational policy and methodology are the school

district's prerogative and that all methodology issues deserve almost complete and absolute deference from impartial hearing officers and reviewing courts. Under the IDEA, local educators enjoy wide latitude in developing the IEP most appropriate for a disabled student and may apply their professional judgment. *Alex R.*, 375 F.3d at 615 (citations omitted). While courts "take great care to avoid displacing the educational policy judgments" of local school authorities, they recognize that the precepts of the IDEA clearly indicate that triers of fact and review courts, "are not **required to accept supinely whatever school officials testify to.**" *Sch. Dist. of Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002)(emphasis added)(citing *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052(7th Cir. 1997); *Murphysboro*, 41 F.3d at 1167).

Moreover, there is no requirement that deference be given to educators' decisions predicated upon faulty data and anecdotally-based conclusions that the student received educational benefit:

The fact finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate. . . .The IDEA gives parents the right to challenge the appropriateness of. . . an IEP. . . .To conclude that the hearing officer erred simply because he did not accept the testimony of the School Board's witnesses. . . would render meaningless the due process rights guaranteed to parents by the IDEA.

County Sch. Bd. of Henrico Co. v. R.T., 433 F. Supp. 2d 657, 678 (E.D. Va. 2006) (quoting with approval *County Sch. Bd. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005.).

Here, there is ample evidence that the District is not providing the student with a FAPE. Most importantly, this is not a case of parents preferring one educational program that they believe is better for their child because it utilizes a specific methodology over a well-conceived severe-profound educational program proposed by a local school authority which meets the substantive requirements of the IDEA. There is overwhelming evidence that the District has never provided the student with an educational program that afforded him the basic floor of opportunity to receive a meaningful educational benefit that access to special education and related services provides. [REDACTED] 46) (testifying that in her professional opinion there has not been an acceptable level of educational progress because the student has not received instruction that would promote growth.).

In the parents' viewpoint, the District's employees testified to a confusing and often contradictory vision of what is required for the student to receive a FAPE. The testimony, they assert, proves that the educational program offered the student was not based on his unique needs but on a formulaic approach to the activities and program that [REDACTED] staff gives all students labeled with severe to profound cognitive impairments. The District is simply attempting to fit the student into a "one size fits-all" program that is nowhere based upon his needs. The curriculum in the student's class is far above his comprehension or ability levels. [REDACTED] 46.) As [REDACTED] observed, regarding a classroom activity in which the student and his classmates were read a story and asked to make choices between colors of stuffed animals, "Teaching him the word for "bear" is not likely to help him acquire the receptive vocabulary he will need to

achieve a level of independence which will be meaningful to him.” [REDACTED] 383).
“Because the student’s receptive language is very limited, and generally his receptive language is most –is best addressed by things that are concrete and that are real in his life. There are to the best of my knowledge no bears in his life.” [REDACTED] 343).

The majority of the student's existence in the severe-profound class at [REDACTED] is spent "waiting": waiting to participate in an activity or form of communication he can understand and waiting for the one-on-one intervention he requires to access any learning. [REDACTED] 316-17, 324; [REDACTED] 395) (documenting that when observed the student was engaged less than 13 minutes during the whole day of an Extend School Year day). Most importantly, there is no genuine attempt to either recognize the student's need for or implement the success he has demonstrated in the intensive ABA program provided at his parents' initiative and expense.

[REDACTED] testified about the IEP developed for the student during conferences held on September 24 and December 11, 2008, and January 14, 2009. She stated that the IEP team members employed by the District were not in agreement that the student required an ABA or DT (Discrete Trial) program included in his classroom programming “but I recall that they agreed to go ahead and do it.” [REDACTED] 50). The District decided to give the student 20 minutes of ABA/DT daily. [REDACTED] 189). She could not recall, however, why the District arrived at the decision to provide DT training to the student for only 20 minutes a day. [REDACTED] 53). Nor could the student's classroom teacher, [REDACTED] who was charged with implementing the program, recall how the IEP team members from the District decided to provide 20 minutes of DT. [REDACTED] 165-66.). Additionally, none of the staff who would be providing the ABA/DT had any training in this method but were expected to implement it immediately. [REDACTED] 189).

The District’s response to the parents’ request to provide ABA services by agreeing to provide a discrete trial training program for only 20 minutes a day with untrained staff does not comport, in the parents’ viewpoint, with any known research and does not appear to be predicated on a good-faith effort to truly provide the student with the intensive ABA program he requires. The parents aver that the insertion of this “plan” appears to have been an attempt to circumvent the procedural and substantive requirements of the IDEA to enable the District to claim later that it developed an appropriate IEP which reflected parental input and was individualized for the student. Instead, the inclusion of a “20 minutes” of discrete trial training, albeit what appeared to be under protest by untrained personnel, could be interpreted as a specious attempt by the District to abide by the IDEA’s precepts regarding parental participation in the IEP process and to appear receptive to the parents’ ideas to enhance their child’s education in the development of the IEP.

The inclusion of the “20 minutes” of discrete trial training in the student’s IEP, on the surface, appears to comply with the requirements for IEP development and implementation but appears clearly intended to allow the District to avoid truly considering the implementation of an ABA program for the student or placement at a private therapeutic school that would provide such a program on a full-time basis. For the parents, this illusion of compliance with the procedural requirements of IDEA for IEP development coupled with the lack of trained staff to implement the discrete trial training, the research to support the efficacy of a DTT program limited to 20 minutes each day,

and the lack of meaningful data demonstrating the student's progress in this program demonstrates that this was not a genuine effort to meet the student's needs for an intensive and individualized program.

The District's apparent unwillingness or inability to provide an education and services to the student based on his unique needs, the parents aver, is reflected in their refusal to teach the student communication skills using sign language despite the clear evidence that this is the only mode of communication that has provided the student with any meaningful form of communication. When [REDACTED] the student's classroom teacher, was questioned by Parents' counsel on direct-examination, [REDACTED] agreed that the student's use of sign language was the first time the student had demonstrated independence in communicating and that using sign language was a functional means for him to communicate. [REDACTED] 176). [REDACTED] while acknowledging that the student had made progress learning to communicate learning functional sign language through ABA, testified that the District was unwilling to alter its approach to teaching the student to communicate. [REDACTED] testified that there was a "team decision that it [functional sign] would be implemented as part of a total communication system." [REDACTED] 51). She also testified that the use of a Picture Exchange System (PECS) was going to be discontinued but that "we did not feel that was the best." (*Id.*).

[REDACTED] claimed that in the District's opinion the student had made progress with PECS despite the parents' repeated statements to the contrary and evaluations by developmental optometrist [REDACTED] clinical psychologist [REDACTED] observations by [REDACTED] that determined the student did have the necessary conceptual understanding of the meaning of PECS. Additionally, the student has visual processing and discrimination impairments that make PECS an inappropriate means of teaching him communication. The District, instead, despite overwhelming evidence to the contrary, continues to insist that a "total communication" approach (i.e. using a combination of PECS, speech, sign, augmentative communication devices) was appropriate. This insistence has ultimately inhibited the student's progress in developing a functional means of communication.

While [REDACTED] agreed with the statement "that all times, you always look at the individual needs of the child," her testimony indicated that the preferences of District teachers and service providers were often the paramount consideration. [REDACTED] 53-54). She testified that, "Children with severe cognitive disabilities learn in many different ways and the teachers and our speech pathologist like to have a total approach, which is possibly sign language, speaking and showing pictures all at the same time, to give a lot of different sensory input to a child, also feeling things." [REDACTED] 52).

The District, according to the parents, also presented a contradictory and inconsistent version of their ability to provide an appropriate DT training program or ABA program for the student. [REDACTED] testified that as [REDACTED] she was "the administrator of all of the staff, the teachers, the aides. I'm also the instructional leader at the school so my job is to work with the teachers on the curriculum that they use in their classroom." [REDACTED] 32). Yet, [REDACTED] could not recall which members of her staff had training in discrete trial training in September 2008, when the District was initially supposed to begin offering the student 20 minutes of what the District considered constituted "DTT" as part of his IEP. [REDACTED] 56).

When asked "at that time did the staff have any training in discrete trial?" [REDACTED] at 56). [REDACTED] replied "I know the teacher did not. . . I'm not sure about our speech pathologist." [REDACTED] 56). [REDACTED] claimed she did not have any recollection that during an IEP conferences held in December of 2008 and January of 2009 that the school staff requested that the student's home ABA providers provide training to them. [REDACTED] 55). [REDACTED] also could not recall that school staff requested information from the private ABA providers including data sheets. (*Id.*).

[REDACTED] also admitted that she did not know if the [REDACTED] had any mechanism to provide training that would have prepared the staff to provide discrete trial training to the student. [REDACTED] 58). When asked if the [REDACTED] could have provide training [REDACTED] responded that parents' counsel would have to ask [REDACTED] the [REDACTED] present at the September 2008 IEP conference about such training. (*Id.*). Most importantly, if the autism program was able to provide such training it would not as [REDACTED] stated "My recollection is that he was not deemed eligible for autism services and that is why they did not provide anything." (*Id.*). While [REDACTED] was charged with the responsibility of curriculum at [REDACTED] including that of severe-profound classrooms, she admittedly knew nothing about ABA/DT and its effectiveness with the severe-profound population. [REDACTED] 37-39). She instead stated a consistent curriculum for grades one through eight at [REDACTED] was used by "all teachers in the severe-profound classrooms" that addressed all the state standards. (*Id.* at 39).

When asked if the curriculum would be different for the student as compared to another child in the same classroom, [REDACTED] replied only that, "It *could* be." (*Id.* at 37). the student never had and continues to have no hope of receiving an intensive ABA program either at [REDACTED] or in any of the District's schools despite the proven effectiveness of this method for him and the meaningful benefit it has provided. The student's mother recalled a conversation with [REDACTED] a District employee who scheduled the student for an educational evaluation for autism. [REDACTED] questioned by the mother at the time as to whether the parents' were aware that ABA was not "done" in the District's schools. (Mother's Testimony, 5/29/09, 233). [REDACTED] admitted that [REDACTED] did not have any kind of intensive, full-day programming with ABA. [REDACTED] 66). [REDACTED] and other witnesses employed by the District stated that staffing considerations were also an impediment to providing such a program to the student at [REDACTED] regardless of his needs.

Similarly, [REDACTED] testified that the student could not be provided a full-day ABA program at [REDACTED] because "There's not enough staff." [REDACTED] 166). [REDACTED] also later testified that she felt that would not feel comfortable doing ABA with the student for a full-day in the classroom because she felt that "it's so intense for him and very upsetting for him. So I feel that if from what I understand, that it would difficult for him to handle." [REDACTED] 218). [REDACTED] made this statement despite having never observed the student in his home program or having any familiarity with private day schools that offer intensive ABA one-on-one throughout the day. (*Id.* at 218-19). When asked about the provision of one-to-one services ABA services to the student, [REDACTED] responded that "We could provide it for a certain amount of time. We could not provide it for all day." [REDACTED] 106). In addition, she stated "It would be

restrictive for a student in terms of his access to school as general, in general to the other students, to the staff in the school, to the other activities in the school.” (*Id.*).

