Case Number: 2010-0273
[redacted] vs. [redacted]
Hearing Officer: Joseph P. Selbka

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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] **Phone:** [redacted]
Superintendent [redacted]
Address [redacted]
Represented by [redacted]

Parent Name [redacted] **Phone:** [redacted]
Address [redacted]
Represented by [redacted]

Date and Timelines
Date of Written Request:08/17/2010
Date of Pre-hearing Conf: 08/05/2011
Date of Hearing: 02/17/2012 to 02/20/2012
Date of Decision: 2/27/2012

Summary of Decision: **The Parent alleged that the District failed to design an IEP for Student in regard to social-emotional issues, failed to properly evaluate Student in regard to social emotional issues; failed to implement an IEP in regard to social-emotional issues; and that the District was attempting to place Student in an environment which was too restrictive in that the District was proposing a therapeutic day school placement. The undersigned found that the District had failed to include all necessary appropriate goals in designing the Student's IEP and rejected all of Parent's other claims. The District was represented by [redacted] and the Parent was represented by [redacted]**

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF [redacted]	)	
	)	**ISBE CASE NO. 2010-0273**
	)	
v.	)	**Joseph P. Selbka**
	)	Impartial Due Process
[redacted]	)	Hearing Officer

Hearing Decision and Order

Introduction

1 This matter is brought by [redacted] ("Parent") on behalf of [redacted] ("Student") against [redacted] ("District"). The hearing began on January 6, 2012, and occurred over eight days, ending on February 20, 2012. The Parent was represented by [redacted], and the District was represented by [redacted]

2. At the hearing, [redacted], and [redacted] testified on behalf of the District. [redacted], Student, and Student's mother testified on behalf of the Parent. [redacted] is Student's social worker. [redacted] and [redacted] are Student's teachers. [redacted] is Student's counselor. [redacted] is Student's social worker. [redacted] and [redacted] are administrators for the District. [redacted] is a clinical psychologist who evaluated Student.

Issues to Be Decided

3. The issues originally to be decided were:

a) Whether the Student's current placement is in the least restrictive environment required by state and federal special education laws. If the District's current placement is not the least restrictive environment required by law, whether Student should be in a regular classroom, a self-contained special education classroom, or a therapeutic day school for part or all of the school day;

b) Whether the District failed to properly evaluate Student as required by state and federal special education law from 2009 until late 2010.

c) Whether the District has properly implemented Student's current IEP in regard to Student's behavioral and social-emotional issues.

d) Whether the Student's current IEP was properly designed and/or developed in regard to addressing Student's social, emotional, and behavioral issues.

e) Whether the Student's current IEP was properly designed and/or developed in regard to providing Student with an educational benefit in math.

4. Issue 3e was withdrawn on the Record by Parent on the first day of hearing.

Findings of Fact

5. Student is a thirteen year old eighth grader at the District. Student's mother is [redacted] ("Parent"). Parent has filed the various due process complaints on Student's behalf mentioned in this decision. Student is currently eligible for special education under the disability terms emotional disability, other health impairment, and specific learning disability ([redacted] Response pg. 3)[1].

6. Student has attention deficit hyperactivity disorder ("ADHD"), and has, in the past, also been diagnosed with opposition defiant disorder ("ODD"). As a result of his disability, Student has exhibited problematic behaviors in the classroom since his kindergarten year.

7. Student's ODD manifests in that when Student is triggered by outside stimuli, Student often believes he is being treated unfairly by authority figures (Tr. 493-494).

8. Student is also hypervigilant to any treatment which singles him in the general education classroom out including receipt of special education services, accommodations, and discipline (Tr. 494, 1181-1183).

9. When Student is in an agitated state and escalating, he often misperceives his environment and the behaviors of those around him, especially those in authority (Tr. 1203-1204). Student consistently misinterprets social situations ([redacted] Ex. 626).

10. Despite Student's disability, he is academically very talented. He is able to succeed academically, and is a stand-out in the areas of art and music. He is generally an above-average student in regard to intelligence and academic achievement.

Preliminary Credibility Findings Regarding Student's Behavior and District Good Faith

11. During the course of the hearing, Parent and Parent's counsel made repeated insinuations and assertions that District personnel were blowing Student's behaviors out of proportion; District personnel were disciplining Student to a greater extent than other students; and the District personnel were reporting Student behaviors to a greater extent than warranted because of a personal dislike of Student.

