

Case Number: 2010-0029

Hearing Officer: Stacey Stutzman

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

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## Impartial Due Process Hearing Decision Cover Page

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District Name  
Superintendent  
Address  
Represented by

Phone: 7735531000

Parent Name  
Address  
Represented by

### Date and Timelines

Date of Written Request: 07/29/2009 and  
Amended on 9/25/2009

Date of Hearing: 01/19/2010 to 1/22/10 and  
2/2/10

Date of Pre-hearing Conf: 10/28/2009

Date of Decision: 2/17/2010

### Summary of Decision

Parent of 8 y/o Hispanic male with [redacted] and mild to moderate bilateral [redacted] fitted with [redacted] glasses, who has limited expressive and receptive communication skills, and who has been educated in a public elementary school in a self-contained classroom with related service support and some mainstreaming for 2 ½ years, sought order to place Student in a private therapeutic day school to receive instruction primarily in American Sign Language. She also requested orders for payment of the private psychological evaluation performed by her expert witness, assignment of a 1:1 bilingual paraprofessional qualified in the use of ASL, increased time for speech/language and O.T. therapy, the services of an audiologist and a deaf, hard of hearing specialist, psychological/social work services, training and support for Student, parent, and staff in augmentative communication, ASL, and assistive technology. Compensatory services for loss of FAPE since July 29, 2007 were also sought. Parent alleged violations of FAPE due to District's failure to adequately evaluate Student, failure to adhere to procedures by not translating all IEPs and progress notes into Spanish and provide adequate translation at IEP and other meetings, and failure to include necessary persons at meetings to interpret evaluation implications. She also alleged failure to develop and/or implement IEPs to provide Student with meaningful educational benefit for multiple reasons. The Due Process Hearing Request raised alleged violations as far back as an unspecified date in the year 2004. District raised Illinois' two year Statute of Limitations, and by Order dated November 17, 2009, Parent's claim was limited to violations that allegedly occurred on or after July 29, 2007, which included school years 2007-08, 2008-09, and 2009 through the date of the hearing in this matter.

**Held:** For Parent on issue of need for Functional Behavioral Assessment and Behavior Intervention Plan and for payment of that part of the private psychological evaluation attributable to the administration and scoring of the Leider and Vineland, which test results were adopted by District for the triennial evaluation of Student; for District on all other issues.

**Ordered:** 1. That District shall conduct a functional behavioral assessment of Student and develop a behavioral intervention plan in accordance with same; 2. That District shall pay [redacted] for the time spent administering and scoring the Leider and the Vineland; and 3. That Student's IEP of 12/11/09 shall be implemented in his current placement.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)  
) ISBE CASE NO. 2010-0029  
)  
) Stacey Stutzman  
) Impartial Due Process  
) Hearing Officer

This matter is before the undersigned impartial hearing officer for a due process hearing concerning Parent's request for Orders that Student be placed in a therapeutic day school at District expense, specifically, [REDACTED] in [REDACTED] to receive instruction primarily in American Sign Language, and for various other orders, including payment of the private psychological evaluation performed by her expert witness, payment for independent assessments in the areas of speech-language and communication, occupational therapy, assistive technology, and augmentative communication, assignment of a 1:1 bilingual paraprofessional qualified in the use of ASL, increased time for speech/language and O.T. therapy, the services of an audiologist and a deaf, hard of hearing specialist, psychological/social work services, and training and support for Student, Parent, and staff in augmentative communication, ASL, and assistive technology. Compensatory services for loss of FAPE since July 29, 2007 were also sought. The hearing officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14-.02a(g)(2008). The parties have been informed of their hearing rights under 23 ILAC 226.625(2007) and 34 CFR 300.512(2006). The undersigned Hearing Officer has also advised the parties that there are and have been no conflicts which have prevented her from conducting a fair and impartial hearing and rendering a fair and impartial decision in this cause.

**Procedural History**

Parent's attorney submitted Parent's request for due process hearing to District's Superintendent via facsimile and U.S. mail on July 29, 2009, alleging District's failure to provide Student with FAPE for multiple reasons during the period from 2004 through the present time. District submitted a written response to the hearing request to Parent's counsel on August 11, 2009. In its response, District stated that prior written notice of its decisions regarding Student's education had been set forth in the evaluation results and IEPs for Student and asserted that the programming and placement provided Student with FAPE in the LRE. Additionally, District cited 105 ILCS 5/14-8.02a in asserting Illinois' two year Statute of Limitations in special education matters and limited its response to violations that allegedly occurred within the statutory time period.

The date for Pre-Hearing established by the ISBE Special Education Database System was August 31, 2009. It was rescheduled to September 10, 2009 at the request of Parent's counsel because she was going to be out of town on that date. It was again continued at Parent's counsel's request to October 28, 2009 to allow her to obtain a report of private evaluation and to submit an Amended Due Process Hearing Request, per Order dated September 4, 2009. Parent's counsel submitted the Amended Due Process Hearing Request via email and U.S. mail on September 25, 2009. District responded to same on October 5, 2009, again raising the two year Statute of Limitations and asserting that it had provided Student with FAPE in the LRE during the statutory time period.

Pre-Hearing Conference was convened on October 28, 2009. The Pre-Hearing Conference Report dated October 31, 2009 is attached to the transcript and incorporated into the record in this matter as Hearing Officer Exhibit A. Hearing was scheduled for December 9, 10, 15, and 16, 2009. At the time of the Pre-Hearing Conference, Parent's attorneys stated that they believed that they should be able to have a due process hearing on violations alleged to have

occurred as far back as the year 2004, notwithstanding Illinois' two year Statute of Limitations. Hearing Officer advised that she believed that the District's position on the application of the Statute of Limitations was correct, but did not wish to preclude Parent's argument. Since Parent's attorneys were not prepared to present their argument orally and no written arguments had been submitted, a briefing scheduled was established for submission of the parties' arguments on the applicability of the Statute of Limitations. Briefs were submitted accordingly, and a Memorandum and Order was entered on November 17, 2009, confirming the limitation of hearing issues to violations alleged to have occurred on or after July 29, 2007.

Pursuant to the parties' joint request for continuance of the hearing to allow the District to conduct its triennial evaluation of Student in December, 2009 and convene an IEP meeting, hearing was continued to January 19 through January 22, 2010, per Order dated November 25, 2009.

On January 13, 2010, District submitted its *Motion to Strike Witnesses*, and Parent responded via email on January 15, 2010. Hearing Officer responded with her determination on the motion via email on January 17, 2010, striking those witnesses whose only purpose was to testify to violations alleged to have been committed prior to July 29, 2007, per the November 17, 2009 Order on the two year Statute of Limitations.

Hearing was convened as scheduled on January 19, 2010 at the school of Student's current attendance. It continued through January 22, 2010, alternating between that school and the school of his previous attendance for the convenience of the witnesses. The parties did not complete presentation of their cases on January 22 and requested an additional day for hearing. Therefore, hearing was reconvened and completed on February 2, 2010.

This Decision was due to be submitted on February 16, 2010, noting school holidays on February 12 and February 15. On February 16, Hearing Officer requested a one day extension to complete it due to the number of issues and volume of evidence to be analyzed, and it is therefore not being issued within 10 days of completion of the hearing. It is not being issued within 45 days of the initiation of the 45 day timeline due to the aforesaid continuances.

In attendance at the hearing of this matter were Student's Mother, [REDACTED] Spanish interpreter [REDACTED] of [REDACTED] Services, Inc. ([REDACTED]), Parent's attorneys [REDACTED], [REDACTED], and [REDACTED] (not in attendance on 1/19/10), and District's attorneys, Michelle Kaplan and Kristine Shrode. The hearing was reported by certified court reporters from [REDACTED], Inc. ([REDACTED] 2), including [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

Twenty-three witnesses gave testimony over a period of five days. Witnesses testifying only on behalf of Parent were [REDACTED], Clinical Psychologist, who conducted a private evaluation of Student, and [REDACTED], Speech/language Pathologist, who conducted a private evaluation of Student, and who testified by telephone. The following witnesses were called to give testimony on behalf of both parties: [REDACTED], Student's current Case Manager; [REDACTED], Student's current Special Education Teacher; [REDACTED], District Audiologist; [REDACTED], Student's current school Social Worker; [REDACTED], school Nurse; [REDACTED], Student's former Case Manager; [REDACTED], Student's former school Speech/Language therapist; [REDACTED], District ATRC evaluator; [REDACTED], Student's former Case Manager; [REDACTED], Student's former school Speech/Language Therapist; [REDACTED], Student's current school Occupational Therapist; [REDACTED], Student's current school Speech/Language Therapist; [REDACTED], current School Nurse; [REDACTED], District School Psychologist; [REDACTED], Student's former Special Education Teacher; [REDACTED], District bilingual Speech/Language evaluator; [REDACTED], Student's former school Occupational Therapist; [REDACTED], Student's former Classroom Assistant; [REDACTED], Deaf and Hard of Hearing Teacher/Evaluator; [REDACTED], District Hearing Impaired Senior Specialist; and **Mother**.