In the parents’ perspective and equally troubling as the refusal to consider providing the student with a school program oriented toward ABA therapy either at [REDACTED] or in a private ISBE approved therapeutic school, was the inconsistent, contradictory and suspect claims that District employees made about the student’s progress and their attribution of that progress to the student’s program at [REDACTED]. Despite evidence that the student has significant visual discrimination difficulties and that pictures are not a meaningful way to teach the student communication, [REDACTED] claimed that the student had made progress learning how to discriminate between pictures of classmates, “The teachers shows him the picture and he looks up to that person.” [REDACTED] 125). However, [REDACTED] acknowledged that this is based on her interpretation of the student’s behavior, which she interprets as demonstrating he consistently looks at the correct person after look at the picture. (*Id.*) [REDACTED] admitted that the student had made progress in his home-based ABA program. She acknowledged that the student had started learning the sign for “more” at home [REDACTED] at 128-29). Both [REDACTED] also claimed that the student was taught to stand independently from a chair by the physical therapist employed at [REDACTED] ([REDACTED] 128-29 [REDACTED] 155). The District, however, failed to produce the physical therapist to testify and did nothing else to refute ABA therapy providers [REDACTED] and [REDACTED] explanations of how the student learned this important self-help skill. In addition, the District did not refute the documentary evidence introduced by the parents’ and explained by [REDACTED] and [REDACTED]. The presented data clearly and compellingly documents the progress the student has made learning to stand from a seated position independently and at various heights. (See [REDACTED], 5/28/09, 523-33 [REDACTED], 5/29/09, 131).

[REDACTED] has provided important guidance regarding the evaluation of a school district’s claims in judging the likely impact or educational benefit of an IEP and the educational program that child received or would have received from it.

The court held that

IDEA ‘does not limit the factors that can be considered in judging the likely impact of the [individualized education program] on the child so long as they bear on the question of expected educational benefits’ to the child. [internal citations omitted]. It is certainly appropriate for the Hearing Officer to decide whether experience shows the pretty picture painted in an individualized education program is more an impressionistic than a realistic rendering of what actually happens in the classroom.

Bd. of Educ of the City of Chicago v. Illinois State Bd. of Educ., 2006 U.S. Dist. LEXIS 75872, *18-*19 (N.D. Ill. Dist. October 18, 2006)(emphasis added).

Similarly, it is also appropriate to determine whether, here, “the pretty picture” of the student’s “good or great” progress painted by the District’s staff in their

testimony and report cards is a realistic rendering of what actually happened in his classroom.

C. Failure to provide the student with individualized and necessary speech-language services and justified this failure with the assertion that the Illinois State Board of Education limits the amount of speech-language therapy to 90 minutes weekly for students eligible for special education under the category of severe-profound cognitive impairments.

The District considers the student to have "significant" or "severe" expressive and receptive language delays. He is unable to communicate verbally. (██████████ 28-41). Although outside the two-year time-period, the parents provide a thorough understanding of the student's educational history to illustrate that the student has been denied a FAPE with regard to individualized and necessary speech-language services for the majority of the time he has been enrolled in the District. The student attended ██████████ from 2002-2007. There is no evidence that the student received any individual speech and language services at his previous placement at ██████████ (██████████ 348, 321, 299, 279, 238). Moreover, the student never had more than one speech goal in all of his IEPs from 2002-2007. (██████████ 347, 314, 294, 243, 205). For the first three years, he received no more than 60 minutes weekly of speech and language services. In 2005, the District further reduced his speech services to 30 minutes weekly. (Compare ██████████ 348, 321, 299, with 279, 238). At that time, District representatives informed the parents that the student was not making progress. (The Student's Mother, 5/29/09, 199-201). ██████████ the student's current speech and language provider, testified that the District regularly reduces service minutes for the students who the District considers have failed to make progress and some students even have their speech services eliminated altogether. (██████████ 240-51). Rather than increasing the intensity of the speech services a student not progressing might receive, ██████████ admitted that the District is unlikely to provide intensive services for a student, like this student, who is "at that cognitive level." (*Id.* at 251). However, at the Parents' insistence, the student's speech services at ██████████ were increased to 45 minutes weekly in January, 2007. (██████████ 231, 228).

When the student began attending ██████████ in September of 2007, his speech services were increased again to 60 minutes weekly. (*Id.* at 212). However, his IEP contained only one lone speech goal. That goal noted, for his present level of progress, that the student was using the picture exchange system (PECS) to communicate and that the student was making progress with PECS. (*Id.* at 205). The goal required the student to communicate by using PECS for "discriminating between 2-3 symbolic pictures" and exchanging the highly preferred picture for corresponding items. (*Id.*). The speech pathologist at ██████████ had stated in the student's prior "Speech and Language Progress Report" in 2006 that the student could "independently exchange a single picture with his communication partner in return for a desired item. . . . He will continue to use the Picture Exchange System (PECS) to request." (*Id.* at 31). However, when the student transferred to ██████████ found that the information previously provided by the staff at ██████████ did not accurately describe the student's communication abilities with PECS. ██████████ noted during the first year that the student was at ██████████ that "The Student doesn't discriminate pictures, has idea of PECS, able to use simple voice output device" but that he had been unable to meet his only speech goal for the 2007-2008 school year requiring him to discriminate "2-3 symbolic pictures." (*Id.* at 205).

Almost six years after the student began school, evaluations completed by the District revealed that the student had only progressed from language skills at the 3-6 / 6-9 month level to 13-16 months. (*Id.* at 28-29). In November, 2008, [REDACTED] wrote of the student that he was nonverbal, he was not able "to communicate his wants/needs" and he did not have "an effective communication system." (*Id.* at 28-29). In the IEP prepared in December 2008 and January 2009, the District finally increased the student's speech minutes to 420 minutes per month. The student now had five speech goals that incorporated learning abstract concepts such as "in, on, off, out;" oral motor exercises with the use of "vocal play;" using sign and a "total communication approach" to request an object from a field of three objects; increasing his vocabulary through "group thematic language lessons;" and learning 5 signs, through the use of sign language. (*Id.* at 165-69). However, when [REDACTED] was asked how much actual individual, one-on-one time of the 420 monthly minutes allotted to the student in his IEP did he actually receive, [REDACTED] testified that she saw him for "at least" 30 minutes weekly. [REDACTED] 118). While the IEP indicates "420 mpw"--minutes per week, this was later clarified during the hearing. [REDACTED] testified that the written notion of "420 mpw" was a mistake and that student was receiving 420 minutes monthly. [REDACTED] 134). The remainder of the student's speech and language services occurred in group settings. [REDACTED] 104-111; [REDACTED] 118). However, as reflected by [REDACTED] "Progress Notes," most of the student's speech services marked as "I"--individual, often occurred in group settings, such as the lunchroom, and occurred during art projects and during occupational therapy activities. [REDACTED] 104-111).

[REDACTED] testified that she recalled hearing the suggestion made during an IEP meeting in December 2008 or January 2009 that the student receive one hour each day of one-on-one speech services because of his significant cognitive impairments and his continued need for a functional means of communication. [REDACTED] 142). [REDACTED] stated that while she was not restricted from providing more than 90 minutes of speech to the student, she admitted to recommending what she believed "would be appropriate service time for a student with a cognitive disability like he had." (*Id.* at 143). [REDACTED] testified that the Illinois State Board of Education recommended no more than 90 minutes weekly for students like this student with severe-profound impairments. (*Id.* at 144). In fact, a 1993 Speech/Language Technical Assistance Manual, originally published by the Illinois State Board of Education, and later revised in 2007-2008 in collaboration with the School Affairs Committee of the Illinois Speech/Language and Hearing Association, suggests that for students considered with "severe" speech needs, that a minimum of 61-90 minutes of speech services be provided. [REDACTED] 439). For students meeting the criteria of "profound" the minimum minutes of speech recommended is 91+ weekly.

The student had, by [REDACTED] own admission, no functional communication abilities when he began to attend [REDACTED]. In the parents own words, it is their observation, after languishing for almost 5 years at [REDACTED] and making no progress with weekly speech services, where speech and language staff clearly and repeatedly misrepresented his PECS communication abilities in present levels of performance as well as Speech and Language Assessments, the student was only able to "pick up a (PECS) picture and crumble it and throw it down." [REDACTED] 182). Most disturbing to the parents was [REDACTED] statements that while severely cognitively impaired students can learn a functional communication system, and that it was "more than likely" a severe-

profound student would require a more intensive program to acquire functional communication skills, that a "nonverbal child with a cognitive ability like (this student's)" may find their speech services decreased or outright eliminated if they do not make gains. (*Id.* at 272, 249-50, 272). As ██████████ testified, "Why would we keep them if they are not making gains?" (*Id.* at 250). When asked why a student who was not making gains would not be placed in a more intensive educational setting where more speech and one-on-one individualized attention could be provided, ██████████ responded, "Not at that cognitive level we wouldn't." (*Id.* at 251).

The student is entitled to receive intensive services to compensate for the District's failure to provide him with appropriate and necessary speech and language services. Compensatory education provides services "prospectively to compensate for a past deficient program." *G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 308 (4th Cir. 2003). Moreover, the student is not precluded by any Illinois State Board of Education recommendations, mandates, or requirements from receiving such individualized services. His unique communication needs--and not low expectations about his cognitive "levels"--should have determined the services he received.

D. Failure to provide special education instruction to the student based upon his unique communication needs and failure to provide a curriculum and instruction that considers the student's lack of functional communication skills.

The student's present functional communication skills has been assessed at roughly the 13-16 month communicative level--a progression of only a few months since the student's entry into the District's schools almost seven years ago. His cognitive levels have been most recently assessed by the District's psychologist, ██████████ at approximately 12-15 months (██████████ 50-51). The District is charged with fashioning "specially designed instruction" that must be provided to the student at no cost to his parents that meet the student's unique needs. 20 USC §1401 (29). The student's many IEPs, developed throughout his years enrolled in the District, contain identical goals that document attempts repeated each year, without alteration, at teaching the student to use PECs and augmentative communication devices, to scoop food onto a spoon, to dress himself, and to ambulate independently. (██████████ 164, 166-73, 205-11, 239-46, 269-78, 292-98, 313-20, 341-47). There is no data nor was there any testimony presented to indicate that the student ever actually learned or attained any of these skills at school.

Starting when the student was first enrolled as a student in the District, the parents maintain that they were compelled to engage private providers to help teach the student these necessary skills: first to walk, then to communicate using sign language, then to learn additional self-help skills like feeding himself, and how to get up from a chair, with the use of ABA. (The Student's Mother, 5/29/09, 195-96, 199-201, 214-21, 228, 230, 276; ██████████ 406-409, 397-401). The first example of the parents' reliance on private providers to address the student's educational needs occurred when the student attended ██████████ as a three year old. Then, the parents had to engage a private physical therapist to fit the student for a walker and teach him to use it. (The Student's Mother, 195-96). The mother recalled that the staff at ██████████ never provided a walker or even suggested that the student could progress to using one and instead continued to have the student use a wheelchair at school. (*Id.*)

[REDACTED], the student's private ABA supervisor, testified that when she first observed and assessed the student's skills over a month-long period in October, 2008, the student "didn't show any form of functional communication. He wasn't able to move about his environment independently...he needed assistance for safety reasons to walk. He didn't have any daily living skills that I observed or any others." [REDACTED] 5/28/09, 293-94). She added that the student had no imitation skills or social skills, or "the skills to learn. He didn't display listener behavior." (*Id.* at 296, 298). The student's ability to imitate was described as "crucial" as sign language is taught through imitation. Imitation is also used to teach daily living skills such as dressing himself and social and play skills. (*Id.* at 312; *see also* [REDACTED] 5/29/09, 125-126, 129). In November 2008, [REDACTED] found that the student had no independent toileting, hygiene or dressing skills. [REDACTED] 353). [REDACTED] noted in her report that "despite special education placement since age 3, marked gains have not been made. A more intensive year-round program is required to meet his needs." (*Id.* at 360).