[1] The factual statements in the school district response were stipulated to by Parent's counsel at the beginning of the hearing.

12. During the course of the hearing, Parent and Parent's counsel also made repeated assertions and insinuations that the District's testimony was slanted because the District wanted to remove Student from the District's main school.

13. Parent and counsel based their assertions on: (1) Student does not exhibit these behaviors outside of school; and (2) Student claims that he is being treated unfairly by District personnel.

14. [redacted] ([redacted]) testified that children with ODD do not need to manifest in all areas of functioning- and that Student's ODD manifests largely (although not exclusively) in the school environment. Children can manifest the symptoms of ODD only in the school system. Therefore, it should be no surprise that Student's ODD manifests primarily in the school setting.

15. Moreover, part of Student's disability is that he misperceives his environment when he is in an agitated state—especially the actions of those in authority (See above). Therefore, the undersigned does not find Student's recountings of his own agitated behaviors in the school setting credible. Finally, when questioned directly on this matter, Parent could not contradict any single incident regarding Student's behavior reported by District personnel without relying on accounts from her son.

16. For the above stated reasons, the undersigned rejects the assertions and insinuations of Parent and Parent's counsel and draws a credibility finding in favor of District personnel as to Student's behaviors in the school environment. The facts set forth regarding Student's behaviors in this decision are based on District personnel testimony which the undersigned has found credible and true. The undersigned similarly makes a credibility finding that claims of unfair discipline by Student and Parent are untrue for the reasons stated above.

17 Moreover, as discussed below, the District has repeatedly made efforts over the course of 2010 and 2011 to attempt to mainstream Student. The District voluntarily agreed to not send Student to a therapeutic day school on January 27, 2010. The District entered into a mediation agreement partially mainstreaming Student in February, 2010. The District revised a behavioral intervention plan in an attempt to mainstream Student further in late December, 2010. In light of the above stated District actions over more than a year, the undersigned makes a credibility finding in favor of the District and finds that the District has acted in good faith in attempting to mainstream Student. The undersigned further makes a credibility finding that District personnel did not shade their testimony in order to remove Student from the District's main (and only) school building.

18. The undersigned also makes a credibility finding that the District has attempted to implement the various iterations of Student's IEP in good faith rather than to get Student out of the District's school building. The undersigned bases this credibility finding on the multiple efforts of the District to evaluate Student, and the efforts of the District to mainstream Student over the course of years as set forth below.

19. Finally, based upon the District personnel's descriptions of Student's behaviors, the undersigned makes a credibility finding that Student still has ODD which manifests in the school environment. The undersigned rejects [redacted] testimony to the contrary.

Student's Behavior and Disabilities in 2008, 2009 to January 13, 2010 (and Prior) and District Responses

20. Student has exhibited problematic behaviors in the classroom since his kindergarten year (Tr. 1194).

21. Student has had various IEPs for the period which the current due process complaint has been filed and for at least two years prior to the filing of the current due process complaint. Student's IEP in 2008 noted that Student was eligible for special education under the disability term, emotional disability, and was provided social-emotional services ([redacted] Ex. Pg. 39, 41, 50). The District also had decided as early as May, 2008, that Student needed program modifications and supports to succeed in the general education classroom ([redacted] Ex. Pg. 51). The District also conducted a functional behavior analysis in Fall, 2008 ([redacted] Ex. Pg. 52).

22. By December, 2008, the District had completed its first behavior intervention plan ("BIP") ([redacted] Ex. Pp. 65-66). Student was to be given a point sheet for good and bad behaviors, preferential seating, proximity control, and peer mentors ([redacted] Ex. Pg. 65). The purpose of the first BIP was to allow Student to model behaviors of his peers ([redacted] Ex. Pg. 65).

23. Student transferred to a different school district in early 2009, and returned to the District in August, 2009 (Tr. 1267-1268).

24. The original behavioral intervention plan was not successful in regulating Student's behavior to the extent necessary to allow Student to properly participate in the classroom. Nor did the 2008 IEP provide Student with progress in his social-emotional functioning. Student pushed other classmates; was often disruptive in class; and argued with other students on repeated occasions in August, 2009 ([redacted] Ex. Pp. 121-127).

25. The District then decided to revise and update Student's BIP again on August 31, 2009 ([redacted] Ex. Pg. 128-131). The District completed an updated functional behavioral assessment and updated BIP with many of the same interventions ([redacted] Ex. Pg. 128-131).