Parent's attorneys submitted 419 pages of documents in their disclosure packet. Parent documents (hereinafter preceded by a "P") used at hearing included the following pages: P1-36, 43-63, 67-70, 73, 78, 80-134, 139, 142-161, 163-164, 166-171, 173-180, 184-185, 194-218, 237-238, 256, 275-277, 282, 296-298, 303-304, 327, and 335-348. In addition, the Curriculum Vitae for [REDACTED] was requested by Hearing Officer during [REDACTED]'s testimony and was identified as H.O. Ex. B.

District's attorneys submitted 405 pages of documents in their disclosure packet. District documents (hereinafter preceded by a "D") used at hearing included the following: D1, 15-16, 26-86, 92-95, 99-102, 107-143, 149-151, 156-167, 170-174, 181-228, 235-239, 244-246c-260, 264-268, 270-272, 275-278, and 281-282.<sup>1</sup>

At the close of evidence, Parent's attorneys submitted a copy of *T.H. v. Palatine Dist. 15*, 55 F.Supp. 2d 830 (N.D. Ill. 1999) for consideration in the Decision of this matter.

At the close of evidence, District's attorneys submitted the following for consideration in the Decision of this matter: *Burlington v. Dept. of Ed. of Massachusetts et.al.*, 471 U.S. 359(1985); *Evanston Dist. 65 v. Michael M.*, 356 F.3d 798 (7<sup>th</sup> Cir. 2004); *Heather S. v. Wisconsin*, 125 F.3d 1045(7<sup>th</sup> Cir. 1997); *Heather S. v. Niles Township H.S. Dist. 219*, 1999 WL 1100931(N.D. ILL. 1999); *Thompson v. Luke P.*, 540 F.3d 1143(10<sup>th</sup> Cir. 2008); *T.F. v. St.Louis County*, 449 F.3d 816(8<sup>th</sup> Cir. 2006); *Blake C. v. Hawaii*, 593 F.Supp.2d (D.Hawaii 2009), *Marc V. v. North East Indep. School Dist.*, 455 F.Supp.2d577(W.D. Tex. 2006); and *Letter to Boswell*, 49 IDELR 196 (9/4/07). On February 3, 2010, District counsel emailed *Board of Education of Murphysboro v. Illinois State Board of Education*, 41 F3d 1162 (7<sup>th</sup> Cir. 1994), which was reviewed online, and a due process hearing decision submitted by another Illinois due process hearing officer in *ISBE Case no. 2008-0211*, which is not precedential in this matter.

### Issues<sup>2</sup>

1. Whether District violated Student's right to a free appropriate public education at any time from July 29, 2007 to the present as follows:

- A. Failure to evaluate Student in a timely and/or adequate manner and in the requisite domains, including the performance of the following:
  - i. cognitive assessment;
  - ii. sensory profile assessment;
  - iii. occupational therapy assessment addressing sensory difficulties and a review of visual motor integration and coordination;
  - iv. speech/language assessment;
  - v. audiological assessment;
  - vi. language proficiency assessment;
  - vii. functional behavior assessment;
  - viii. augmentative communication assessment; and
  - ix. assistive technology assessment
- B. Failure to adhere to procedural requirements under the IDEA and the Illinois School Code and their attendant regulations designed to allow Parents to participate meaningfully in the development of Student's educational plan, including
  - i. failure to provide all IEPs and progress notes translated into Spanish;
  - ii. failure to provide full and adequate translations of discussions at IEP meetings, domain meetings, and other planning meetings; and
  - iii. failure to include participants at meetings to interpret the instructional implications of evaluation results;
- C. Failure to develop and/or implement individual education plans to provide Student with meaningful educational benefit, including
  - i. accurate statements of present levels of performance;
  - ii. identification of all of Student's disabilities;

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<sup>1</sup> It is noted that the document description provided in District's Index to Documents is incorrect in some instances.

<sup>2</sup> Following Hearing Officer's Ruling on the Statute of Limitations, Parent's counsel confirmed agreement with the issues as framed in the Pre-Hearing Conference Report via email dated November 18, 2009.

- iii. clear and measurable goals and objectives commensurate with Student's potential for development;
- iv. adequate related services to meet Student's educational needs, including<sup>3</sup>
  - a. assistive technology;
  - b. augmentative communication;
  - c. deaf-hearing support;
  - d. audiology services;
  - e. bilingual education;
  - f. speech-language pathology services
  - g. occupational therapy;
  - h. psychological services;
  - i. 1:1 instructional aide;
  - j. training to assist Student to tolerate and use his hearing aids; and
  - k. training and support to parents in communication techniques, including the use of augmentative communication devices and American Sign Language
- v. effective teaching methodologies;
- vi. meaningful communications methods;
- vii. compensatory services for failure to permit Student to wear his hearing aids;
- viii. behavioral intervention plan?

2. Whether District has failed to place Student in the least restrictive environment in which he can receive a satisfactory education at any time from July 29, 2007 to present?

3. Whether the least restrictive environment in which Student can receive a satisfactory education at this time is a self-contained classroom in a public elementary school, as District recommends, or a therapeutic day school, as Parents request?

**Statement of Facts**

The material facts put into evidence at hearing which are relevant to the issues in this matter are as follows: Student is an eight year old Hispanic male with [REDACTED] ( [REDACTED]; D165) He is currently fitted with hearing aids in both ears to address a mild conductive hearing loss in his left ear and a mild to moderate conductive hearing loss in his right ear. ( [REDACTED]; D170) He was initially determined eligible for special education and related services pursuant to the *IDEA* just prior to age three on July 1, 2004. He received his triennial evaluation in 2007, his IEP team again determined eligibility based on a primary disability of "moderate cognitive delay", and an IEP was developed for Student at a conference held on June 5, 2007. ( [REDACTED]; D31-58) Student's full scale I.Q. is 48. ( [REDACTED], [REDACTED]; P337; D165) He has expressive and receptive language skills at the age equivalents of 23 months and 24 months respectively. ( [REDACTED], [REDACTED]; P59, D173) He is able to detect and understand speech, and he speaks some words in English and some in Spanish. He also knows some signs. ( [REDACTED]; Mother; [REDACTED]; [REDACTED])

Student resides with his Mother, a native of Mexico, who has lived in the United States for nine years and speaks Spanish and very limited English, and with his brother and sister, who attend public school, and speak English as well as Spanish. In the home, Student's Mother speaks only Spanish with the children. Student's father speaks English as well as Spanish. ( [REDACTED]; Mother) Mother took the children and moved from the home in July, 2009, but Student still enjoys a close relationship with Father. Mother works outside of the home 1 day per week. She has not learned English. She is not enrolled in English or sign language classes. Student communicates at home with some spoken words, gestures, and facial expressions. Mother has learned some sign language on the internet and in a book and has taught Student to use some

<sup>3</sup> The Parent's attorneys withdrew the issue of failure to provide physical therapy prior to completion of the hearing.

signs, including *mom* and *dad*. Student watches television and enjoys music and drums. When he isn't wearing his hearing aids at home, he is less receptive to Mother. He sits directly in front of the television set and turns up the volume. He imitates the characters in the movies he watches on television. He learns by imitating others and by repetition. Mother has made a book at home with the days of the week and colors to help in communication. She believes that Student considers the voice output device provided by District as a toy. When Mother takes Student shopping or to church, student misbehaves by hitting others or throwing things, and Mother does not feel that she can take him anywhere because of his behavior and because she feels that other parents do not want him around their children. Mother feels that the behavior is due to Student's frustration at not being able to communicate. She has visited [REDACTED] a therapeutic day school for deaf and hard of hearing students in [REDACTED], and would like student to attend because all of the students have a 1:1 assistant. Student is not toilet trained and wears pull up diapers, which he is able to change himself. Mother has not been advised of any medical reason for Student's lack of proper toileting. He does indicate his need to use the toilet in some instances, but attempts by Mother to toilet train him at home have not been completely successful to date. (Mother; [REDACTED])