[REDACTED] the [REDACTED], described the type of curriculum offered in the student's classroom. [REDACTED] stated that "All of the teachers have to teach according to the Illinois State Board of Ed standards" and that the student's curriculum in his severe-profound class "would be a highly modified curriculum that has to be based on the standards, the Illinois standards." [REDACTED] 36-37). [REDACTED] first stated that the curriculum in the student's severe-profound class is "differentiated for each child according to the child's unique and individual needs." (*Id.*). But when questioned whether the student's curriculum was then different than for others in this severe-profound class, [REDACTED] replied, "Yes. It could be." (*Id.* 37).

It is also noted in the student's current IEP that his "skills are considered pre-academic." [REDACTED] 150). Yet, the focus of his program is not individualized and differentiated. [REDACTED] recalled [REDACTED] described the student's program as including a curriculum that included science, home arts and literature. [REDACTED] 353). [REDACTED] observed the student in three learning environments: his home ABA program in the summer of 2008, his 2008 extended year summer program at [REDACTED] and his regular educational program at [REDACTED] in the fall of 2008. [REDACTED] 371-396). [REDACTED] first noted that the student's ESY program "was clearly generic and was not calculated in any way to be in accord with his IEP." [REDACTED] 372). [REDACTED] observation of the student in September, 2008 revealed that the student was consigned to receive an educational program that he could neither truly see or comprehend nor could he participate in the program in any meaningful manner.

[REDACTED] described the student as "bombarded with language to the point at which he is likely to be confused" in addition to being presented with a mixture of communication modes such as oral language, PECS and signs. (*Id.* at 383). Classroom instruction included abstract concepts and requesting responses from students on these intangible concepts, utilizing great amounts of hand-over-hand instruction or assistance to push the student through an activity or to "voice" his response to questions on an augmentative communication device. (*Id.* at 373-77). [REDACTED] noted that the student spent a lot of his time "waiting"--which the student's teacher also admitted occurred. (*Id.* at 379).

As the student had no expressive vocabulary, limited comprehension of oral language, and an inability to relate to written language [REDACTED] found the vocabulary used in the student's regular classroom in the fall of 2008 and classroom text-based activities was not "calculated to provide significant educational benefit... Thus reading books to him does not serve to share information with him, to stimulate him to learn to read, to provide language enrichment, or to provide entertainment to him." (*Id.* at 383-84). the student was expected to learn and to understand abstract concepts like the days of the week, which [REDACTED] believed "unreasonable to expect him to have any comprehension of." (*Id.* 337). [REDACTED] stated that the student "needs to learn how to express his wants and needs... These are very basic things. They are pretty concrete and he has no way of expressing." (*Id.* 337-38). [REDACTED] poignantly observed: "If you can't tell someone you're hungry, why would you care whether it's Tuesday or Wednesday?" (*Id.* at 338). [REDACTED] concluded that, while the staff at [REDACTED] were "kind and good people. . . [but] They're not teaching the student at his level and they're not teaching him with the appropriate intensity for him to make the progress that he needs to make." (*Id.* at 358).

[REDACTED] testified about her observation of the student on May 13, 2009. [REDACTED] observed a similarly distressing example of the student's curriculum and instruction at [REDACTED] and the District's failure to understand his cognitive, communication or adaptive capabilities and needs. Noting that the student's lack of educational progress was attributable to the student's instruction that "doesn't seem to be at a level that would promote that growth," [REDACTED] stated that the student requires an educational program that provides "one strategy for communication that works, signing... that should be the focus" and not a methodology, such as total communication, that used multiple forms of communication. (Sobel, 52.).

[REDACTED] described the student's engagement in self-stimulatory behaviors "throughout the day" that interfered with learning. ([REDACTED] 62-63, 66-67). The "inclusion" interaction with the nondisabled peers that [REDACTED] insisted the student so much enjoyed appeared meaningless to the student. Hand-over-hand manipulation was frequent as the student was disinterested or unengaged in the "egg drop" activity with these peers. (*Id.* at 63). [REDACTED] testified about the student's inability to grasp the concept of the activity and the lack of any guidance or attempt to engage or teach the student in the task with these peers by any staff. (*Id.* at 64-66). As the student was not independent with any skills, he required one-to-one interaction or he was not engaged. (*Id.* at 67, 93-94). Abstract concepts, such as "big versus little" were taught in the severe-profound class and were not, in [REDACTED] opinion, appropriate curricular content for the student: "it is above his ability level as far as the concept. It did nothing to promote his advancement in activities of daily living. And it was set up in such a way that did not accommodate for his vision problem." (*Id.* at 72). Hand-over-hand manipulation was again frequently utilized in the classroom when the student did not respond to a request immediately. (*Id.* at 73). As [REDACTED] testified, "And then, again, that was a missed opportunity. Given more time, it would have been nice to see him have success." (*Id.*).

While the student's "low cognitive level" was often cited by District staff as a reason for the student's slow if nonexistent progress on his many IEPs, there did not appear to be much thought given to the curriculum and content of instruction that the

student's "low cognitive" needs required and what level of instruction he was receiving at [REDACTED] stated that the student requires an intensive ABA program. She opined, based on her expertise and knowledge of the research, that the 20 minutes of daily ABA the student received in his class was "too short" and typical ABA programs provide 25 hours of services each week. [REDACTED], 99). [REDACTED] discounted the impact of the 20 minutes of ABA provided to the student at [REDACTED]. "...the data I received is from the ABA team...that's private. And it clearly shows over months or weeks, based upon what the target is, moving from greater to fewer prompts, that...he's been moving toward doing these tasks independently." (*Id.* at 113-114). Noting that the District had not shared any data on their 20 minutes program, she further observed that the student had "been at the school program since 3. And his growth, from what I have knowledge of, is much more recent." (*Id.*)

There is a clear "disconnect" in the District's ability to recognize the student's actual levels of functioning and communication deficits and creating meaningful, accessible instruction to the student to provide him a FAPE while adhering to the required state standards. The District has not provided the student with an appropriate individualized program based upon his unique needs. While he attends school staffed by well-intentioned individuals, the student has received no benefit from the provision of an educational program premised on constant "hand over hand" manipulations of his hands to drive him through the classroom work, the reading of stories he cannot understand, and the use of materials and curricular content that he can neither comprehend nor access in any meaningful manner.

E. Failure to offer meaningful instruction in any effective communication methods to the student within the time period stated in the due process complaint or anytime during the student's enrollment in the District, which resulted in the student failing to learn any functional communication skills until his parents obtained and paid for services that address his functional communication needs.

When the student entered the District, he was described as presenting with "severe delays in receptive and expressive communication (scores indicate approximate 80% delay)." [REDACTED] 347). Despite this considerable deficit in communication skills, the District gave the student only one annual speech goal to "increase his ability to signal intentionality through use of gestures and/or manual switch." (*Id.*) Subparts of this goal stated that the student would "establish intentional communication and cause/effect, increase imitative skills; and consistency of responses using facial expressions, oral motor movements, gestures and body language to 50% accuracy across the curriculum." (*Id.*) While at [REDACTED] the student's speech and language services continued to include one solitary goal, although his speech minutes were eventually decreased, as discussed previously in Section C. In subsequent years, the student was described as having successfully attained the ability to "request preferred items or activities 6 of 6 times with minimal to moderate cues" [REDACTED] 314); being able to request a preferred item 8 out of 10 times with minimal to moderate prompts (using a picture exchange system) [REDACTED] 294); exchanging a symbol of a preferred item 8 of 10 trials with no prompts- 3 times daily (noting that the student achieved this goal "inconsistently"--but evidently still achieved the goal) [REDACTED] 276); and finally, during the school year of 2006-2007, being expected to "discriminate between two symbolic pictures" in 8 out of 10 trials without any support

required in either the annual goal or any of its benchmarks (██████████ 243). ██████████ the student's speech and language provider at ██████████ noted that the student was unable to meet either this last goal or any of its benchmarks without "physical and maximum prompts and assistance." (*Id.*)

A year later, in a "Speech and Language Assessment," ██████████ wrote that the student "does not have an effective communication system" and cannot "communicate his wants/needs." (*Id.* at 29). It was clear to the parents that the student's prior 5 years at ██████████ had afforded him no educational progress in developing his communication abilities. ██████████ subsequently also testified that PECS did not work for the student, but that she felt a "total communication system" would work for the student, encompassing "reaching, vocalizing, eye gazing, signing and a modified picture exchange program." (*Id.* at 29).

The parents testified, as did ██████████ the student's private ABA home supervisor, that PECS had been used for years with the student to no avail. (The Student's Mother, 5/29/09, 203, 214-15, 241-42, 264-65; ██████████ 5/29/08, 293-94). The student's mother described how she and her husband became increasingly concerned and frustrated as they witnessed year after year pass by, first when the student attended ██████████ and then again at ██████████ with the student never showing any progress in the development of his communication abilities. (*Id.*)

In Summer, 2008, the parents were finally able to provide the student with the ABA program first recommended by ██████████ in August, 2007. ██████████ 198, 402-04; The Student's Mother, 5/20/09, 213). The private therapist and the parents concluded that since the student had never shown any progress using PECS, they should attempt to teach him sign language. ██████████ 193). The parents, who were self-funding this home ABA program, could only afford 4-6 hours weekly of services. (The Student's Mother, 7/1/09, 29; The Student's Father, 5/29/09, 319). Yet within several weeks of starting the program, the student demonstrated his first ever purposeful and understandable communication. It was, as the student's mother testified, his first "word" and purposeful communication ever: "I looked at my son; and I said, ... what do you want. . . . And he did 'more.' And to me that was almost like his first word. . . . He wanted more TV. . . It was completely independent." (*Id.* at 218-19). The student's mother described how "we were all amazed that just after a short, after a month. . . (the student) was actually doing something. He was actually trying to make an attempt to communicate." (*Id.* at 228). The student began learning other signs in the ABA program. ██████████ 193).

In the fall of 2008, the parents requested that the District in the absence of evidence that the student had ever made any progress using PECS, and clear evidence that using ABA to teach the student functional sign was working that only sign language be used to teach the student how to communicate. The District agreed, and in a revision to the IEP on September 24, 2008, stated that the student's speech goal would be revised and the District would "discontinue picture exchange system and use functional signs for communication." ██████████ 188, 190).

The District's speech therapist assigned to the student ██████████ chose not to abide by this IEP. Instead she made a unilateral decision regarding the appropriateness of

the student's IEP as she later testified that she did not agree that sign was the best way to teach communication to the student. [REDACTED] did not think that learning sign language was necessarily a functional form of communication as not everyone can interpret or understand sign language and that sign language would not teach the student independent communication skills. [REDACTED] 95, 99, 112). -Consequently [REDACTED] continued to use a total communication approach that encompassed "gestures, eye gaze.... some sign language" and "modified PECS". (*Id.* at 99, 101, [REDACTED] 29). She also admitted that both the student's use of gestures and eye gaze relied upon the interpretation of the person with whom the student was attempting to communicate. [REDACTED] 101-02) [REDACTED] later admitted that these types of communication methods, which are open to interpretation by people who do not know the student, are not functional. (*Id.* at 112). While [REDACTED] stated that sign language would be part of this "total communication approach, she also admitted that the student received "less than an hour for sure" of actual sign language use daily. (*Id.* 245).