26. The District convened an IEP meeting on November 18, 2009, and added a 1:1 aide for Student as well as social work consult minutes ([redacted] Res. Pg. 3). Student's behavior did not improve as a result of adding these services to Student's IEP ([redacted] Res. Pg. 3). The District scheduled IEP meetings on both December 2, 2009, and December 17, 2009, both of which were cancelled by Parent.

27. Prior to the filing of the present due process complaint, Student's behaviors intensified in the classroom. Beginning in the Fall of 2009, and continuing throughout

the 2009-2010 school year, Student exhibited escalating and aggressive behaviors including, but not limited to: fighting with other students, drawing racially violent pictures, leaving Student's assigned classroom without permission, and disrespecting other students and staff ([redacted] Response, pg. 3). Student continued to disrupt class, threaten other students, leave class without permission, be insubordinate, punch other students, initiate a Nazi rally when learning about the Holocaust, and refuse to serve detentions([redacted] Ex. 134-158, 163-166).

28. The District added a full-time paraprofessional for Student on November 18, 2009 ([redacted] Ex. 168; [redacted] Response, pg. 3). Student's disruptive, insubordinate behavior escalated from November, 2009, until January, 2010 ([redacted] Ex. Pp. 170-181, 189-197).

Parent and District Negotiations and Litigation in 2009 and 2010 Prior to the Filing of the Current Due Process Complaint

29. On January 13, 2010, the District held an IEP meeting which Parent did not attend ([redacted] Response, pg. 4). Parent was sent notice of the meeting ([redacted] Response, pg. 4), and Parent does not challenge the propriety of the January 13, 2010, IEP meeting in this due process hearing.

30. At the January 13, 2010, IEP meeting, the District members of the IEP Team decided that Student needed to be placed in a self contained special education classroom for his entire school day and taught by a certified special education teacher ([redacted] Response, p. 4). The January 13, 2010, IEP Team also recommended that Student be placed at a therapeutic day school as there was no suitable self contained classroom at the District's lone school ([redacted] Response, pg. 4).

31. Student's behavior failed to improve and in January 13, 2010, the District articulated the failed interventions ([redacted] Ex. 230-231, 235, 243) and Student's disruptive and other problematic behaviors continued through January, 2010 ([redacted] Ex. 230-237, 247-251).

32. Parent disagreed with the placement change, and the District convened another IEP meeting on January 27, 2010 ([redacted] Response, pg. 4). The District agreed to create a self contained classroom for Student with Student as the only student in the classroom ([redacted] Response, pg. 4). An IEP was drafted for that date ([redacted] Ex. Pp. 255-293). Student began receiving services under the January 27, 2010 IEP ([redacted] Response, pg. 8).

33. On or about February 5, 2010, Parent requested an independent evaluation of Student ([redacted] Response, pg. 5; [redacted] Ex. Pg. 295). The District filed a due process complaint on February 9, 2010, alleging its evaluations (conducted in early 2009) complied with the special education laws ([redacted] Ex. Pp.298-299), and the parties agreed to undertake mediation of the dispute ([redacted] Ex. 488). In a form signed by both parties, they agreed that any issues unresolved through the mediation would go to a due process hearing([redacted] Ex. 488).

34. The District due process complaint was ultimately settled through mediation ([redacted] Response, pg. 5; [redacted] Ex. Pg. 298, 494-496). The settlement occurred on February 23, 2010 ([redacted] Ex. 492). The parties agreed upon an independent evaluator, [redacted] ([redacted]) ([redacted] Ex. Pg. 495), and agreed upon a schedule for Student until the evaluation could be completed ([redacted] Ex. Pg. 495). Part of the mediation agreement was to have a school social worker meet Student every morning, and to have Student mainstreamed for lunch, P.E., and chorus ([redacted] Ex. Pg. 495). The remainder of Student's day was to be in a 1:1 self contained classroom ([redacted] Ex. Pg. 495). Student's then current behavior plan was to remain in place ([redacted] Ex. Pg. 495).