The IEP developed on June 5, 2007 was in effect when Student entered elementary school as a first grader from the District early childhood program at age six in the Fall of 2007.(D31-54) At that time, he had suffered from ear infections and had been treated with P.E. tubes in the ears. He was wearing one hearing aid to address a mild to moderate conductive hearing loss to provide amplification of sound in his right ear. He had hearing within normal limits in his left ear. Measures of cognition indicated scattered scores to the 34 month level. His communication skills included use of manual signs, vocalizations, facial affect, and pointing. He verbalized some words at home and some at school, including "no" and "agua". He was considered shy and gentle and able to warm up and grow comfortable with adults and environments when given the opportunity. Social work services were not required to allow him to benefit from his special education. (D32-33)

The IEP for implementation in the 2007-08 school year also noted Student's ability to imitate, his enjoyment of music and musical instruments, and the need for repetition in instructing him. It indicates that his hearing, vision, and speech concerns affect his performance. (D35) Functional analyses and behavior intervention plan was not deemed necessary because his behavior did not impede his learning or that of others. (D37) Accommodations and modifications were included in his IEP, including assistive technology in the form of a single switch voice output device, personal glasses and hearing aid, and adaptive feeding equipment, paraprofessional support for diapering, dressing, feeding, transitioning and for cuing to remain on task. Student was designated as an English Language Learner, requiring support in the form of consultative services to meet his linguistic and cultural needs. (D38) A variety of other accommodations were noted to help Student learn, including, inter alia, cuing, communication with pictures, signs, and verbal models, repetition, and redirection. (D39)

Eight goals with quarterly benchmarks were included in Student's 2007-08 IEP to be implemented by his special education teacher, occupational therapist, and speech/language pathologist. (D40-47) In addition to direct occupational therapy and speech/language therapy, Student's IEP also provided for consultative services from the nurse, to watch for symptoms related to an umbilical hernia, the audiologist, and the physical therapist. (D48) Placement was designated as a self-contained special education classroom to provide for small group instruction with a multisensory approach, allowing for repetition to master skills, and integration with regular education peers for non-academic subjects. (D50)

### The 2007-2008 School Year

Beginning in the Fall of 2007 Student was placed in [REDACTED]'s self-contained special education classroom with 8 to 10 students and 2 bilingual paraprofessionals. The program was located in a public elementary school and was designed to address the educational needs of students with moderate cognitive impairments. [REDACTED] Student received occupational and speech/language therapy per his IEP. ([REDACTED]; [REDACTED]) The District audiologist consulted with the

teacher each quarter per the IEP to monitor fluctuating hearing loss through the review of outside evaluations from Children's Memorial Hospital and monitoring Student's use of his hearing aid. (█; █; P202) The classroom was equipped with the Picture Exchange Communication System (PECS), a Big Mac, and a Three Step Little Mac. Student's use of those systems was progressive, but he became bored with the devices. (█) The teacher met frequently with Mother, and one of the paraprofessionals would interpret and translate for Mother. Daily communication with Mother was conducted via a log in which the teacher, who did not speak Spanish, wrote, and which was then translated by the bilingual paraprofessional. (█; Mother; █) Student could sign "more" and "play" and could verbalize "Pancho" and use the sign for "dog." He was a sweet, mischievous, energetic little boy who engaged in normal small child behavior in █'s classroom. (█; █)

Student engaged in self-stimulatory or self-soothing behaviors including kicking the desk, tapping his chin with his index finger, and putting things like blocks and laces in his mouth. He did not put his hearing aid in his mouth at school. If he took his hearing aid off, the paraprofessional would place it in his backpack. (█; █) At some point in the Spring of 2008, Parent became concerned that Student would put his hearing aid in his mouth and swallow the hearing aid battery. She quit sending the hearing aid to school. (Mother) The teacher did not observe any difference in Student's ability to learn in the classroom when he was not using the hearing aid. The occupational therapist who worked with Student provided chewable items appropriate to satisfy Student's oral needs due to low tone in the mouth. (█; █)

The Speech/Language Pathologist assigned to work with Student in the 2007-08 school year did not speak Spanish. She knows 15 to 20 signs but is not trained in American Sign Language. She worked on language based activities with Student. Although the goal she was to implement from the 6/5/07 IEP called for Student to sign and verbalize in an effort to get him to communicate, she found that Student did not spontaneously use sign language. She used the Picture Exchange Communication System (PECS) with him because Student was not signing, the goal was to get Student to communicate, and she felt Student communicated better with pictures, which were starting to work with him. (B.W.)

Student followed directions and met his IEP goals and benchmarks for the 2007-08 school year. (█; █; █) An annual review of Student's IEP was held on May 23, 2008, and a new IEP was written for implementation beginning on May 26, 2008. Mother attended and a Spanish interpreter was provided for her. Attendees also included Student's Case Manager, Teacher, O.T., P.T. Audiologist, and School Nurses. (█, █, █, █, █; █) The Speech/Language Therapist provided her input and goals prior to the meeting and was excused from the meeting with agreement from Parent. (█; D79) Mother received a copy of her parental rights in Spanish. (D81) She did not express any concerns regarding Student's program and advised that she was happy that the school kept her informed with regard to Student's schooling. (█; D61) The IEP noted that languages used by Student included English and Spanish and that he communicated via sign, gesture, and orally. It further noted that English and Spanish were spoken in the home at that time and that Parent communicated with Student orally and with gestures. (D62) It was determined that Student did not require functional analysis and behavior intervention plan. (D63) Modifications and Accommodations again noted the need for support due to his being an English Language Learner, assistive technology in the form of his glasses and hearing aid, a single switch voice output device, and adaptive feeding equipment, and paraprofessional support for toileting, dressing, and cuing to stay on task. (D64) Other accommodations, such as repetition and simplification, hand-over-hand assistance, physical, visual, and verbal cues, and redirection were also included. Nurse consultation was discontinued at this time because there were no medical concerns. (D65)

Audiological consult was discontinued at the 5/23/08 IEP meeting because Mother reported that she did not want Student to swallow the hearing aid battery and the doctor had told her that Student did not need his hearing aid in school. In view of normal hearing in the left ear, Student's hearing was considered adequate for communication and speech/language development. (█; █ D246a)

Seven goals and attendant quarterly benchmarks, based on stated present levels of performance, were included in the 5/23/08 IEP to be implemented by the special education teacher, the bilingual speech therapist, and the occupational therapist addressing Student's need to express his wants and needs, to learn his numbers, to understand and follow safety signs in the community, to match letters to the letters in his name, to improve his communication skills, to develop an appropriate hand grasp for writing, and to use scissors appropriately. ( ; ; ; D60-72) Student remained in his placement in 's classroom for the 2008-09 school year with mainstreaming for non-academic activities and the related services of speech/language and occupational therapy, 120 minutes per month direct/consultative each. ( ; ; .)

In June, 2008, Student's speech/language therapist referred Student to the District's Assistive Technology Resource Center for an assessment of Student's augmentative communication needs with Parent's consent. (B.W.; P173-176)

#### The 2008-2009 School Year

An augmentative communication evaluation was conducted by pursuant to that referral on October 28, 2008. ( ; P177-180) Student was able to respond to the evaluator's verbal language directed toward him at all times, including in the hallway. He was able to hear the feedback from the voice output devices used during the evaluation. recommended that Student be provided with a portable eight cell voice output device known as an *Intelle Talk*. She recommended the device because it was very motivating to Student in initiating communication. He was able to communicate with pictures via PECS, but Mother desired a more high tech communication system, and the device added voice output which Student was able to hear, and the picture templates and voices recorded to accompany each picture could be changed according to Student's environment and needs. The device's portability permits Student to take it with him in the community and allows him to express himself to others who can understand the voice output. It will help him to develop and increase expressive and receptive language, as is supported by the research that has been done. ( ) trained the bilingual speech therapist but did not train Mother because the device was simple to use and to program and Mother did not request training. Student used it in speech therapy beginning in November 2008 to work on his goal of making requests. He scanned the pictures and pressed a single cell to request an item. He sometimes needed a point prompt, verbal cue, or hand over hand assistance. ( ; .)