[REDACTED] a Board Certified Behavior Analyst, and the supervisor of the student's private ABA program, testified that teaching the student so many modes of communication is "extremely confusing" to the student and akin to "asking him to learn four languages." ([REDACTED] 5/28/09, 29, 363). [REDACTED] described that teaching the student sign language and PECS simultaneously "is nearly impossible. . . to teach them functionally and to teach a child to be able to functionally communicate is nearly impossible. . . .The data isn't showing that he is learning these multiple ways of communication." (*Id.* at 359-61). [REDACTED] additionally testified that for PECS to be effective, PECS needs to be implemented by all staff throughout the day, not just with the student, but with each other and throughout the classroom instruction. [REDACTED] 5/28/09, 359-61). This would require that the PECS icons, or pictures, would be exchanged throughout the day steadily by staff with the students with no other mode of communication being used. (*Id.*) There was no evidence that the student's classroom staff, or even [REDACTED] was implementing PECS in this manner so as to offer any real instructional consistency to the student. [REDACTED] was in fact observed by [REDACTED] to simultaneously use a combination of oral prompting, PECS, hand-over-hand signing, and then pairing a PECS icon with food while providing the student's speech services during lunch. [REDACTED] 378).

Moreover, the "total communication system" used by [REDACTED] was exceedingly troublesome, to the parents, in several other respects. Despite the IDEA's clear mandate that goals must be "measurable" goals, [REDACTED] was very clear that she did not keep objective data on any of her goals with the student. 34 CFR 300. 320 (2)(A-B); (3)(i). [REDACTED] only data on the student's speech goals was on a computerized print-out that was primarily a narrative of activities completed with the student, with no objective measurement of successful goal attempts, no documentation of the number of attempts, or the amount of support necessary to achieve the goals. [REDACTED] 154-56, 158). Moreover, many of the student's speech therapy minutes are spent in art or occupational therapy projects. [REDACTED] 104-11).

[REDACTED] was also charged with implementing the student's signing instruction in a discreet trial or ABA format. [REDACTED] 189-90). While acknowledging that DT and ABA are data-driven programs and require data to be taken throughout trials of activities, [REDACTED] stated that even though she only did three trials of his signing during each

time she worked with the student and was only working on 2 signs with the student, she could not take data during the student's DT time. [REDACTED] 120, 147-48). [REDACTED] stated she was unable to take data on the student's discreet trial time because it often occurred in the lunchroom--the "natural environment" while she had "six students with severe/profound disabilities and you are trying to get a lesson across." [REDACTED] 148, 154, 168-70).

The parents were also troubled by [REDACTED] testimony when she stated that she was not required to take objective measurements on the student's speech goals, and that she assessed his progress through observation which she described as "good equally" as data. (*Id.* at 156). Her speech goals for the student specifically deleted the evaluation procedure to "chart progress" and stated that [REDACTED] would "observe progress" weekly. [REDACTED] 165-69). While [REDACTED] admitted that "I don't measure observations," she insisted that her observations, while purely subjective, would still be the only basis of assessing the student's progress because "if you work with someone, you know, basically, the progress that is being made." [REDACTED] 156). When questioned as to how [REDACTED] knew how the student was meeting the percentages on his goals without any objective data [REDACTED] claimed, "There are sometimes data taken that I do not--I just use for my own while I am doing with the student, and I do not put in into the record." (*Id.* at 255).

Despite augmentative communication devices also being part of the student's "total communication" methods, and despite testimony that these devices were readily and regularly used in the classroom with the student, [REDACTED] had no data on the student's accuracy with or how often he used augmentative communication like voice output devices in the classroom. [REDACTED] 254-55). [REDACTED] testified that the student's augmentative communication devices were not sent home unless the parents requested them as other students in the classroom also used the augmentative communication devices. (*Id.* at 130-31). She also stated that while the student used augmentative communication devices "appropriately," she only meant that the student knew to touch the device rather than to "bang it" or "destroy it"--not that he used it to communicate effectively. (*Id.* at 253).

[REDACTED] spoke of the "natural environment" of locations in the school in which she provided the student's speech services, such as the lunchroom, as it was her experience that the student would "generalize" what he learned to other environments. (*Id.* at 118-19, 201-02). She admitted that neither the student nor anyone could generalize facial expressions--a component of the student's "total communication"--outside of the classroom. [REDACTED] 258-59, 266). She did not know if the student was generalizing any of the PECS or any of the other modes of "total communication" outside of the classroom or at home. (*Id.* at 246) [REDACTED] also initially testified that she was unaware if the student's mother sent the student's PECS icons or information about signs he was learning in his home ABA program from home to school, but later stated that she was aware that something might have been sent in the student's backpack. (*Id.* at 246-47) [REDACTED] did not have any specific data to share with the parents to see which method of total communication was most effective for the student. (*Id.* at 256). She did, however, offer the possibility of finding some "sketchy data;" which she would have to see if she could locate. (*Id.*).

The parents found [REDACTED] testimony regarding her unilateral decision, in their words, to "usurp" the IEP process and her statements regarding her own proficiency with sign language also troubling. While initially testifying that she had sign language knowledge, she testified that the student was confusing the sign for "finish." (*Id.* 231-32). The student's mother testified that the sign the student was using was, in fact, a similar-looking sign for "music." (The Student's Mother, 5/29/05, 304-06). When asked if the student may have been signing the word for "music," [REDACTED] response was revealing: "It could be his interpretation. That is why I wouldn't use sign with him all the time because if I didn't know it, I could say finished, and he could be saying he wanted music." [REDACTED] 263-64). [REDACTED] admitted that she wasn't aware at the time that the student was signing the word for music. (*Id.*) [REDACTED] completely disregarded the IEP revision in September of 2008 requiring that PECS be discontinued in favor of strictly signing. It now appears, from the parents' standpoint, that her reluctance to embrace sign language for the student may have been resulted from an insufficient knowledge of sign language not an actual understanding of the student's needs and abilities.

Despite [REDACTED] unilateral implementation of the "total communication" approach and her avowed belief that it was more appropriate than the IEP mandated use of sign, she admitted to the student's lack of progress using this approach. [REDACTED] testified, at the time of the hearing in May, 2009, that the student was not on track for meeting his second benchmark on his first speech goal from his current IEP--which he was supposed to have met by April, 2009. [REDACTED] 223; P.D. 165). [REDACTED] stated that the student was not meeting his oral motor imitation goal for his current second goal, for the April benchmark either, as the student "is not imitating. . . he is not imitating any sounds." ([REDACTED] 223-24, [REDACTED] 166). When questioned as to the student's progress on his current third IEP speech goal, that requires him to request a toy using a variety of methods, including pictures, with 65% accuracy using "moderate" cues, [REDACTED] stated that "even though we said we would not use pictures, I continued to use the pictures and pair them (objects) together, and now he is giving the correct picture with the object." [REDACTED] 226, [REDACTED] 167). No data or objective evidence exists regarding the student's ability to do this task. From the parents' viewpoint, it is also contradictory and bewildering that [REDACTED] would still use pictures with the student, given her acknowledgement that pictures, the basis of PECS, were meaningless to the student and that the student's use of PECS for the many years before he entered [REDACTED] provided him with no functional communication skills. (P.D. 29).

When questioned as to how the student demonstrated progress on the first benchmark of his current fourth IEP speech goal of showing an understanding of vocabulary in group language activities or lessons, [REDACTED] could not articulate how very vaguely....these goals don't really tell all we do." [REDACTED] 229). Added to this confusing description of how the student would ever show progress on this goal was the bewildering description of how the student indicated his friends in the classroom from a choice of two: "The student knows who, and he will look and pick if they are at home or if they are at school." (*Id.* at 230).

The student's fifth and last current speech goal in his IEP was to teach him 5 new signs in sign language by October, 2009. [REDACTED] stated that the student had met the first benchmark of the one sign of "finish" ([REDACTED] 230). She did not know of any data

taken throughout the remainder of the school day of how often the student was signing. [REDACTED] 268).

Had it not been for the parents continued efforts to ensure the student made progress and their seeking out [REDACTED] to evaluate the student, they may never have known about or considered an ABA program to teach the student how to communicate using sign language. However, the District ignored [REDACTED] recommendations. The District now employs the ineffective method of "total communication" that was in fact, utilized at [REDACTED] when the student first enrolled there. the student would have remained locked in his solitary world had the parents' not finally funded their own educational program—a private ABA program--which finally allowed the student a genuine and independent mode of communication.

The student's independent communication skills have continued to develop with learning additional and even reciprocal signs in his home ABA program--the beginnings of conversation. Even [REDACTED] while clinging to the unproven and undocumented success of the "total communication" program, conceded that the student has no reciprocity with PECS, but that the student does imitate signs. [REDACTED] 244). She further conceded that a comparison of PECS with functional sign language showed that the student was more independent with sign--but that his signs are not always "exact." (*Id.* at 171).

The student is not entitled to the "best" education. *Rowley*, 458 U.S. at 198, 200-01. Nor may parents specify what methodology must be used with their children. *Lachman v. ISBE*, 852 F.2d 290, 296 (7th Cir. 1988). However, the student is fundamentally guaranteed a FAPE. He can, by all accounts, be expected to learn how to functionally communicate. While this matter pertains only to the education the student received for the last two years, the evidence demonstrates that for close to 7 years, the District has failed to do anything to teach the student how to communicate other than to use the same ineffective methods, year in and year out, that denied him, and continue to deny him, the acquisition of basic skills that are necessary for the student to learn to live as independently as possible. The parents and their privately retained providers have demonstrated that the student can learn sign language using a research-based program such as, ABA. The District does not use ABA in any of its programs, despite the existence of copious research as to its effectiveness with the developmentally disabled and students with autism.

Intensive ABA instruction is available in the [REDACTED] area in educational programs provided at private therapeutic schools for children with autism and other developmental disabilities. These are year-round programs as the research demonstrates that such programs are what these children need to make appropriate progress. One such school, the [REDACTED] is certified and approved by the Illinois State Board of Education and offers intensive ABA instruction to both students with autism and students with cognitive impairments. [REDACTED] 505-519 [REDACTED] has already evaluated the student and has offered to accept him as a student [REDACTED] 504). Presently, the parents are funding the only ABA program they can afford so the student will learn communication and other adaptive daily living skills. The student is not receiving an appropriate public education in the District and the only real education he is receiving is certainly not free.

While parents may not be able to dictate methodology to a school, the District is still required to, as part of its provision of FAPE and "specially designed instruction" to a student, "adapt, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction, to address the unique needs of the child that result from the child's disability." 34 CFR §300.39 (b)(3)(i) (emphasis added). The overwhelming evidence proves that the student failed to make any progress using the District's preferred methods of teaching the student a functional form of basic communication. The District's persistence in using those ineffective methods along with the District's repeated failure to identify the student's vision deficits, clearly thwarted the student's ability to develop any meaningful understanding of the PECS communication method. This demonstrates that the District still cannot competently and appropriately address the student's unique communication needs.

F. Failure to provide and to implement special education instruction based upon the student's unique functional needs including failure to provide the student with an appropriate systematic toileting plan.

It is important that children with disabilities learn to use bathroom facilities as appropriately as they can. It is a major part of social acceptability, basic human dignity, and independence. Courts have also made it clear the education for children with severe disabilities under the IDEA is to be broadly defined and have recognized that toilet training is an integral part of the education of children with significant disabilities. *See e.g. Amanda J.*, 267 F.3d at 883; *Polk*, 853 F.2d at 176. The parents allege that the District's actions regarding toilet training the student exemplifies the District's failure to provide the student with an education that was individualized and reflected his unique needs or was designed to foster independence. It also exemplifies the District's overarching attitude regarding its responsibilities for the student's education. Despite the clear dictates of the IDEA, the District sought to have the parents assume much of the burden for providing for the student's educational needs.