35. Student's behaviors remained problematic from January 1, 2010, after the January 27, 2010, IEP and after the February, 2010, mediation agreement ([redacted] Ex. Pp. 626-634; 1575-1635). Student was repeatedly and regularly insubordinate; used racial slurs against fellow students; refused to go to counseling sessions; threw things at other students; kicked desks, lied to authority figures; and called teachers slang names (*Id.*)

36. In April, 2010, Student wouldn't comply with any direction to leave the commons area ([redacted] Ex. Pg. 628). The District called the police because of a concern that Student might be dangerous to himself or others ([redacted] Ex. Pg. 628). Student also used racial slurs, banged his head against a plastic bucket, and consistently received detention for misbehaving in classes which he was mainstreamed in ([redacted] Ex. Pg. 628-629). Student often inflicted physical and emotional pain on teachers and students at the District in early 2010—including punching and closing doors on students and teachers; drawing pictures of killing teachers; ripped up behavior charts; ripped up art projects and assignments ([redacted] Ex. Pg. 628-630). Student also consistently "shut down" when frustrated or when faced with consequences of his actions ([redacted] Ex. Pg. 628-630).

37. The parties attempted to come to a mutually acceptable placement from June, 2010, to September, 2010, but were not able to do so ([redacted] Response, pg. 7).

The DHS Evaluation Challenged by Student in this Due Process Complaint and Subsequent IEP Meetings and the Current Due Process Complaint

38. Parent consented to [redacted] evaluation, and DHS evaluated Student in March, 2010 ([redacted] Response, pg. 5). [redacted] gave her report to the District and Parent on or about April 13, 2010 ([redacted] Ex. Pg. 575).

39. [redacted] conducted the following assessments: WISC-IV; WIAT-III; Rorschach Inkblot Test; Classroom Observation; K-SADS; BASC-II; Child Symptom Inventory-4 ([redacted] Ex. Pg. 575-585).

40. The results of the various assessments was that Student continues to have a disability related to distractibility, hyperactivity, impulsivity, and oppositionality, especially in school ([redacted] Ex. Pg. 582). Student was disorganized, inattentive, easily distracted, and had difficulties completing tasks and sustaining attention ([redacted] Ex. Pg. 582). As a result of Student's disability, he had serious conduct problems in school

including physical aggression, bullying, deceitful, making derogatory racial comments and violent drawings, disrupting class, teasing other students, noncompliance with teacher directives, violation of school rules, and a refusal to serve detentions (Ex. Pg. 582). His inattentiveness in school was notably worse than his behavior at home and in the community (Ex. Pg. 582).

41. found that Student still should be diagnosed with ODD and ADHD (Ex. Pg. 583). Student further had underdeveloped social skills and used avoidance and withdrawal into fantasy to defend against negative mood states (Ex. Pg. 583). ( ), Student's social worker did not disagree with assessments as of the date of the evaluation.

42. recommended that Student be placed in a classroom with students who have similar levels of cognitive and emotional/behavioral functioning and a small student-to-teacher ratio (Ex. Pg. 584).

43. also recommended the behavior modification plan, close monitoring, school based counseling services, and regular home-school communication Ex. Pg. 584).

44. also recommended a therapeutic day school placement for Student Ex. Pg. 584). This was based on assessments, Student's history, the record of failed interventions, and the resources available at the District.

45. testified at the hearing[2]. testified that both being with nondisabled peers who dislike Student and being in a 1:1 classroom isolated from other students can inhibit Student's social-emotional progress and harm Student's emotional well-being.

46. observed Student in class while he was in a 1:1 setting. Student was also subsequently observed in his gym class by another school psychologist, Ex. Pp. 644-646).

47. testified that, in regard to her social-emotional evaluation: She used technically sound instruments; the assessments used do not discriminate on a racial or cultural basis; administered all assessments and she is trained and knowledgeable in regard to every assessment administered; every assessment was used for its proper purpose; Student was assessed in all areas of educational need; there were no sensory, manual, or speaking issues related to Student's disability; Student was assessed in all areas of suspected disability.

48. The District scheduled, but Parent cancelled an IEP meeting on April 24, 2010 (Response, pg. 5). The IEP ultimately did meet on May 12, 2010, with Parent and Parent's counsel in attendance, to discuss changes to Student's IEP (Response, pg. 5-6). The parties were unable to come to an agreement and the IEP Team reconvened on June 16, 2010, and September 3, 2010 (Response, pg. 7). During this period, the

[2] The transcript for the last two days of hearing was not available at the time of the decision. Therefore, DHS' testimony and part of BK's testimony was taken from the undersigned's notes in the hearing.

District attempted to find a placement for Student in the [redacted] but the [redacted] refused to take an out of District student (Tr. 37).