Student's Case Manager for the 2008-09 school year, , communicated with Mother in Spanish and translated for her. She convened an IEP Revision Meeting on November 20, 2008 which was attended by said bilingual Case Manager, Mother, and Student's teacher. 's report of evaluation was considered at that meeting and the recommended *Intelle Talk* was provided for Student to use at school and to take home with him. At that time Mother was also seeking a 1:1 aid for Student because she did not want Student to wear his hearing aid to school unless the school could guarantee that Student would not swallow his hearing aid battery. The teacher was advocating for Mother in that regard because she felt that she could always use another pair of hands in her classroom in addition to herself and the two bilingual aids, although she felt that the number of personnel already in the classroom--three adults for seven children--was sufficient to prevent Student from putting his hearing aid in his mouth. Student already had someone in close proximity to him and monitoring him full time. An additional full time 1:1 aide for Student was discussed at the 11/20/08 IEP revision meeting. It was not approved by administration. The teacher also inquired as to audiology consult for Student due to the fact that he had a hearing aid and she had received consult with audiologist during the previous school year. However, as noted above, the audiology consult had been terminated at the 5/23/08 IEP meeting because Student was not wearing his hearing aid to school and had normal hearing in one ear. ( ; ; Mother; D99-102)

On April 7, 2009, District notified Parent in Spanish that Student's program would be closed at the school of attendance at the end of the school year, and that Student was to be enrolled in the Moderate Cognitive Impairment program at a different school in the District for the 2009-10 school year. Mother protested the closing of the program and also objected to the

newly proposed school, based upon the neighborhood in which it was located and its demographics. ( [REDACTED]; [REDACTED]; D281-282) The Case Manager attempted to convene an annual review, but it was delayed because the Parent advised her that she had retained an attorney and also because Parent presented a new audiological report from Children's Memorial Hospital that required the District audiologist's review and participation in the meeting. ( [REDACTED]; D109)

On March 25, 2009, the Department of Audiology at Children's Memorial Hospital conducted an Auditory Brainstem Response (ABR) Evaluation of Student while under anesthesia. The results of the ABR indicated that the mild to moderate conductive hearing loss in Student's right ear was stabilized. It also indicated a decrease in hearing in the left ear since the previous ABR in October 2006, and diagnosed a mild conductive hearing loss at 500-4000 Hz. (D108) The Pediatric Audiologist recommended hearing aids for Student to amplify sound in both ears at this time, and issued a summary of her recommendations to Parent, a copy of which was provided to the Case Manager on or about May 12, 2009. According to that summary, Parent had advised the audiologist that she had discontinued Student's use of his right hearing aid at school because of the "lack of appropriate monitoring in the classroom". ( [REDACTED]; D109)

On April 27, 2009, Parent had Student evaluated by [REDACTED], a Speech/Language Pathologist at La Rabida Children's Hospital. She obtained her information from Mother and attempted to assess Student in English, Spanish, and sign language. Mother advised her that she wanted a 1:1 aide for Student due to his short attention span and high level of activity. [REDACTED] issued a report of her evaluation dated May 21, 2009. Therein she recommended that Student receive a minimum of 45 to 60 minutes per week of speech therapy from a bilingual speech therapist and placement in a Hearing Impaired classroom. ( [REDACTED]; P345-348)

An annual review of Student's IEP was convened, and an IEP developed on May 26, 2009. Participants included the Case Manager, the District Representative, Student's teacher, a General Education Teacher, Mother, Father, the School Nurse, an Interpreter/Translator, the Occupational Therapist, the Speech/Language Pathologist, the District's Audiologist, and attorneys representing Parent. Parent submitted a written document in Spanish expressing her concerns. ( [REDACTED]; D116-143; P109-139) The reports of audiological evaluation from Children's Memorial Hospital and [REDACTED]'s private speech evaluation were presented and considered at this IEP meeting. According to those reports, Student's left ear hearing aid was dispensed on April 22, 2010 by the pediatric audiologist at Children's Memorial Hospital and orientation provided to Parent, and Parent was advised to pursue full-time use of the hearing aids by Student. She also recommended that the school explore the benefits of an FM system for Student. Audiological consultative services were added to Student's 5/26/09 IEP, a consent for further audiological assessment was signed by Parent, and an FM system was subsequently provided for him and his teacher trained in use of the FM system in Fall 2009. ( [REDACTED]; D107-111)

[REDACTED], Student's bilingual speech therapist, reviewed and summarized [REDACTED]'s report of private speech evaluation at the 5/26/09 IEP meeting. [REDACTED] increased Student's weekly speech/language therapy minutes to 50 minutes of direct service in the 5/26/09 IEP. She did not agree with H.D.'s recommendation of a Hearing Impaired classroom with sign language as the primary mode of communication for Student, since she felt that sign language is very abstract and fast paced and would be difficult for Student to use as his primary mode of communication due to his cognitive impairment, which she felt was more appropriately addressed in his current placement. ( [REDACTED]; D112-115)

The 5/26/09 IEP was 26 pages long and addressed Student's needs, including his expressive and receptive language deficits, the need for bilingual instruction, and his lack of toilet training. It included parental concerns, including objection to the school proposed for Fall 2009 placement. (D119-120) A number of accommodations and modifications were designated, including dedicated paraprofessional support and a picture based communication book. (D121-126)

Present levels of performance, to which Student's individual goals are tied and from which progress on his annual goals is to be determined, were not stated except in three areas: Speech/Language as pertaining to use of his *Intelle Talk*; Social Sciences (although the statement given seems to apply to the area of biology not social science), with a goal to identify and

distinguish big animals from small animals; and Independent Functioning pertaining to his grasp and pre-writing skills. (D128, 133, and 134)

The statement given as his present level in Language Arts is: *Due to Student's limited communication and bilingual needs content needs are to be chunked into very small parts and introduced slowly.* The goal is for him to identify letter/sound combinations, but it does not let the reader know where student presently functions in regard to identifying same, if at all. (D127)

For Social/Emotional, the present level given is: *Student is hard of hearing and bilingual student who requires content to be introduced in very small chunks and very slowly.* The goal is for Student to develop self awareness and life skills and prompts, but it gives the reader no idea of where Student currently functions in this regard. (D130)

The present level for Biology & Physical Sciences is: *Student is currently not able to read letters and has difficult attending to an assigned task. Student requires hand over hand assistance write his first name. He requires hand over hand assist for paper and pencil activities.* The goal tied to this statement is for Student to be able to identify living and non-living objects, however, which does not seem to be related to the given current level of functioning. (D131)

The present level for Mathematics is: *Student is hearing impaired bilingual, and cognitively delayed. He requires content to be introduced in very small chunks and very slowly.* The goal is for him to be able to rote count to 30 in both languages, but there is no indication of where he currently performs in regard to mathematics or rote counting. (D132)

On another page identifying the area of need as Social Sciences, the present level is stated as *Student is hard of hearing student who requires picture cues and prompts in content areas and lessons to be introduced in small chunks and slowly.* The goal is for him to demonstrate knowledge of direction, including left and right and also under, over, next to, and by, but there is no indication of Student's present level of performance in this area. (D135)

And, finally, a goal assigned to the Nurse in the area of health/medical simply refers to his follow-ups at Children's Memorial Hospital and La Rabida, his hearing aids, chewing and swallowing, and need for supervision as his present level but has a goal for Student to learn the signs of well, sick, stomach ache, and headache to tell the nurse how he feels. (D136)

The placement determination was for Student to remain in a self-contained classroom with the related services of speech/language and occupational therapy and nursing, mainstreaming for art and P.E., and audiology consult services. (D137-138)

#### The 2009-2010 School Year

On July 29, 2009, Parent's attorneys requested the due process hearing in this case. (*Due Process Hearing Request* dated 7/29/09) District agreed to allow Student to enroll in the Moderate Cognitive Impairment classroom in another school within the District rather than the school to which Mother objected. Both Parents met with the Case Manager at the new school at the end of August. Father conversed with the Case Manager in English. The Case Manager determined that the school could implement Student's 5/26/09 IEP, and Student began attending the program when school opened in September. (██████████) During Semester one, Student received the related services of direct speech and occupational therapy, and the audiologist consulted with the Student's teacher, installed the FM system, and checked Student's hearing aids on a consultative basis. Student was mainstreamed with typically developing peers for non academic activities and for Science in a regular education third grade classroom, with the special education teacher also in attendance. He was able to interact with typical peers on hands on projects within the science class. (██████████, ██████████, ██████████, ██████████; D246c-254)

The School Nurse met with Student unless his absences or school holidays occurred on Fridays, the day she is assigned to the school. Direct nursing service was called for in the 5/26/09 IEP, although she felt that the goal for him to sign if feeling ill would be more appropriate for the speech therapist to address and spoke to the speech therapist in regard to same. She hoped to see Student become more independent in his toileting. She feels that Student is healthy and does not require direct nursing services (██████████)

When Student began the school year, his special education classroom had 3 to 6 children, and Student had a 1:1 aide per his 5/26/09 IEP. Currently, Student's special education classroom

includes nine students, aged 8 to 11 and two bilingual paraprofessionals. Student has a shared aide who is bilingual, per his 12/11/09 IEP. The teacher speaks English, can sign the alphabet, and knows 10 to 15 functional signs. She took a 3 hour class on functional sign.