The parents aver that the District was well-aware of the parents' longstanding concern regarding the student's need for toilet training. The parents had been requesting that the District address toilet training even prior to his attendance at [REDACTED]. [REDACTED] the parents had requested that the District address the need to toilet train the student when he was still attending [REDACTED]. (The Student's Mother, 05/29/09, 199, 207, 216). [REDACTED] acknowledged that the District was aware of the parents' concerns and testified that this issue was discussed at the IEP conference conducted on September 24, 2008. [REDACTED] 39-41). [REDACTED] testified that the District had requested that the parents consult with the [REDACTED] (hereinafter "the [REDACTED]" to develop a toilet training program. (*Id.* at 43). [REDACTED] claimed that "we develop programs with the parents." (*Id.*) The student's mother testified that the District recommended that she attend a toilet training program offered by "Little Friends." (The Student's Mother, 05/29/09, 248). The student's mother did so at her own expense. (*Id.* at 249).

The issue of toilet training was also discussed at the December 11, 2008 and January 14, 2009, IEP conferences. During those meetings, District personnel, in the parents' opinion, reluctantly agreed to consider implementing a toileting plan and again placed the onus on the parents to develop a plan. [REDACTED] a District

social worker, testified that, "It was agreed with some stipulations. . . I believe that the mother was to try it at home during Christmas break, let us, let the know [sic] how it was going and what seemed to work and what didn't work. And then the school would try to model what she's doing." [REDACTED] 07/02/09, 55-56).

While the District was well-aware of the parents concerns and had agreed to initiate toilet training in the school setting, there were significant delays in the effort. [REDACTED] described a meeting that occurred in January or February of 2009 with [REDACTED] the [REDACTED] and the student's mother regarding "having some consistency between home and school for some toileting and some different equipment that can be used. She had some ideas for some equipment." (*Id.* at 109; *See also* [REDACTED] 07/14/09, 63). In fact, despite the discussion of a toileting plan as far back as the September 24, 2008, IEP conference, [REDACTED] did not contact [REDACTED] until the end of November or the beginning of December to seek her assistance concerning the student's toileting issues. [REDACTED] 70). Until [REDACTED] visit to [REDACTED] in January or February 2009, [REDACTED] did not have an adaptive seat that enabled the student to use the toilet. [REDACTED] 135). At that time, [REDACTED] brought an adaptive toilet seat with her, which was necessary because the student's small body and physical difficulties made maintaining his position on the toilet difficult and detracted from his ability to attend to the task of eliminating in the toilet. (*Id.*; *see also* The Student's Mother, 05/29/09, 246) (describing that until [REDACTED] supplied the toilet seat, there was no such seat available for the student's use) and [REDACTED] 87) (describing her efforts to find an appropriate toilet seat for the student.).

[REDACTED] testified that she and her classroom staff were working on toilet training with the student. [REDACTED] 185-86). However, [REDACTED] testimony did not support [REDACTED] statements that the [REDACTED] staff "developed programs with the parents" or made efforts to promote consistency between home and school. [REDACTED] claimed that as part of her and her teaching assistants' efforts to toilet train the student, he was being instructed to use sign language "to make the bathroom sign." (*Id.* at 184). However, [REDACTED] testified that she could not recall if she had notified the parents that was part of the school's training process. (*Id.* at 186).

[REDACTED] also admitted that a toileting plan was developed for the student in the IEP developed December 11, 2008 and January 14, 2009. (*Id.*). [REDACTED] stated that the IEP called for a two week trial of taking the student to the toilet every 30 minutes and for data collection regarding those efforts. (*Id.* at 195). [REDACTED] claimed that she did that for two weeks but that it did not make any difference in teaching the student to urinate in the toilet if he was taken every 30 minutes or three times a day on a schedule that was based on staff convenience. (*Id.* at 196). In sharp contrast [REDACTED] testified that the student was experiencing "a lot of progress" using the toilet at home on a schedule of every 30 to 45 minutes day. (The Student's Mother, 05/29/09, 251-52). The student's mother testified as to what a toileting plan that works for the student requires, "He has to put on often. And he has to be put on at proper timing." (*Id.*). [REDACTED] the District's severe-profound coach, also was unable to understand from the District's toileting data why the District discontinued taking the student to the toilet almost every hour and, instead, returned to the practice of taking the student to the toilet only three times daily, especially if the data did not reflect consistent success. [REDACTED] 112-15).

When asked if it was difficult to try to check the student every 30 minutes, [REDACTED] stated that "For him it was. It was disruptive." [REDACTED] 195). When asked if it was "Disruptive for him or for the classroom?" [REDACTED] stated, "Well, for both for him also." (*Id.*) [REDACTED] response to questions about whether the student could be toilet trained using an intensive approach like ABA were equally revealing. Regarding whether the student might be toilet-trained in a more intensive setting where he would receive one-on-one services, [REDACTED] opined, "I think it's an awful lot to ask of him . . . to have an intense toileting program." (*Id.* at 197). [REDACTED] claimed that if she was asked to toilet train the student using an ABA approach, as recommended for him by [REDACTED] [REDACTED] stated "I'm sure I'd be able to work it out." (*Id.*) When asked "So why not do it?" [REDACTED] replied, "There's restrictions. We don't have things that would accommodate that. We don't have access to the washroom all the time. We don't have the staff that would be able to that all the time. So there are limitations." (*Id.*)

The testimony of the student's mother also revealed that [REDACTED] appeared unwilling to follow the suggestions of the [REDACTED] toilet training program, which the student's mother had attended at the District's behest. The mother testified that [REDACTED] recommended "doing away with Pull-ups and diapers completely. They recommended putting him [in] underwear." (The Student's Mother, 05/29/09, 253). [REDACTED] told the student's mother that she could not send the student to school without sending diapers because of the staff effort required to attend to the student if his pull-up required changing. (*Id.*)

In sharp contrast to [REDACTED] apparent limited view of the student's ability to tolerate toilet training, in the eyes of the parent, several other witnesses testified that the student is ready and capable of toilet training. [REDACTED], who had conducted two observations of the student at school and one at home, stated that the student was ready to be toilet trained because he could remain dry for a substantial period of time, indicating some bladder control. [REDACTED] 327; see also [REDACTED] 394, 396, 383) [REDACTED] testified that the student has the ability to be taught to be toilet trained. [REDACTED] 05/28/09, 341). This opinion is shared by [REDACTED] [REDACTED] and [REDACTED] [REDACTED], 54; see also [REDACTED] 370) (documenting [REDACTED] recommendation that the student should receive ABA through the school system to address toilet training) and [REDACTED] 404)(documenting [REDACTED] statement that she believed the student could be toilet trained using ABA).

[REDACTED] testified that it was important the school and home should communicate and work together on toilet training the student. [REDACTED] stated that "The consistency and stability of a program is important and also generalization, to do it in more than one setting." [REDACTED] 54). [REDACTED] also stated that the school team should be developing the plan as they have expertise that the parents do not. (*Id.* at 54-56). While this opinion was also expressed by [REDACTED] and [REDACTED], the District did not provide the student with an appropriate systematic toileting plan with the main component of "consistency with school and home." ([REDACTED] 85; see also *Id.* at 96-97) (describing the importance of consistency and her positive impression of the mother's commitment to the student's development and to the toilet training efforts.).

G. The failure to provide the student with appropriate instruction to address other self-help skills and activities of daily living.

The student still requires specialized instruction to learn to dress himself, to feed himself, to use the toilet and to ambulate independently. At the time the student enrolled in the District's program at [REDACTED] the student had annual goals addressing these needs. His first IEP goals described how the student could bring a spoon to his mouth, but that he could not scoop food onto his spoon so as to acquire independence in eating. [REDACTED] 346). The student could stand, but could not walk without assistance. (*Id.* at 343). While admittedly not toilet-trained, there was no goal or plan in his early IEPs to address this critical need. (*Id.* at 335). A review of the student's IEPs indicates that his progress learning self-feeding skills never changed from year to year at [REDACTED]-while still able to bring spoonfuls of food to his mouth, he continually required someone at the school to first scoop the food on the spoon for him. (*Id.* at 318, 297, 270). In the most recent IEP of January 2009, the lack of any real progress over the years in this skill is plain from his stated level of progress: "The student is currently bringing food to this mouth using a spoon with 80% to 100% accuracy. Scooping food onto the spoon is emerging." (*Id.* at 164).

It is the parent's belief that the District ignored the student's need to learn dressing skills. A goal concerning these skills was not even provided to the student until 2005 when his IEP included learning how to pull a zipper up and down--his first dressing goal. (*Id.*) His following year's IEP in 2006 repeated the goal, with a somewhat bizarre description of the student's present level of progress on his ability to unzip and remove his jacket: "self help skills; hand function." (*Id.* at 246). His 2007 IEP stated that the student was now able to unzip his jacket but still required assistance to zip once the jacket was already partially zipped. (*Id.* at 211). The current IEP dressing goal states that "the student 'assists' with putting on his jacket given verbal cues." (*Id.* at 172). It also notes that the student requires "full assistance" to pull his pants up and down. (*Id.*).

The student's IEP of November, 19, 2007, acknowledged that the student could not stand up independently from a sitting position, and that he "requires maximum to moderate assists with all transfers." [REDACTED] 210). His one annual physical therapy goal for the 2007-2008 school year stated: "The student will tolerate perform transfers (sit to stand, stand to sit and floor to stand) with minimal assist and decreased anxiety." (*Id.* at 210). In his physical therapy goal the following year, the student had evidently not made any significant progress as his levels of performance again described: "the student requires minimal to moderate assist to perform sit to stand/stand to sit transfer." (*Id.* at 170). His annual goal again projected that the student would "perform sit to stand/stand to sit and transfer in his classroom des, toilet and lunchroom chair throughout the day with manual and verbal cuing as needed for safety and to assist to initiate the transfers." (*Id.* at 170).

On January 27, 2009, the student's home ABA program began to teach the student how to stand up from a sitting position at various heights. [REDACTED] 541). [REDACTED] the student's ABA provider, and [REDACTED], described how the task of standing from a sitting position was taught in these incremental heights to the student. [REDACTED] 5/28/09, 323-28). While initially teaching the student with the physical prompting of firmly pushing the student on the back to stand, this prompt was eventually fully faded

(i.e., eliminated) so that by March 5, 2009, the student was able to transfer to his feet, without any physical prompting or supports whatsoever from a sitting position of only 15" off of the floor. (*Id.*). The ABA home program indicates extensive data and trials incurred in teaching the student this skill. (*Id.* at 546-549).

██████████ testified that the school had taught the student to independently transfer from a sitting to a standing position in the 2008-2009 school year. ██████████ (204-05). However, the "data" that ██████████ kept on this skill does not reflect that the student was exhibiting this skill at all independently during the course of ██████████ limited data-taking. In the student's home ABA program, specific data documents that the student was able to transfer to a sitting position by January 28, 2009, with only a partial prompt-- only 1 or 2 fingers between his shoulder blades until he stood. ██████████ (546). the student mastered this skill entirely in his home ABA program with no prompts or supports by April 8, 2009. ██████████ (548). Detailed data prepared by ██████████ reflects how the home ABA program systematically taught the student this skill in incremental heights, first teaching him to stand from higher, then lower positions, with the goal of the student eventually learning to stand from a floor position. ██████████ (541, 546-49).

At school, ██████████ was instead either fully lifting the student to his feet, "half lifting" the student or "initiating" a lift by grabbing the student by his belt and pulling the student to his feet. ██████████ (114-16). Although ██████████ also testified that the student could now stand independently as a result of these efforts, there was no data produced past the date of February 23, 2009, to support that ██████████ "hand over belt" technique was in any way helpful for teaching the student to stand independently. (*Id.*). ██████████ the home ABA supervisor testified that this technique used at school utilized "full prompts" that the student then relies on making it more difficult for the student to learn to stand independently. ██████████ (5/28/09, 334).