49. Parent filed her due process complaint on August 17, 2010 ([redacted] Ex. Pg. 751).

The Time Period Between the Filing of the Current Complaint and Hearing (The HA Evaluation, an Updated Behavioral Management Plan

50. Because of the stay-put, Student remained in the placement agreed to during the mediation in February, 2010. The District had no authority to unilaterally change the placement (other than to try and mainstream Student further) from the filing of the pending due process complaint to the present.

51. The parties continued to work together even after Parent filed her due process complaint. The parties agreed to conduct a second independent evaluation which occurred in November, 2010, and completed in December, 2010 ([redacted] Ex. 1038-1045). [redacted] ([redacted]) conducted the evaluation. [redacted] stated that Student has a chronic history of externalizing behavioral problems at school ([redacted] Ex. 1043), and that Student continues to be noncompliant, disruptive, argumentative, and disrespectful to staff ([redacted] Ex. 1043).

52. [redacted] recommended as to Student: (1) education with other students so that Student can observe, model, and learn appropriate ways of behaving. Student needs to be taught behaviors in the environment where they typically occur, and reinforce Student to demonstrate approximations of proper behaviors ([redacted]. Ex. 1044, #2); (2) using the functional behavioral assessment completed as part of Student's evaluation (described below) to develop appropriate interventions for Student ([redacted] Ex. 1044, #2); (3) use of a point card wherein good behavior (based on clearly verifiable factors and evidence) can be rewarded ([redacted] Ex. 1044, #3); (4) using the evidence based intervention, check-in and check-out ([redacted] Ex. 1044, #3); (5) use of "precorrection," a preventative approach to behavior wherein Student is prepared for transitions from one class to another ([redacted] Ex. 1044, #4). Precorrection in Student's context, means identifying the predictable behavior which causes Student's escalations; specifying the expected behavior for handling the transition; modifying the context and teaching Student the appropriate behavior in the context of the transition; conducting behavioral rehearsals with Student; and praising Student for appropriate behavior ([redacted]. Ex. 1044, #4).

53. In order to carry out [redacted]'s recommendations, the District retained a behavioral consultant [redacted] ([redacted]) ([redacted] Ex. #1). [redacted] observed Student in the classroom, reviewed Student's records, and interviewed school staff ([redacted] Ex. #1). [redacted] recommended the following: A points system for earned reinforcement with daily and weekly reinforcement; a modified "Boys town" social skills instruction; self-monitoring daily conferences with staff to review and graph his performance; graphing and charting behaviors identified in the functional assessment report; school home contingencies and daily communication between Parent and the District; behavioral contracts; Redirection to current activity; redirection to alternative activity; redirection to reinforcement system;

proximity management; prompt to pre-taught coping strategies; teacher-directed removal from immediate area and move to alternative setting for on-going de-escalation support; teacher prompt to counselor or mentor meeting; and administrative intervention including interventions ([redacted] Ex. #1).

54. The District conducted a new functional behavior assessment in December, 2010 ([redacted] Ex. 1). The parties had an IEP meeting on January 28, 2011 wherein they agreed to the new behavioral intervention plan ([redacted] Ex. 1144-1150).

55. The parties conducted a second IEP meeting on June 17, 2011 ([redacted] Ex. 1182). Parent's attorney attended the meeting ([redacted] Ex. 1182).

Student's Current Condition in the School

56, Student's behaviors have improved to some extent ([redacted] Ex. 722-725). He is able to remain in certain classes. He will listen to his preferred teachers and not disrupt class most of the time in the classes led by these preferred teachers.

57. However, in science class with a nonpreferred teacher, Student disrupts class nearly every day (Tr. 898-906, 914-915). Student's behaviors can sometimes endanger other students in science class (Tr. 906-907). Student continues to bully other students (Tr. 907-908). Student sexually harasses his science teacher (Tr. 910-912). Student abuses and sexually harasses his aide (Tr. 912-914). Student often "shuts down" and stomps out of class and stops learning (Tr. 498). Student will start arguing and swearing at teachers in class (Tr. 498, 518-521). Student regularly refuses orders from nonpreferred District personnel and leaves class without permission (Tr. 498, 518-521). Student refuses to serve detentions. Student is particularly concerned with perceptions of fairness and being treated unfairly by authority figures (Tr. 493-494, 496-497).

58. Student's escalations often take up seven to eight minutes of class when they occur (Tr. 520-522). Student's escalations occur on average once a week (Tr. 498-499).