In the classroom, Student's behavior ranges from very appropriate to out of control at times, depending on his mood. He does not like to write. When asked to do so, he might write his name or he might throw things flail his legs, or hide behind the desk. He did have difficulty with transitions until the teacher started playing music at transition times, and Student is now very, very calm. Student's behavior has improved dramatically with the addition of music. His behavior does not impede his learning because he is redirected, he can take a time out, and positive reinforcement is used in the classroom. A behavior intervention plan is not needed. It is built into the classroom with a behavior chart.

Student constantly self-stimulates by shaking his hand in front of his face or waving an object in front of his face. The occupational therapist advised the teacher to allow him to use the object, a strip of Velcro. The school psychologist advised her to take it away. Student focuses on his work without the object. She takes it away and gives it back to him as a reward when he does his work. Student sometimes "goes into his own world." The teacher and aide point and redirect him and he does his work, including tracing his name independently and writing the day of the week independently. The teacher implemented the 5/26/09 IEP. Student met his quarterly benchmarks.

Student uses his *Intelle Talk* to ask for bubbles and play dough. He speaks English one to two words at a time. He says "thank you", "excuse me", "mine", and some of his classmates' names. His total spoken vocabulary is 10 to 15 words. With a group he counts by 10s to 100 and up to 30. He is inconsistent counting by 5s. Using the *Intelle Talk* he can pick the day of the week with a full prompt. He answers reading comprehension questions with 50% accuracy with the device. Ten new pictures are added to the *Intelle Talk* each week. PECS is available in the classroom, but Student does not use it.

The teacher consults with the audiologist once a month. The teacher is trained in the use of the FM system, which is used as a back-up when Student doesn't wear his hearing aids. Student wears his hearing aids unless they make noise or he has an ear infection. When he wears his hearing aids, he can hear and follow oral directions. When the hearing aids make noise, the teacher cleans and repositions them, or Mother takes them and gets them fixed.

#### Recent 2009 Evaluations

In August of 2009, Parent had a private assessment of Student performed by [REDACTED], a licensed clinical psychologist who speaks English and is trained in American Sign Language. (ASL) [REDACTED]; P335-343; D156-164), and, after the receipt of [REDACTED]'s report of evaluation, Parent's attorneys submitted their Amended Due Process Hearing Request to include a summary of [REDACTED]'s conclusions. (*Amended Due Process Hearing Request* dated 9/25/09)

[REDACTED] is the Clinical Director of the [REDACTED] at [REDACTED] in [REDACTED], and the [REDACTED] in [REDACTED], Illinois, serving children and adolescents who are deaf and hard of hearing with behavioral/emotional or multiple challenges. [REDACTED] Ex. B)

[REDACTED] tested Student for 6 to 7 hours and interviewed Parent for 1 ½ hours on August 13 and August 30 and observed Student in his current special education classroom on September 17, 2009 for 1 ½ hours. She administered the Leiter-R: Visualization and Reasoning Battery to determine Student's level of cognition and administered the Vineland-II Adaptive Behavior Scales to Mother through a Spanish translator who accompanied Mother to determine Student's level of adaptive functioning. On the Leiter-R Student scored a 58 in Fluid Reasoning, qualitatively described as a mild delay, a Brief I.Q. of 54, qualitatively described as a mild to moderate delay, and a Full Scale I.Q. of 48, which is qualitatively described as a moderate cognitive delay. Student's adaptive functioning, including communication, daily living, and socialization, per the Vineland-II, is low, falling into the 1<sup>st</sup> percentile compared with same-age norms. [REDACTED]; P337-341)

█ compared Student's current adaptive functioning results of August 2009 with those of his last Vineland assessment in May 2007 and determined that, over that period of two and a quarter years, there were Age Equivalent increases of nearly three years in coping skills, over two years in community skills, nearly two years in domestic skills, and over a year in play and leisure skills. Also, he displayed a two year gain in written skills. He had modest Age Equivalent increases of four months in receptive communication, from 11 months to 1 year 3 months, and 6 months in expressive communication, from 1 year 4 months to 1 year 10 months. The comparison also indicated a decrease in the area of interpersonal skills since the prior assessment. █ also assessed Student's maladaptive behavior via the Vineland-II and determined that his internalization of emotional distress is average when compared with the national norm group of children his age. However, his externalization of distress is "elevated", including poor eye contact, impulsivity, and "some" physical aggression. He is restless and has difficulty paying attention, and he engages in repetitive stereotypical behaviors, such as poking himself in the chin with his thumb. (█; P339)

Based on her evaluation, █ recommended placement of Student in a Total Communication Classroom to include constantly used American Sign Language directly instructed by a deaf educator. (█; P342)

District's psychologist adopted the scores and assessment procedures on the Leiter and the Vineland administered by █ as valid measures of Student's current level of functioning, which confirm moderate cognitive delay and significant delays in communication, daily living skills, and socialization. (█; D165-166) █ charges \$200 per hour and spent 5 hours and 45 minutes evaluating Student and interviewing Parents for her assessment. She also scored the Leiter and the Vineland. (█; P344)

Subsequent to █'s assessment of Student and the amendment to the hearing request, on November 20, 2009, a Domain meeting was convened at which time District obtained Parent's consent to accelerate Student's triennial re-evaluation, which was not due to be conducted until the Spring of 2010. A Spanish interpreter/translator was provided for Mother. (█; D149-151) The parties jointly requested a delay in the due process hearing to allow for the re-evaluation and attendant IEP meeting. (*See Procedural History at page 3 above*) The re-evaluation was conducted by District personnel, including assessments by the school psychologist, social worker, physical therapist, occupational therapist, bilingual speech/language pathologist, nurse, deaf/hard of hearing specialist, and audiologist. (█, █, █, █, █, █, █, and █; D165-189, P43-69)

According to the most recent assessments of Student, Student's cognition is moderately impaired and his adaptive behavior is significantly delayed, as determined by █ and affirmed by █ per the discussion above. His academic skills are at the preschool level. (█; D165-166) His expressive and receptive language skills are at the 23 to 24 month level. During the assessment by the bilingual speech/language therapist using English, Spanish, and sign language, he demonstrated that he was able to hear adequately, and he eagerly responded to verbal requests spoken in English. He used spoken English, not sign language or Spanish, other than two Spanish words, to respond to verbal requests. Student sought out and used his *Intelle Talk* device during the assessment. Standardized testing was performed that resulted in the assessor's determination that Student has a communication impairment in the areas of Articulation/Phonology and Language that impacts academics and social interaction. She also determined that future assessments should be conducted in English. (█; P58-60)

The occupational therapist who has been working with Student in the 2009-10 school year on his fine motor and visual motor integration skills conducted the occupational therapy assessment for the triennial re-evaluation in December and focused on Student's sensory processing, which was made an issue in the due process hearing request. She determined that Student's sensory processing deficit is mild, impacting his attention span and contributing to his self-stimulatory behavior and that it is properly addressed with the strategies used for him in his classroom and with her consultation with his teachers. He does need occupational therapy to address fine motor and visual motor integration deficits to use in the classroom, specifically the need to be able to write his name. (█; P50-54)

The school social worker conducted a social/emotional assessment of Student as part of the triennial evaluation. He interviewed Mother and was advised of the Parents' separation and Mother's concerns regarding Student's communication difficulties. He also observed Student in the classroom. He concluded that social work services should be provided to help reduce Student's frustration and aggressive behaviors in class. (█; P61-62)

█, who had resumed providing consultative audiology services for Student in Fall 2009 based upon her review of the most recent reports from Children's Memorial Hospital diagnosing hearing loss in the left as well as the right ear, determined that Student meets the audiological criteria to receive deaf and hard of hearing services and referred Student for assessment by a deaf/hard of hearing educator. (█; P43-44; 327) An assessment was performed by the deaf/hard of hearing educator as part of the triennial re-evaluation. She attempted 3 tests over a period of 45 minutes, using oral English, oral Spanish, and functional sign language. Student did respond to 2 pictures correctly in oral Spanish, "Poppi" and "gato." She believes that it would be helpful for Student to learn functional sign language and recommended the consultative services of a deaf/hard of hearing teacher for Student. (█; P45-46)