██████████ insisted that the District's physical therapist had taught the student this standing skill. (██████████ 125-26). Yet the progress "data" authored by the District's physical therapist, ██████████ regarding the student's progress on his goals is strangely silent on the instruction of this skill. Only two notations even tangentially suggest in the ██████████ log and data that the student is making progress at all on this transferring skill in physical therapy: "max assist with floor to stand transfers " (1/9/09); "he requires maximum assist to transfer on bicycle" (3/17/09). ██████████ (107, 111.) There is no other data to reflect any progress or any information on the goal of standing independently. It should also be noted that the student did not receive a consistent and appropriate number of physical therapy minutes. Many notations are made that either the student or the physical therapist were absent, or that the therapist needed to attend meetings, including IEP meetings.. Those times were evidently not made up with the student. See notations 11/26/08 (██████████ 105), 12/01/08 (██████████ 105), 12/02/08 (██████████ 105), 12/11/08 (██████████ 106), 12/16/08 (██████████ 107), 12/17/08 (██████████ 107), 1/14/09 (██████████ 107), 1/15/09 (██████████ 108), 1/30/09 (██████████ 108), 2/6/09 (██████████ 109), 2/09/09 (██████████ 109), 2/10/09 (██████████ 109), 2/17/09 (██████████ 110), 2/23/09 (██████████ 110). Additionally, the District failed to produce the student's physical therapist at the due process hearing to testify.

The evidence is overwhelming that every critical life skill that the student has needed to learn has only been taught and learned by the student because his parents,

frustrated at the lack of any meaningful advancements that the student was making in learning any of these necessary skills in the District's programs, found and hired private providers to teach the student these skills. While outside the scope of this matter, the evidence regarding the student's learning to walk independently demonstrates that an overarching pattern exists regarding every skill the student has acquired. The acquisition of ambulatory skills through therapy provided by [REDACTED] and the other outside therapies his parents have obtained, during the period of time within the scope of this matter, not the District's educational program and related services, enabled the student to learn these skills. (The Student's Mother, 5/29/09, 193: [REDACTED] 227, 406, 244-45.). Most recently, the ABA instruction has provided the student with an opportunity to learn how to independently feed himself, to independently stand, and an increasing array of communicative responses, using sign language to make spontaneous requests. [REDACTED] 537-68).

The repetition of the District's life skill goals for the student, year after year, with no perceptible progress, resulted in a denial a FAPE for the student who, in the opinion of the independent evaluators, can learn, but was unable to because the District persisted in using means to teach him that were not appropriate for his needs. The District's instruction was not based upon the student's "unique needs" nor was the student's education "free" when the parents were compelled to fund the only instruction that has ever yielded progress in the student learning these very necessary activities of daily living.

H. Failure to provide appropriate behavioral interventions to address the student's significant behavioral concerns including, but not limited to, self-injurious and self-stimulatory behaviors.

Rowley instructs that an IEP is valid when (1) it was adopted according to the IDEA's procedures and (2) it is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To meet the second, substantive criterion of *Rowley*, an IEP must respond to all significant facets of the student's disability, both academic and behavioral. *Alex R.*, 375 F.3d at 613. That is why a school district's IEP team is required to assess whether the student's disability-related "behavior impedes his or her learning or that of others" in the classroom. 20 USC 1414(d)(3)(B)(i).

The IDEA further recognizes that the quality of a child's education is inextricably linked to that child's behavior, and hence an effective educational evaluation must identify behavioral problems. *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). A behavior intervention plan individualized to a student's needs is based on a "functional behavioral assessment," which is an approach that incorporates a variety of techniques and strategies to diagnose the "functions" of, and to identify likely interventions intended to address, problem behaviors. *See generally*, Illinois State Board of Education, "Behavioral Intervention Plan," at [www.hbug.k12.il.us/.../37-44K and L Instructions and Documents.pdf](http://www.hbug.k12.il.us/.../37-44K%20and%20L%20Instructions%20and%20Documents.pdf). Such an assessment should identify the skills' deficits and environmental factors that initiate, sustain or end the behavior in question. (*Id.*). The functional behavior assessment is important because it enables the IEP team to understand "functions" of the behavior (e.g., escape, avoid an unpleasant task or situation) and is a part of the IEP process that enables the team to develop a behavior

intervention plan (hereinafter "BIP") that teaches and supports replacement behaviors which serve the same "functions" as the problem behaviors. (*Id.*)

In the Summer of 2007, in a report presented to the District on November 19, 2007, ██████ noted, of the student, that "his repetitive, self-stimulatory behavior is significantly interfering with his progress." ██████ 404). ██████ recommended an applied behavior analytic approach to reduce the student's repetitive behaviors. The District, however, has never provided the student with an appropriate BIP. While a BIP was developed in March 2008, ██████ testified regarding that plan ". . . I have good knowledge of the behavioral modification literature. And there is nothing that would support this as an effective program." ██████ 70).

In fact, District employees repeatedly denied that the student even demonstrates behaviors that interfere with his learning and may be dangerous to himself and others. While acknowledging that the student has a history of self-stimulatory behaviors including hyperventilation, biting his hands, and putting his hands down his throat (what the school staff calls "thrusting"), both ██████ and ██████ testified that these behaviors have improved. ██████, 78, 88, 90; ██████, 267-69; ██████ 348-49). In fact, ██████ testified that now, "if he ever starts that kind of behavior, it just is simple redirecting him in school and he stops." (*Id.* at 91). Any claims that this is even true are negated by the observations of the student at ██████ conducted by ██████ and ██████. These observations demonstrate that the student's behavior continues to warrant significant concerns and that the District has no consistent behavioral plan or any other form of appropriate intervention.

████████ performed minute-by-minute observations of the student at ██████ on July 2, 2008 for 3.5 hours and September 17, 2008 for over 5 hours. ██████, 305, 318, 341; ██████ 372-82, 385-94). During both observations, the student engaged in self-stimulatory and self-injurious behaviors. When she conducted the July observation, ██████ found that the student spent much of the day under stimulated. "He had nothing to do and so he amused himself." ██████ 315). ██████ stated, "He stimmed intermittently all day long. . . I don't believe that there was ten minutes when he wasn't stimming, when he went without stimming." (*Id.*) the student's behavior included engaging in self-induced hyperventilation. (*Id.* at 316). the student also engaged in behaviors like repeatedly grabbing his teacher's shirt. ██████ reported that the staff did not demonstrate any consistency in how the student's behaviors were addressed. (*Id.* at 349).

████████ also conducted an observation of the student at ██████ on December 3, 2008. (████████ 362-364). During that observation, ██████ learned that from staff members that "were turning the student's chair around from a position that had put his back to them, his food, and the table-which later they told me that is what they do *sometimes* when he engages in inappropriate behavior-definitions for these inappropriate behaviors and procedure for turning him around were not available however". ██████ 363 (emphasis in the original); ██████ 5/28/09, 356-57). ██████ wrote a report, which was later shared with District personnel that documented significant concerns about the student's potentially dangerous behavior and cautioned that without a consistent response to his behavior there was a real potential that the student's behaviors would "change from inappropriate to dangerous or severe. . . ." ██████ 364).

██████████ observed the student at school on May 13, 2009, or just 13 calendar days before the start of the hearing. During the observation, ██████████ found that when she conducted her observation, that the student engaged in potentially self-injurious behaviors and self-stimulatory behaviors throughout the day and these behaviors interfered with what he should have been doing. (*Id.* at 62, 66-67). In addition, ██████████ did not observe the staff providing a consistent response to these behaviors. She found this concerning "Because it interferes with learning, with socialization and there's potential harm." (*Id.* at 68).

██████████ provided a long-term and practical explanation of why the District's failure to address the student's behavior was a concern, "[T]he reason that was of concern was that although it's quite manageable in a little child, a little kind of frail child who is ten years old, when he's 20 it will be absolutely unacceptable. It must be dealt with now." ██████████ 208). "If he's 20 or 25, he's not going to be well treated by the people who help wherever he is if he's grabbing people's clothing and sometimes the skin right under it." (*Id.* at 322).

I. Failure to consider the recommendations of the outside evaluator in November, 2007, regarding the use of educational interventions such as Applied Behavioral Analysis to enable the student to learn to communicate functionally and to his address his behavioral needs.

In the summer, 2007, the parents obtained a private psychological assessment of the student from ██████████ (██████████ 402). ██████████ *inter alia*, recommended

The Student would benefit from an individualized, applied behavior analytic approach to reduce his repetitive behavior, as well as to teach him more adaptive self help and social skills. This approach is critical because the student has demonstrated that he does have the capacity to learn new skills, but his repetitive, self-stimulatory behavior is significantly interfering with his progress. Also research has demonstrated that intensive, comprehensive ABA therapy is beneficial for developmentally delayed children to teach them adaptive skills. I believe that the student could be toilet trained with this approach, as well as learn some basic self-help and communication skills. ██████████ 404).

██████████ attended an IEP conference on November 19, 2007, to present her report. ██████████ 198). While the District adopted ██████████ findings regarding the student's cognitive functioning, the ██████████ staff replied that they did not feel that they had the staff or the training to carry out an ABA program at the time. (The Student's Mother, 05/29/09, 210). Additionally, ██████████ a District psychologist, attended the IEP conference and prepared the summary of cognitive findings in ██████████ report for inclusion in the IEP. (██████████ 198). On cross-examination, ██████████ was asked why she accepted the cognitive findings but not the recommendations and if she disagreed with the recommendations. ██████████ replied, "To answer your question, to be honest, I don't know enough about ABA to agree or disagree with the comment." ██████████ 07/14/09, 53). She also admitted she was not familiar with the research on ABA, how the 20 minutes of ABA was progressing in the

student's classroom or any progress the student has made at all as a result of any of the ABA instruction he received whether it be in the home-based program or in the 20 minute school program. (*Id.* 53-55).

The District has attempted to make something of the fact that the parents' counsel was present at the November 19, 2007 IEP and that a Parental Dissent was never filed. The student's mother testified that she wanted to give the staff and program at [REDACTED] a chance -- to see if the student would receive the educational benefit at [REDACTED] so absent at [REDACTED]. (The Student's Mother, 05/29/09, 211-13). The decision not to submit a written dissent or voice disagreement at the IEP does not negate the parents' right to raise this issue in a later request for a due process proceeding. The U.S. Department of Education, Office of Special Education Programs has ruled that parents do not need to raise a particular special education issue at an IEP meeting in order to preserve that issue for argument in a due process proceeding. See "Letter to Dowaliby," 38 IDELR 14 (OSEP, 2002); "Letter to Lenz," 37 IDELR 95 (OSEP, 2002); and "Letter to Zimberlin," 34 IDELR 150 (OSEP 2002). Most importantly, it does not excuse the District's failure to consider [REDACTED] recommendations and the resulting loss of educational opportunity to the student.

The 'centerpiece' of the IDEA's education delivery system is the 'individualized education program,' or 'IEP.' " *Honig v. Doe*, 484 U.S. 305, 311 (1988); see also 20 U.S.C. § 1414(d) (defining and describing the development, review, and revision of an IEP). "The IEP, the result of collaborations between parents, educators, and representatives of the school district, 'sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. *Honig*, 484 U.S. at 311. The procedural requirements of the IDEA have great importance and one central focus: "full participation of concerned parties throughout the development of the IEP." *Rowley*, 458 U.S. at 206. Parental participation requires more than just allowing the parent to attend an IEP meeting." While a school district can come to an IEP meeting having formed an opinion before an IEP meeting, they cannot so fully have closed their minds to the parents' position prior to the meeting and deny the parents the opportunity for meaningful participation.