59. The District has been unable to accurately determine the antecedent behaviors which cause Student's escalations (Tr. 499).

Parent's Arguments Regarding Evaluation, IEP Design, and IEP Implementation

60. At closing argument, Parent contended that the IEP had not been implemented and/or designed properly[3] in the following ways as the following interventions had not been tried: no behavioral contracts; little communication with the Parent; no group therapy; no social skills class; the school schedule had not been modified; a social worker should have provided counseling as opposed to the school counselor.

[3] The Parent in her complaint also alleged that Student should have been classified as OHI as well as ED and that this is another IEP design violation. This is a harmless procedural error (at most). Once Student was classified as eligible for special education, his disability designation is irrelevant as his IEP had to be based on Student's unique needs, strengths, and weaknesses.

61. At closing argument, Parent contended that the IEP had not been implemented in the following additional ways: no "Boystown model" had been implemented; no social skills training had taken place; the BIP had not been consistently implemented by every teacher, and teachers had not been trained to implement the IEP.

62. At closing argument, Parent contended that the IEP did not have appropriate goals in that there needed to be goals related to increasing Student's social skills; communication skills; and communication with District personnel.

63. Finally, the Parent argues that the 1:1 classroom is an inappropriate design and implementation of the IEP for Student.

Various Design Issues in the Student's IEPs as Highlighted by BK

64. Student needs to develop and work on his social skills with peers and with authority figures (Tr. 538-540, [redacted] Ex. 583, 1044).

65. Student also has self esteem issues which affect his learning and his social skills—as his self esteem issues are connected to sadness and anxiety ([redacted] Ex. 581, Tr. 1158). These negative feelings lead to problems with learning and behavior issues for Student (*Id.*).

66. There are three IEPs or proposed IEPs at issue in this case: the January 27, 2010, IEP (as later modified by a mediation agreement); a May 12/ June 16, 2010, proposed IEP; and a January 28, 2011, proposed IEP.

67. The Parent presented no evidence that there were IEP design flaws which occurred from August, 2008, until January, 2010. Indeed for most of 2009, Student did not even attend school in the District. More specifically, the Parent provided no evidence or argument that the District should have known that different IEP goals and interventions were necessary from August, 2008, until December, 2008, and from 2009 until January, 2010. Until the 2010, [redacted] evaluation, there was no evidence presented at hearing that self esteem and anxiety were a problem for Student.

68. The District does have goals in its various IEP requiring Student to be respectful to peers and teachers; to obey school rules; to participate properly in class; to not distract teachers and class; and to stop arguing with teachers ([redacted]. Ex. 277, 605, 607, 608, 703-705, 722-723). In the January, 2011, IEP, the goals were changed and synchronized with the VM BIP ([redacted]. Ex. 1152).

69. [redacted] testified that it would take approximately two years of social work services in weekly sessions for Student to make appropriate social-emotional progress and be brought to the point where Student should be if he had been provided appropriate special education services by the District.

70. The undersigned makes an inference that two years of social work from [redacted] would compensate Student for the failure to properly design the IEP in regard to social-emotional goals based upon the testimony and opinions of [redacted]. The undersigned makes an inference that [redacted] would be most likely to provide Student with progress he lost because Student has a trusting relationship with [redacted]

The Implementation of the Current IEP and Specifically, the Implementation of the Behavioral Intervention Plan and the Alleged Untried Interventions

71. Apart from the contentions set forth by Parent above regarding IEP implementation, there was uncontradicted testimony that the other aspects of the behavioral intervention plan have been implemented by the District (See e.g., Tr. 1558-1600).

72. In the 2010-2011 school year, [redacted], the school social worker at the time, attempted to provide counseling services to Student on repeated occasions (Tr. 1524). Student refused to work with [redacted] (Tr. 1524). The School counselor, [redacted], thereafter offered Student counseling services which he only occasionally accepted (Tr. 524, 1372). [redacted] testified that a student cannot be forced to participate in counseling, and any counseling undertaken without Student's cooperation would be useless (Tr. 1373-1374). [redacted] agreed that Student had to be with someone he trusted in order for social work services to be effective and social-emotional progress to be made (Tr. 1155-1156).

73. [redacted] testified that she was qualified to provide counseling services to Student and the type of social work services listed in the IEP. [redacted] and [redacted] testified that a social worker should provide such counseling services. However, they could point to no requirement that a social worker counsel students. Rather, [redacted] only had to be certified as a school counselor to provide counseling services to Student. (IHO Ex. #6).