The nursing assessment for the triennial re-evaluation was conducted by █, the school nurse. The assessment noted Student's wearing of glasses and hearing aids and his most recent vision and hearing screenings of 11/4/09. The nurse was most concerned with Student's self-care deficits secondary to his diagnosis of █, particularly his lack of toilet training. She also addressed the need for proper nutrition and the need for the family to make sure Student takes his thyroid medication. She encouraged communication between school and family regarding a toileting schedule. As stated above, she believes that communication of his wants and needs should be addressed by the speech therapist. (█; 67-68)

Based on the aforesaid triennial re-evaluation, Student was determined eligible for special education and related services as a student with a moderate cognitive impairment, a hearing impairment, and a speech/language impairment at the IEP conference convened on December 11, 2009. All of the assessments were presented by the aforesaid evaluators and considered at that meeting, and Mother was in attendance with her lawyers. (D190-197) Immediately following the eligibility determination, an IEP conference was held and an IEP developed. (D198-226) The IEP includes both academic and functional goals with quarterly benchmarks in the areas of Language Arts, Mathematics, Science, Social Science, Personal Care/Independent Functioning, Social/Emotional, and Speech/Language to be addressed by Student's Special Education Teacher and Paraprofessional, Speech Pathologist, Social Worker, and Occupational Therapist. Present levels of performance are provided in relation to each goal. In certain instances the goal calls on Student to use his *Intelle Talk* to communicate his responses to questions. His social/emotional goal addresses the need to reduce inappropriate behaviors, including self-stimulation and aggression. (D208-218)

More than 3 pages of classroom accommodations and modifications were generated at the IEP meeting to address Student's specific needs, including, inter alia, flexible seating, visual prompts, PECS and voice output device, frequent restroom breaks, collaboration among teachers and support staff and related service providers. (D202-207)

The IEP calls for provision of the direct related services of Speech/Language Therapy in the amount of 45 minutes per week, Social Work in the amount of 15 minutes per week, and occupational therapy in the amount of 30 minutes per week. The Least Restrictive Environment was determined to be "General education with special education support over 60% of the school day outside of the general education setting in a general education school" with 80 minutes per week in the regular education Science classroom and mainstreaming for Art, Music, and P.E. Consultative services are to be provided by the audiologist, deaf/hard of hearing teacher, nurse, and speech therapist to the special education teacher, and collaboration is called for between teachers and service providers as well. (D219-220)

Student can receive an appropriate education in his current placement, which addresses his cognition deficits first and foremost, and he should not be removed to a more restrictive environment. He needs typically developing same age peers to model appropriate behavior and verbal communication. His cognitive impairment causes expressive and receptive language



### General Considerations

Parent called 23 witnesses, including herself, to testify in this matter. Student's Father, who did not join Mother in the submission of the hearing request in this case, was listed on both parties' witness lists, but was not called to testify. The private speech/language assessor ( ) and the clinical psychologist ( ) who were called by Parent were knowledgeable in their respective fields and their assessment results were generally consistent with District's findings. However, their testimony was not sufficient to sustain Parent's burden of proof in light of the very strong testimony given by the other witnesses in favor of the District's program, who were also very knowledgeable and persuasive as to why the Student's current program is and has been appropriate to his needs. , , , and . were very compelling witnesses on the issue of programming for this Student in light of his particular needs. Additionally, Student's current educational team, including the case manager, teacher, social worker, speech/language pathologist, and occupational therapist, provided evidence that they are willing and able to collaborate as necessary to help Student progress in all domains and help integrate him with age appropriate typically developing peers in the school he attends. They also have support from the deaf/hard of hearing educator in their efforts to increase Student's communication skills. Student has not had the benefit of enrolling in kindergarten at his neighborhood school and advancing from grade to grade with his age appropriate typically developing peers without being moved from school to school, which would have provided him with a consistent group of role models for development of social and communication skills and possibly a consistent group of service providers from grade to grade. That consistency is important and can hopefully be provided in his current school for the next few years. The current speech pathologist and social worker are in a position to collaborate with each other and with the regular education teacher to promote and facilitate important interactions for Student with typically developing peers.

The evidence presented, when analyzed under the *IDEA* and *Illinois School Code* and their attendant regulations, leads to the conclusion that Parent has actively participated in her child's educational planning. The District has been attuned to Student's needs and attentive to Parent's concerns and requests even though it has not always agreed with her and given her what she has asked. The IEPs developed for Student since July 29, 2007 have been reasonably calculated to provide Student with meaningful educational benefit, although it does appear that the present levels of performance were not properly stated for all of the goals written in the 5/26/09 IEP. Still, the goals and benchmarks were appropriate and the staff was able to work on the goals and benchmarks during Student's first semester of the 2009-10 school year according to the testimony of staff. The testimony provided by the classroom teacher and others who have observed Student in the current classroom indicates that a behavior intervention plan is needed for Student at this time in order for him to receive an appropriate education, and to that end, a functional behavior assessment should be conducted and a plan put into place for him.

### Conclusions specific to the stated issues

1. Whether District violated Student's right to a free appropriate public education at any time from July 29, 2007 to the present as follows:

- A. Failure to evaluate Student in a timely and/or adequate manner and in the requisite domains, including the performance of the following:
  - i. cognitive assessment;
  - ii. sensory profile assessment;
  - iii. occupational therapy assessment addressing sensory difficulties and a review of visual motor integration and coordination;
  - iv. speech/language assessment;
  - v. audiological assessment;
  - vi. language proficiency assessment;
  - vii. functional behavior assessment;
  - viii. augmentative communication assessment; and
  - ix. assistive technology assessment?

The preponderance of the evidence does not support Parent's contention that the District deprived Student of FAPE by failing to adequately evaluate him in all relevant domains at the times required pursuant to the *IDEA*, with the exception of the need for a functional behavior assessment at the current time. Once a Student is found eligible for special education pursuant to an initial full and individual evaluation, a reevaluation must not occur more than once a year and must occur at least once every 3 years, unless the parents and the district agree otherwise. *23ILAC226.120(2007)*; *34CFR300.303(2006)* The domains to be considered in the course of designing an evaluation are health, vision, hearing, social and emotional status, general intelligence, academic performance, communication status, and motor abilities. *23ILAC226.75(2007)* In the case at hand, Student was re-evaluated in 2007, and he was not due for a re-evaluation until Spring of 2010. However, the District convened a Domain meeting on November 20, 2009, obtained Mother's consent for re-evaluation, and re-evaluated Student in December of 2009 in all of the requisite domains.

The occupational therapist addressed Student's sensory issues in her evaluation and report. The District also completed an augmentative communication evaluation in 2008 to help address Student's communication deficits. There is no indication that further assistive technology assessment has been needed. Additionally, as Mother provided District with audiological reports from Children's Memorial Hospital regarding Student's hearing status, the District audiologist reviewed them and determined services accordingly. Likewise, the District considered the outside speech assessment from LaRabida at the IEP meeting of 5/26/09 and increased Student's speech/language minutes in conjunction with the report and the District speech therapist's determination of Student's needs. The District psychologist adopted the private psychologist's Leiter and Vineland assessment results as part of the triennial re-evaluation in December, 2009.

Before a child is given an evaluation, the district must determine the primary language of the child's home, general cultural identification, and mode of communication, so that testing is not discriminatory. *105 ILCS 5/14-8.02a(2008)*; *23ILAC226.140(2006)* All of the IEPs developed within the relevant timeframe in this case address Student's language proficiency. It has been documented that Spanish is spoken by Student's Mother who is a native of Mexico, that Student is an English Language Learner who communicates with some English and Spanish words and verbally and some signs but mostly with gestures. Input has been obtained from Mother and teachers and service providers to determine how to address Student's communication needs. He has not been determined to be disabled based on his ethnicity and the failure to test him appropriately, the concern behind the law in question, but rather because he is cognitively impaired. Student was assessed by a bilingual speech/language pathologist for his recent triennial re-evaluation. He was also assessed by a deaf educator who attempted to determine his ability to communicate with sign language.