As the court noted in *Deal v. Hamilton County Bd. of Educ.*, describing, the parents plight when the school still refused to provide services despite the strong evidence presented by the parents there, "this is predetermination.... Where there was no way that anything the Deals said, or any data the Deals produced, could have changed the School System's determination of appropriate services, their participation was no more than after the fact involvement." 392 F.3d 840, 858 (6th Cir. Tenn. 2004) (citing *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988)). Most importantly, any argument that the relief the parents now seeks unjustly encroaches on the District's rights regarding the selection and design of an educational approach fails to consider the overarching requirement of the IDEA that a student's IEP must be calculated to provide educational benefits. *Rowley*, 458 U.S. 176, 206-07; see also *Polk*, 853 F.2d 171, 182 (3d Cir. 1988).

The District's failure to consider [REDACTED] recommendations and provide an IEP that incorporated these recommendations resulted in a denial of FAPE to the student as he

spent yet another year, as he had since he was enrolled five years before, receiving an almost identical and, still, inappropriate educational program.

J. Failure to evaluate and to address the student's visual deficits, which resulted in the parents having obtain and to privately fund an outside an evaluation that determined that the student's distance vision deficits negatively impact his ability to participate in educational activities.

As described at length in Section A.(i.) above, the District did not to evaluate the student's visual deficits. The parents believe that there is a direct correlation between this failure and the resulting denial of a FAPE to the student during the years he has languished in a District program that failed to consider that his vision prevented him from receiving any benefit from use of PECS or many of the other visually oriented elements of the classroom activities that made up the student's school day.

It is also important to note that District employees (i.e., [REDACTED] and [REDACTED]) testified that they acknowledged the student's vision deficits and addressed the impact these deficits had on the student's participation in the curriculum. These statements are suspect in light of the testimony of [REDACTED] that as late as May 13, 2009, she observed the student during a lesson about "big versus little" which not only did nothing to promote the student's advancement in activities of daily living, "it was set up in such a way that it did not accommodate for his vision problem." [REDACTED] 72.). Moreover, the District's concentrated effort, in the eyes of the parent, to refute the findings of [REDACTED] by conducting a "Functional Visual Assessment" of the student on May 26, 2009, the very first day of the due process hearing should be considered when determining whether the District has appropriately evaluated and addressed the student's visual deficits. Not only is the timing of this report suspicious, but the contents are concerning as well especially in light of the fact that the report essentially refutes [REDACTED] entire findings. See ("Report of the Proceedings" 05/29/09 documenting 164-170 the Impartial Hearing Officer's concerns regarding the timing of the District's "Functional Vision Assessment" of the student.). Moreover [REDACTED] letter dated June 29, 2009, submitted in response to the District's May 26, 2009 report, provides the most succinct explanation of the District's failure to consider appropriately the student's visual deficits in the development and provision of his educational program:

A comment that states that a student's visual perception are commensurate with his intellect implies that the evaluator:

1. has a complete and thorough understanding of the individual's cognitive capacity;
2. has obtained that understanding of their cognitive capacity in a manner that would not be affected by visual perception delays

The evaluator would have to believe a child is unteachable to recommend that no accommodations or interventions are necessary when there is a profound delay in visual processing that would clearly limit his ability to lean through typical visual exposure. [REDACTED] 570) (emphasis added).

K. Failure to provide appropriate therapeutic recreational services despite recommendations by the District's own social worker that the student receive recreational services to increase his social interactions with peers and participate in an appropriate amount of recreation. The District, instead, recommended that these services be provided at the parents' expense.

During the student's three-year reevaluation with the District, a "Social Assessment" was completed by [REDACTED], a District's social worker. [REDACTED] (52-53). While not recommending social work services be provided by the District, [REDACTED] noted, in her report, that, "At the present time, the student isn't involved in any activities within the community. This social worker recommends that the parents seek some activities for the student to increase his social interaction with peers and provide an appropriate amount of recreation, at their own expense." (*Id.* at 53). When asked why she thought that this should be an expense assumed by the student's parents, [REDACTED] testified that she was not familiar with "therapeutic recreation" as a related service. [REDACTED] (63). It was her understanding that recreation needs, including therapeutic recreation, had to occur within the school day hours. (*Id.* at 64). She also stated that she was unaware of schools funding therapeutic recreation outside of the school day, "if it isn't a typical activity, such as something that the classroom would be involved in or during gym class." (*Id.*)

The parents had already funded much of the student's education, and arguably, the only significant education that has provided him with any meaningful gains. They have been forced to self-fund the only vision assessment ever performed on the student. The effort to once again impose upon the parents the expense for providing what the District is required by law to provide the student as part of his right to receive a FAPE is an inexcusable delegation of this responsibility to the student's parents. While [REDACTED] testified that she was unaware of the District's duty to provide any social skill services outside of the hours of the school day, the law is clear regarding the provision of identified recreational and community needs. Related services in the IDEA specifically defines recreation, including therapeutic recreation as among the non-exhaustive list of potential services that must be provided as part of a FAPE. 20 USC 1401 §602(26); 34 CFR §300.34(a). Recreation is further specified as "the assessment of leisure function, therapeutic recreational services" including "recreation programs in schools and community agencies." 34 CFR §300.34(11)(i-iii). Related services must also be provided at "public expense" and "without charge" to a student or their family. 20 USC 1401 §602 (9).

Although [REDACTED] later characterized this recommendation in her report for the student's social needs as "more of a want, a recommendation, something that would benefit him" and not a description of the student's actual needs, this explanation is a legally impermissible attempt to relieve the District of its educational responsibilities and to, again, foist the cost of a service upon the student's parents. (*Id.* at 64). [REDACTED] stated she personally knew of no after school programs that the District had ever funded. (*Id.* at 62-63). She also testified that did not believe any services that a student required that might occur after the school day ended should be the expense of a school district. The parents aver that this is clearly contrary to the IDEA and the concept of FAPE--which is not necessarily bound by the strictures of the school day, particularly with students like this student, who most likely will require many

community-based experiences throughout his life to further the acquisition of skills necessary to access activities in the community.

L. Failure to provide prior written notice regarding the District's refusal to provide educational services recommended by the parents' outside evaluators.

Prior to the parents' undertaking and paying for a private ABA home program in the summer of 2008, the parents received credible evaluations that indicated that the student was not progressing in his school program. [REDACTED], the student's pediatric neurologist, assessed the student on June 1, 2006, and made the observation that the student had made "very little progress" over the past two years and that "his educational program should consist of intensive training to accomplish independence in at least some life skills. The student can learn this sort of thing with a great deal of repetition. If the school program is not providing The student with adequate work on life skills and adaptive skills then The student should be staffed in a program that can meet his needs." [REDACTED] 411) (emphasis added).

After the parents' realized that the student was receiving the same type of programming and curriculum at [REDACTED] that he had received at [REDACTED]—one without the needed intensive instruction that [REDACTED] described, the student was further evaluated by [REDACTED] a psychologist. [REDACTED] had evaluated the student in June and August of 2007 and compiled her findings in a report. [REDACTED] 402-04). Subsequent to that report, [REDACTED] attended the student's annual review on November 19, 2007, to discuss her findings and recommendations. [REDACTED] 198). While the IEP notes that [REDACTED] report was reviewed by members of the IEP team and portions of her findings were incorporated in the IEP, i.e., the student's cognitive level, no mention is made of her specific educational recommendations regarding the student. (*Id.*) [REDACTED] recommended, as the student demonstrated some self-stimulatory characteristics of autism spectrum disorder,

that the student would benefit from an individualized, applied behavior analytic approach to reduce his repetitive behavior, as well as to teach him more adaptive self help and social skills. This approach is critical because The student has demonstrated that he does have the capacity to learn new skills, but his repetitive, self-stimulatory behavior is significantly interfering with his progress. Also research has demonstrated that intensive, comprehensive ABA therapy is beneficial for developmentally delayed children to teach them adaptive skills. (*Id.* at 404).

[REDACTED] specifically added that "The student could be toilet trained with this approach, as well as learn some basic self-help and communication skills." (*Id.*) At the IEP meeting conducted on September 24, 2008, the parents submitted a report authored by [REDACTED] a developmental pediatrician who is also an associate professor of human genetics at the [REDACTED] (*Id.* at 370). Noting the student's "remarkable progress" during his ABA program in his home during the summer of 2008 [REDACTED] also advised that the student should receive this programming at school to teach the student adaptive skills and toilet training. (*Id.*) [REDACTED] urged that "School placement recommendations should take into consideration the availability and ability to provide ABA services." (*Id.*)

[REDACTED] a clinical psychologist and the [REDACTED], evaluated the student in November, 2008. [REDACTED] 353-361.) [REDACTED] found that a comparison of evaluations over the years "reveal that the student's day-to-day living skills and functioning in the areas of socialization and communication have not advanced since the 2002 (Vineland) assessment. . . .Despite special education placement since 3, marked gains have not been made. A more intensive year-round school program is required to meet his needs." (*Id.* at 353-61, 360). [REDACTED] also reiterated the recommendations of a "one-on-one aide" utilizing ABA. (*Id.* at 361). She noted the "research-based support of efficacy for children with profiles like The student" but that the 20 minutes of ABA that staff at [REDACTED] was currently providing to The student "is not sufficient to meet his needs; programs typically include approximately 25 hours/week." (*Id.*) [REDACTED] concluded that "In light of the scope of the services required to meet the student's educational needs, a non-public setting is expected to provide the necessary structure and assistance to improve the student's skill development and ability to function." (*Id.*)

After the November 19, 2007 IEP conference, the District never provided any written explanation to the parents as to why the ABA programming proposed by [REDACTED] was rejected. An alternative private placement was not even considered in the "least restrictive environment" analysis. [REDACTED] 213). No further written communications regarding [REDACTED] recommendation for a more intensive programming for the student's utilizing ABA were ever received by the parents.

At the September 24, 2008, IEP conference, at which [REDACTED] report was submitted to the District and at which it was again the parents who requested that the student receive an intensive, one-on-one ABA program, the IEP team rejected the request for an individual aide and intensive ABA services--instead allotting the student only 20 minutes of ABA daily provided by staff who had no training in ABA. The rationale provided at the time for the rejection of the one-on-one aide or the request for the minimal 20 hours weekly of intensive ABA programming for the student was staff speculation that such intensive programming would be too tiring for the student and would further interfere with classroom curricular objectives. [REDACTED] 446-47).

At the September, 24, 2008, and again at the IEP conferences held on December 11, 2008 and January 14, 2009, the parents requested the District to place the student in a private educational program where he could receive intensive, one-on-one ABA programming throughout his school day as this was the only intervention that had ever shown any progress with the student and was also consistent with the recommendations of all of their outside evaluators. (The Student's Mother, 5/29/09, 282; [REDACTED] 153, 175). The December 2008-January 2009 IEP notes "the parents believe that their child needs to learn sign language in an intensive ABA setting" but that later the District rejected the request for a separate day school setting as "the IEP team considered the request and it was rejected due to the student's progress in his current placement." (*Id.*) The parents never received any follow-up explanation as to the basis of this determination of "progress" or why intensive ABA programming, or the consideration of an outside day school for the student was rejected. (The Student's Mother, 5/29/09, 282). They never received any written notification from the District after any of these IEP meetings to explain why their various requests for a change in the student's services and placement were rejected. (*Id.*)

Both Federal and Illinois law provide strong procedural protections that are inherent and mandated in the IEP process for parents when the school district either proposes to initiate or change an educational placement or FAPE to a student or refuses to initiate or change the placement the placement or provision of FAPE. 20 USC 1415(b)(3)(A)-(B); 34 CFR 300.503 (a)(1),(2); 23 Ill. Adm. Code § 226.520. The multiple recommendations and requests for intensive ABA services at [REDACTED] the request for an individualized aide at [REDACTED] as well as the recommendations that the student be placed in a private day school that would offer him intensive, year-round ABA programming are well within the purview of a FAPE for the student. The parents contend that the District failed to provide any such written notices to the parents' as required by federal and state law. These parental procedural rights are incorporated in the Notice Of Procedural Safeguards for Parents as given to the parents at their various IEP meetings. [REDACTED] 450-67). The Notice of Procedural Safeguards is specific in this "prior written notice" requirement that not only must the District provide, in writing, a description of the action refused by the District, but also an explanation for the refusal and a description of each evaluation procedure, assessment, record or report the agency used as a basis for the proposed or refused action. 20 USC §1415 (c)(1)(A-F); 34 CFR §300.503(b)(1-7), 23 Ill. Adm. Code §225.520. The reasons why a proposed action is refused must be included as well as a description of factors relevant to the refusal. 34 C.F.R. §300.503(b)(1-7). The notice including these specific mandates is to be sent within 10 days of the District's decision to refuse the proposed action. 23 Ill. Adm. Code §225.520.