Behavioral intervention is an intervention based on the methods and empirical findings of behavioral science and designed to influence a child's action or behaviors positively. *23ILAC226.75(2006)* A functional behavioral assessment is an assessment process for gathering information regarding the target behavior and its causes and effects, the controlling variables, and the intent the behavior serves for the child to be used in developing a behavior intervention plan where it is needed. *23ILAC226.75(2006)* A behavior intervention plan is required for the IEP of a child whose behavior impedes his learning. *34CFR300.324(2006)*; *23ILAC226.230(2006)* In this case, Student's behavior in the classroom becomes out of control at times. He throws things, flails his legs, and hides behind the desk. He also engages in a substantial amount of self-stimulatory behavior for which the teacher has received conflicting advice from others to address same. This behavior clearly detracts from his ability to stay on task. Although the teacher and her assistants address this behavior within the structure of their classroom by using the system they have in effect for all of the children and by redirecting Student, everyone who works with Student needs to understand what precipitates the behavior and develop a consistent plan of intervention that can be used to alter the negative behaviors and allow Student to generalize the good behavior that he will hopefully develop from use of the plan to all settings within the school and at home and in the community at large.

B. Failure to adhere to procedural requirements under the IDEA and the Illinois School Code and their attendant regulations designed to allow Parents to participate meaningfully in the development of Student's educational plan, including

- i. failure to provide all IEPs and progress notes translated into Spanish;
- ii. failure to provide full and adequate translations of discussions at IEP meetings, domain meetings, and other planning meetings; and
- iii. failure to include participants at meetings to interpret the instructional implications of evaluation results?

A school district is required to provide prior written notice to parents who are not proficient in English in their native language. *34CFR300.503(c)(ii)(2006)*; *23ILAC226.500(2006)* Additionally, it must arrange for an interpreter for a parent whose native language is other than English if it is necessary to ensure that the parent understands the proceedings at an IEP meeting. *34CFR300.522(e)(2006)* The preponderance of the evidence does not support Parent's contention that Student was denied FAPE due to procedural violations she alleges in subparagraphs *i.* And *ii.* above. District complied with the prior notice requirements of the IDEA and the Illinois School Code by providing all notices, including Domain sheets and consents for evaluation in Spanish, and also provided copies of all Parents' rights in Spanish. Additionally, the District has had an interpreter/translator available at all IEP meetings and domain meetings since July 29, 2007. Student's father speaks English and Spanish and has conversed with the current Case Manager in Mother's presence in English. The Case Manager at the prior school was bilingual and fluent in Spanish. Mother has had translation/interpretation in all conversations with Student's classroom teachers, and a daily progress log has been sent home in Spanish for her. She did not testify that she ever asked for Spanish translations of any IEPs or progress notes from District personnel. Parent's attorneys have not cited any State or federal law that requires District to translate all IEPs and progress notes into Spanish for Mother. Mother has not specified any other meetings whatsoever where a translator/interpreter was not provided. She did not testify that she has been kept from participating in Student's educational planning because of any documentation or translation/interpretation issues. In fact the evidence shows that Parent has participated meaningfully in Student's educational planning at all times since July 29, 2007.

In reference to the allegations of subparagraph *iii.*, Parent's attorneys have not specified the participants, the evaluations, or the meetings to which they refer nor the statute or regulation the District is alleged to have violated or when the violation(s) allegedly occurred within the relevant time period in this case. Mother did not testify to any facts relating to absence of participants at IEP meetings or how that prevented her from participating in a meaningful manner. The composition of a child's IEP team is governed by *23ILAC226.210(2006)* in relation to *34CFR300.321(2006)* A review of the evidence indicates that when any team members were absent from IEP meetings, their reports and or/goals were presented by others and Mother also signed consents to absences of team members. Mother did not testify that she or her lawyers invited any participants or asked to have any other participants invited to any of the IEP meetings. Therefore, the preponderance of the evidence does not support Parent's contention that a procedural violation occurred in this regard that resulted in a deprivation of FAPE to Student.

C. Failure to develop and/or implement individual education plans to provide Student with meaningful educational benefit, including

- i. accurate statements of present levels of performance;
- ii. identification of all of Student's disabilities;
- iii. clear and measurable goals and objectives commensurate with Student's potential for development;

- iv. adequate related services to meet Student's educational needs, including<sup>4</sup>
  - a. assistive technology;
  - b. augmentative communication;
  - c. deaf-hearing support;
  - d. audiology services;
  - e. bilingual education;
  - f. speech-language pathology services
  - g. occupational therapy;
  - h. psychological services;
  - i. 1:1 instructional aide;
  - j. training to assist Student to tolerate and use his hearing aids; and
  - k. training and support to parents in communication techniques, including the use of augmentative communication devices and American Sign Language
  - l. effective teaching methodologies;
  - m. meaningful communications methods;
  - n. compensatory services for failure to permit Student to wear his hearing aids;
  - o. behavioral intervention plan?

The development, review, and revision of an IEP for a student is governed by the provisions of *23ILAC226.220(2006)* in relation to *34CFR300.324, .328(2006)* The content of a student's IEP should conform to the requirements set forth in *23ILAC226.230(2006)* and *34CFR300.320(2006)* Since July 29, 2007, Student's IEP teams have developed 3 IEPs for him on May 23, 2008, May 26, 2009, and December 11, 2009. An IEP meeting was also held to consider the Parent's request for a 1:1 aide and the addition of the augmentative communication device pursuant to the evaluation conducted by the District's assistive tech department in the Fall of 2008.

Although the present levels of academic achievement were not clearly provided in regard to some of the goals listed in his May 29, 2009 IEP, the current staff was able to work on the goals as appropriate to Student's needs in the Fall of 2009, and there is no evidence that FAPE was denied because of the statements given in the IEP. Student's IEPs have consistently recognized Student's cognitive impairment and included input relating to his language deficits and his history of mild to moderate hearing loss, initially in the right ear and, per the report from Children's Memorial Hospital provided to the IEP team in the Spring of 2009, the mild conductive loss in his left ear and the prescription of bilateral hearing aides to address the hearing loss. Although it is not necessary for an IEP team to determine Student eligible for special education in all of his deficit areas in order to identify his needs and provide programming to address those needs, the team did include eligibility due to a hearing impairment and a speech/language impairment to his IEP in addition to his continuing eligibility as a student with a moderate cognitive disability to his most recent IEP after conducting the triennial re-evaluation.

Clear and measurable goals accompanied by quarterly benchmarks commensurate with Student's potential for development, as far as his potential can be determined at this point in time, have been written by Student's IEP team in each of the three IEPs developed for him since July 29, 2007. He has made progress on those goals according to the testimony of teachers and service providers. The only criticism of the goals on the 5/26/09 IEP came from the current school nurse who felt that the goal written by the previous IEP team directing the nurse to work on Student's signing of his health related feelings. She appropriately discussed that goal with the speech pathologist. [REDACTED] in her testimony at this hearing directed criticism some of the goals in the December 11, 2009 IEP, but the evidence shows that the goals have been written by the team to address Student's needs and to provide him with meaningful educational benefit following completion of the triennial re-evaluation.

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<sup>4</sup> The Parent's attorneys withdrew the issue of failure to provide physical therapy prior to completion of the hearing.

A student's IEP must include a statement of the special education and related services and supplementary aids and services and program modifications or supports to be provided to enable the student to advance appropriately toward attaining his goals, to be involved in and make progress in the general education curriculum and to participate with nondisabled peers in academic and nonacademic activities. 34CFR300.320(4)(2006) Student's IEPs over the past two and one half school years have provided him with speech/language therapy, occupational therapy, assistive technology, augmentative communication, and audiology services as the IEP teams have deemed necessary. He now has direct service from the school social worker. No evidence was presented as to the need for any type of psychological services.

Student's classroom assistants have been bilingual. His current speech pathologist is bilingual. Consultative services from a deaf educator have been added to his most recent IEP. Mother's request for a 1:1 aide to prevent Student from putting his hearing aid in his mouth was considered and denied in 2008, and the teacher and an aide testified that Student did not put his hearing aid in his mouth and that there were sufficient adults in the classroom to prevent him from doing so without a 1:1 aide. He was given a 1:1 aide per his 5/26/09 IEP for the Fall of 2009, but the IEP team at the 12/11/09 IEP meeting, including the classroom teacher, determined that a shared aide was sufficient for Student's needs given the fact that he is now tolerating his hearing aids and the adult/student ratio in the classroom is small.