The District never provided any written explanation to the parents to justify the rejection of [REDACTED] recommendations for ABA after the November 19, 2007, IEP meetings. Similarly, the District did not abide by the requirement for prior written notice after rejecting the requests made during the September, 2008, December, 2008 or January, 2009 IEP meetings. The single assertion made in the most recent IEP that the student was "making progress in his current educational placement" was specious and unsupported by the parents' private evaluators and their data or any objective data from the District. Conclusively, overbroad, and self-serving statements that a student is making "progress" in the IEP without more is not consistent with written notification requirements of providing a detailed description of each evaluation procedure, assessment, record or report the agency used as a basis for the proposed or refused action.

The District's failure to abide by the procedural mandates of prior written notice was contrary to clear state and federal requirements and deprived the parents of their right to learn and to respond to any rationale the District used for refusing the intensive programming, supports and consideration of a private day program that every single private evaluator stated the student needs to receive an educational benefit. The failure to provide prior written notice accordingly denied the student a FAPE, as the parents were never provided with any legitimate justification for the District's decisions to continue with programming that offered the student, little or no opportunity, to receive an education that afforded him the opportunity to make quantifiable progress.

M. Failure to consider a continuum of placements, including consideration of private special educational facilities that would provide the student with an appropriate educational program that would allow him to progress in all required domains.

Schools districts are charged with ensuring the availability of a "continuum of placements" to meet the special education needs of children with disabilities and varying educational needs. 34 CFR 300.39, 300.115; 23 Ill. Adm. Code 226.300; 226.700(a)(3). The continuum of alternative placements must include "special schools" so as to recognize the need for various types of classes and settings in which special education may be provided. (*Id.*) These may also include placement by School District in non-public (i.e., private) special education facilities at district expense. 23 Ill. Adm. Code §226.330. While placement decisions are guided by the additional requirement to educate students in the least restrictive environment, the individual educational needs of the student must always be paramount in guiding placement decisions. If a student is not progressing academically, it is critical to place the student into an environment where there is academic benefit, even if the environment is more restrictive. "Least restrictive environment" is most fundamentally for the student, where the student can learn.

There is no data and only anecdotal conjecture regarding the student's progress at [REDACTED] and [REDACTED]. There is the indictment of the District's own program that was issued by the student's current speech and language provider, [REDACTED], that upon entering [REDACTED] after five years at [REDACTED], the student had no functional communication system to express his wants and needs. It is the parents' belief, not unsupported by the record of these proceedings, that the student has experienced multiple years of ineffective instruction in the teaching of self-adaptive skills. The only documented progress in the student's development of these skills resulted from the opportunities to learn provided by the student's private providers. Upon his arrival at [REDACTED], the student's undiagnosed vision deficits continued to plague his acquiring communication abilities, as staff at [REDACTED] embarked on a "total communication" system that relied, in large part, upon two-dimensional pictures that the student could not scan or discriminate. [REDACTED] staff continue to persist in using PECS with the student despite the District's knowledge that the student has a visual processing deficit so that he cannot scan or discriminate pictures--which hold no meaning for him. The student's cognitive impairments also impact heavily on his learning how to communicate. Yet District staff, while acknowledging teaching the student so many methods of communicating may confuse him, cling to the belief that total communication is the best way to teach the severe-profound population, including the student's. The student's unique needs regarding how he learns and how he needs to be taught are lost in a classroom with curriculum he cannot understand, he cannot relate or respond to, and from which he cannot possibly benefit.

The "least restrictive environment" the student is placed in by the District at [REDACTED] is in fact, very restrictive for the student as it effectively denies him the opportunity to attend a school where he would make progress. The inclusion program that the District uses to justify placing the student at [REDACTED] and to deny him the opportunity to attend a therapeutic school, have little or no meaning to the student. [REDACTED] also described her observation of the student's involvement in various activities with these nondisabled peers as meaningless and beyond the student's conceptual

understanding. [REDACTED] 63-66). His "inclusion" opportunity is no more meaningful to the student than trying to grasp the concepts of the days of the week. [REDACTED] 333-38). Moreover, [REDACTED] and [REDACTED] testified that the student's only interaction with nondisabled students occurs twice weekly, for an amount of about 90 minutes. [REDACTED] 132). The student's teacher, [REDACTED] confirmed that the "maximum" amount of time the student would be with these peers would be about an hour and a half weekly. [REDACTED] 206). Yet, the District has placed these 90 minutes above the importance of providing the student with an education that provides him meaningful benefit. The District clearly has forgotten that along with the statutory preference for inclusion, the IDEA's least restrictive environment provisions states that children with disabilities are to be educated alongside children without disabilities to the maximum extent *appropriate*. 20 USC 1412(5)(A) Nowhere in the IDEA is a child with disability to forego a meaningful educational benefit solely to enable the District to occasionally place the child in the presence of children without disabilities. See *Rowley*, 458 U.S. at 181, n. 4 (noting that the Act recognized that some children with disabilities would require education in separate classes or institutional settings including separate schools exclusively for children with disabilities.).

The parents have concluded that their child has languished in District programs for almost 7 of his 10 years with no objective evidence of any educational benefit or meaningful improvement in his communication or self-help skills. The evidence of the progress he has made in his home based ABA program has established that the student can learn in an intensive, full day, year-round ABA program. At the present time, despite the widespread acceptance of ABA as a recognized research-proven program for populations with both autism and cognitive impairments, the only area school that is ISBE approved and would offer an appropriate placement for the student is the [REDACTED]. The [REDACTED] presently serves both children with autism and cognitive impairments and would be available to provide the student with an educational placement like the one he needs to make progress and to receive meaningful benefit from a FAPE. (P.D. 468-82, 504). [REDACTED] can provide the student with the one-on-one, intensive, ABA programming like the one the parents have been furnishing to the student at home. Placing the student at [REDACTED] would enable the student to receive such a program in a school setting. [REDACTED] 505-19). With an appropriate placement at [REDACTED] the student is expected to expand his functional communication skills. He would also receive a curriculum geared to his unique needs focused on acquiring basic communication and daily living skills.

Decision & Order

Under the IDEA, the burden of proof in an administrative due process hearing is upon the party seeking relief, whether that is the disabled child or the school district. *See generally Schaffer v. Weast*, 546 U.S. 49 (2005). The issue of the burden of proof is most significant when the proceedings produce a record that indicates that both sides have presented significant evidence that is equal in weight and persuasive in nature. In the matter at hand, this is not the case. In the hearing held over six days (May, 26, 28, 29 and July 1, 2, 14, 2009) the testimony elicited from all witnesses, including District employees, and the documentary evidence, including the results of numerous evaluations of the student and data documenting his progress in his home-based ABA program demonstrate that the student parents have overwhelmingly satisfied their burden of proof and proved that the District has denied the student a FAPE. While the District staff that testified during the course of the hearing appeared well intentioned and dedicated to their role as educators, their efforts fell significantly short in continuing to identify the student's lack of progress and adapting his individual goals to meeting his special needs, particularly in the areas of communication, speech and language and toileting. While the District, in their written argument and attempts at eliciting testimony from witness at the hearing appeared to make a case that their procedural efforts were well intentioned and founded in firm legal principals, the implementation of what resulted from their efforts failed to produce any meaningful impact on the provision of educational programming for the student. Additionally, while the District appeared to take into consideration the student's gains through the numerous IEPs convened, the results failed and were not reasonably calculated in their providing the means for the [REDACTED] school staff to provide an educational program that would or could benefit the student's special needs, especially in taking into consideration the student's established gains made through his home based ABA program provided at parent expense. Testimony by District staff indicated a willingness to learn more about ABA techniques, and apparent attempts to have training provided, but in reality, that, did not occur. Almost all of the success that the student experienced is attributed to the persistent efforts of the parents who showed continued dedication and endless effort to strive to have their child learn basic skills toward establishing quality independent living life skills. Their conscientious efforts have been noted and they should be congratulated for their earnest and hard work. While the District maintains that their efforts demonstrate assuring services to the student in the least restrictive environment at [REDACTED] school, the evidence adduced at Hearing is overwhelming in favor of having a program provided for the student, albeit in a more restrictive setting, that can focus more direct and personalized attention to him in order that he may establish a higher quality of independent living skills, that has been documented through parent independent evaluator's.

ORDER

1) The student shall be placed at the [REDACTED] for the 2009-2010 school year, which is an ISBE-approved private therapeutic school providing a full-day year-round educational program with intensive educational and therapeutic services utilizing an evidence-based approach to address the student's core deficits in the areas of behavior, functional independence, functional communication, and social skills.

Immediate placement shall be defined as within 30 calendar days following the date the hearing officer's decision is mailed in this matter pursuant to 105 ILCS 5/14-

8.02(a)(h)(stating." Additionally, transportation to and from the [REDACTED]

[REDACTED] shall be provided at no cost to the parents.

2) The student shall be entitled to compensatory education as follows:

a) The additional provision of 2 years of compensatory education at the [REDACTED]

b) Reimbursement for all expenses incurred by the parents for the cost of the home-based program as delineated in Parents' Documents Submitted for Hearing (P. 495-503.) and reimbursement for all expenses incurred for the student's home-based ABA program from the date of May 26, 2009 until the student's first day of attendance at the [REDACTED]

3) The addition of the related service of therapeutic recreation services in the IEP developed after the student is placed at the [REDACTED] for the 2009-2010 school year.

4. Within forty-five (45) days of receipt of this Order, [REDACTED]

[REDACTED] shall submit proof of compliance to:

ILLINOIS STATE BOARD OF EDUCATION
PROGRAM COMPLIANCE DIVISION
100 NORTH FIRST STREET
SPRINGFIELD, ILLINOIS 62777-0001

Right to Request Clarification:

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party(s) and the Illinois State Board of Education. After a decision is issued, the hearing officer may not make substantive changes to the decision. The right to request such clarification does not permit a party to request reconsideration of the decision itself, and the hearing officer is not authorized to entertain a request for reconsideration.

Right to File Civil Action

This decision is binding on the parties unless a civil action is timely commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

The undersigned Hearing Officer certifies that he served copies of the aforesaid Decision and Order upon Parents and District, through counsel, and the Illinois State Board of Education at their stated addresses by depositing same with the United States Postal Service [REDACTED] via certified mail, with postage prepaid before 5:00 p.m. on September 21, 2009.

Dated this 21st day of September,
2009.


HARRY A. BLACKBURN
HEARING OFFICER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Decision and Order was sent via e-mail and placed in the U.S. Mail via certified mail at [REDACTED] and directed to:

[REDACTED]

[REDACTED]

Mr. Andrew Eulass
Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

before 5:00 p.m. on September 21, 2009.



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