Training was not given to Mother in the use of Student's *Intelle Talker*. However, there was no evidence that she asked for training or that she did not know how to use it. She only testified that she didn't feel it was effective for Student at home because he viewed it as a "toy." The speech therapist testified that it was easy to program and use. There was no deprivation of FAPE to Student in this regard. The District has had no obligation to provide Mother with training in American Sign Language. Student tolerates his hearing aides. When necessary, the classroom teacher cleans and repositions them.

In 2008, the evidence shows that Mother chose not to send Student's hearing aid to school because she wanted the school to "guarantee" that he would not take it out, put it in his mouth, and swallow the battery. Neither the teacher nor the classroom assistant supported Mother's allegation that the District prevented Student from wearing his hearing aid. The classroom teacher testified that the absence of the hearing aid did not prevent Student from meeting his goals and benchmarks, and District personnel provided excellent testimony regarding the effects of a conductive hearing loss in one ear with normal hearing in the other. The District had no obligation to include compensatory services for failure to permit Student to wear his hearing aid in Student's IEPs.

As discussed above, Student's IEP should include a behavior intervention plan to provide him with FAPE, and a functional behavior assessment should be conducted as soon as possible to allow the development of same.

Finally, the preponderance of the evidence does not support Parent's allegation that District has denied Student FAPE by failing to include effective teaching methodologies and meaningful communications methods in Student's IEPs. In support of Parent's argument, Parent's attorneys have cited *[REDACTED] v. Palatine Dist. 15*, 55 F.Supp. 2d 830 (N.D. Ill. 1999). However, it is not persuasive here for the reason that District has complied with the law in providing Student with an appropriate program. *[REDACTED]* involved a pre-schooler with autism whose parents had implemented a home-based Lovaas ABA program for their child before he entered school. In seeking reimbursement for the cost of the home-based program, they were successful in proving to the hearing officer and the court that the program they had in place through trained therapists and which they had been using exclusively and consistently for their child provided an appropriate education while the District's proposed early childhood program, which was not sufficiently individualized for Student's unique needs, did not. In this case, according to the testimony of many, many witnesses, the IEPs developed and implemented since July 27, 2007 have provided an appropriate education for Student. They have been reasonably calculated to provide Student with meaningful educational benefit. School personnel use oral English, oral Spanish, augmentative communication, gestures, pictures, and functional signs to communicate with Student and to encourage Student to communicate. He has made educational gains since his

last triennial evaluation, even though the gains in receptive and expressive language have not been as great as gains in other areas. He is learning the English language and is still supported in the use of his Mother's native language. Mother has not learned English or American Sign Language and speaks only Spanish to her children.

Parent cannot point to any educational program that she has in place for Student, let alone an appropriate program. There was conflict in the testimony of Parent and [REDACTED] regarding what type of sign language would be appropriate for Student, as [REDACTED] advocates teaching Student in an environment where American Sign Language is used to teach non-hearing and non-speaking children with behavioral issues, while Mother said she wants Student to learn functional sign language. Signed English is used in certain District programs. The testimony of the District's witnesses was compelling in regard to the inappropriateness of American Sign Language for this Student. Each and every District witness with knowledge of educational programming for both hearing impaired and cognitively impaired children testified that Student's current programming is appropriate and that removal to a classroom for the hearing impaired or a therapeutic day school for deaf/hard of hearing students would be inappropriate. They also testified that the District programs using total communication were not appropriate to address Student's cognitive impairment, which they believe is his primary disability and the cause of his language deficits. Student can hear and speak. It is appropriate for District personnel to encourage Student to develop speech as a way to communicate with whatever supports work for Student, including gestures, pictures, functional signs, and voice output devices, knowing that his Down syndrome presents obstacles to his potential for communication. Further, integration to the greatest extent possible with typically speaking peers on a regular basis is crucial to Student's language development.

2. Whether District has failed to place Student in the least restrictive environment in which he can receive a satisfactory education at any time from July 29, 2007 to present?

The preponderance of the evidence does not support Parent's contention that Student has not been placed in the least restrictive environment since July 29, 2007. To the maximum extent appropriate, the placement of a student shall provide him with the opportunity to be educated with children who are not disabled. The placement of limited English proficiency students with disabilities shall be in non-restrictive environments which provide for integration with non-disabled peers in bilingual classrooms. *105 ILCS 5/14-8.02a(2008)* Parent requests an order placing Student in a therapeutic day school. Student's past and current IEPs have all been capable of being implemented in a regular elementary school within a self-contained classroom addressing his cognitive disability and supports and services to address his other needs, and with mainstreaming for non-academic and some academic activities. The IEP team has had no reason to consider a more restrictive setting for him. In the case of this Student's need for typically developing peers as role models for speech and social interaction, the more inclusion that the team can facilitate at this point in time, the better. *See Oberti v. Bd. of Ed. of Clementon School Dist.*, 995 F.2d 1204 (3d Cir. 1993) regarding the benefits that are assumed to occur as the result of inclusion with typically developing peers.

3. Whether the least restrictive environment in which Student can receive a satisfactory education at this time is a self-contained classroom in a public elementary school, as District recommends, or a therapeutic day school, as Parent requests?

As discussed under paragraph 2 above, the preponderance of the evidence does not support Parent's request for placement of Student in a therapeutic day school. [REDACTED] recommended a hearing impaired classroom, and even [REDACTED] conceded that although [REDACTED] could serve Student, his needs might also be met in an appropriate public placement. Neither party asks for a less restrictive environment than the current placement. Therefore, as between the two placements proposed, the District's recommended current placement in a self-contained

classroom in a public elementary school is the least restrictive in which to implement Student's IEP.

Student's current educational team, including the case manager, teacher, social worker, speech/language pathologist, and occupational therapist, provided evidence that they are willing and able to collaborate as necessary to help Student progress in all domains and help integrate him with age appropriate typically developing peers in the school he attends. They also have support from the deaf/hard of hearing educator in their efforts to increase Student's communication skills.


Relief Requested by Parent

As noted in the Pre-Hearing Conference Report, Parent has requested entry of several orders in this matter. Partial payment of [REDACTED]'s bill by District is being allowed on the grounds that the District did adopt the results of the tests she administered for its triennial evaluation, and the portion of the bill which appears to be attributable thereto based on her testimony and the statement of charges put in evidence is being ordered. Also, as discussed above, the District is being ordered to conduct a functional behavioral assessment of Student and to develop and implement a behavior intervention plan for him based on the issue directed to the lack of a functional behavior assessment and behavior intervention plan, although such an order was not requested. The Student's current IEP already calls for the services of an audiologist, so an order for same is not required. The District's triennial evaluation was not shown to be inappropriate and therefore, the Parent's request for IEE at District expense is not being ordered. District has already provided the amount of speech/language therapy recommended by the private speech/language evaluation, and there was no evidence provided at hearing to support the request for additional minutes. The remaining requests for orders to place Student in a therapeutic day school, provide a specific 1:1 paraprofessional throughout the school day who is bilingual and qualified in the use of American Sign Language, and to increase the amount of occupational therapy services were not supported by the evidence.

**IT IS THEREFORE ORDERED:**

1. That District shall pay [REDACTED] \$1500 for the administration and scoring of the *Leider-R* and *Vineland II* assessments upon receipt of this Order.
2. That District shall conduct a functional behavioral assessment of Student and develop and implement a behavior intervention plan in accordance with same upon receipt of this Order.
3. That District shall be permitted to continue to implement Student's IEP in his current placement at his current school.
4. That District shall provide proof of compliance with orders 1 and 2 above to the Illinois State Board of Education, Program Compliance Division, 100 N. First Street, Springfield, IL 62777-0001 on or before March 17, 2010.

DATED: February 17, 2010

  
Stacey L. Stutzman  
Impartial Hearing Officer

1242 Deer Trail Lane  
Libertyville, IL 60048  
(847) 362-1950

### **RIGHT TO REQUEST CLARIFICATION**

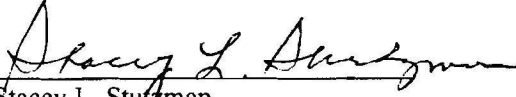
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought,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

### **RIGHT TO FILE A CIVIL ACTION**

This decision shall be binding upon the parties unless a civil action is 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 the decision of the impartial due process hearing officer is mailed to the parties.

### **CERTIFICATE OF SERVICE**

The undersigned due process hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parents and Parent's counsel, District and its counsel, and the Illinois State Board of Education at their respective addresses by depositing same with the United States Postal Service at Libertyville, IL, certified mail postage prepaid, on February 17, 2010 before 5:00 p.m.

  
Stacey L. Stutzman  
Impartial Hearing Officer