74. The District also created a social skills class for the entire school so as not to isolate Student and highlight his disability (Tr. 1573-1574). Student is also provided social skills training by [redacted] when he chooses to accept the services (Tr. 1419, 1422-1423).

75. Student's teachers from this school year and last school year have been trained to implement the current behavioral intervention plan (Tr. 1562-1563).

76. In implementing the current IEP, Student has a daily check-in and check-out (Tr. 1370-1371). This is a social and emotional intervention wherein [redacted] provides social and emotional support for Student at the beginning and end of each day (Tr. 1370-1371). [redacted] is also available for counseling for Student during the course of the day (Tr. 1371-1372).

77. Student has been educated in a 1:1 classroom for much of his day since January, 2010 which Student contends is too small. The undersigned viewed the classrooms at the hearing. Both rooms were at least 100 square feet (Tr. 139-140). The rooms appeared

more than adequate to conduct a 1:1 session. The undersigned finds the claim that the rooms are somehow harming Student to be unsupported by any evidence other than the bare assertions of Parent. Moreover, the 1:1 placement for part of the day was agreed to by the Parent in a mediation agreement within three weeks of placement as discussed above.

78. The District presented uncontradicted testimony that there was no other child who could properly share a self contained classroom with Student.

79. [redacted] discussion of a modified "Boys Town" program was related to a points program wherein Student's good behaviors would be rewarded [redacted] Ex. #1, Par. 3). The District has implemented a points program in regard to Student's behaviors (Tr. 1578-1583).

80. [redacted] entered into a behavioral contract with Student. Student's former special education teacher also entered into a behavioral contract with Student [redacted] Ex. 691).

81. The District contended that Parent has been uncommunicative with District personnel in regard to Student's status. Parent has been and is ill with multiple chronic serious illnesses including cancer and multiple sclerosis. Parent admitted at hearing that she has been uncommunicative with the District because of her illnesses. The District also contended that Parent doesn't believe Student's behaviors warrant the discipline imposed by the District. Parent corroborated this statement and admitted she questions every disciplinary action imposed on her son.

82. The undersigned makes a credibility finding that Parent and the District have a noncooperative relationship based upon the testimony set forth above. The undersigned bases this credibility finding on the fact that Parent has consistently refused to accept that Student exhibits severe, problematic behaviors in the school setting—a refusal which has continued throughout Parent's testimony at hearing. Parent testified that she believes Student is being targeted because Parent has filed legal action against the District—rather than the fact that the District is reacting to Student's disruptive behaviors in school.

83. Based upon this credibility finding, the undersigned makes an inference that communication between the District and Parent are unlikely to change Student's behavior. Since Parent is unwilling to accept the severity of Student's behavior in the school setting, it is unlikely that Parent can work with the District to correct Student's behaviors. The undersigned makes a further inference that the District's failure to daily communicate with Parent was a reasonable methodological choice given Parent's inability to address Student's behaviors in a realistic manner.

84. The District has attempted to place Student with preferred teachers so as to try and be successful in mainstreaming Student (Tr. 1575-1577). However, it is hard to schedule Student as the District has not been able to determine the antecedents for Student's escalations (Tr. 499).

85. The undersigned makes an inference that the District decisions on how to provide counseling was based upon a reasonable choice of methodology. The District made its decision on who would provide counseling based upon District personnel [redacted] who Student had a good relationship with. This choice is especially reasonable given that Student had to voluntarily consent to counseling.

86. The undersigned makes an inference that the District decisions on how to provide social skills training (through individual counseling and schoolwide programs) was based upon reasonable choice of methodology. The District made its decision based on the fact that the District did not want Student singled out in front of other students. The District's methodology was reasonable given the fact that Student dislikes to be singled out in front of other students.

The District's Proposed Placement

87. By the end of the hearing, The District proposed a full time therapeutic day school placement for Student modeled similar to the placement at [redacted] or [redacted] The District believes that this is proper because: (1) a therapeutic day school staff can better provide instant interventions when Student escalates; (2) there are other peers with emotional/behavioral disabilities who Student can model behaviors from; (3) the therapeutic day school can provide a small, appropriate classroom which is unavailable at the District's main building; and (4) a therapeutic day school will immerse Student in the therapeutic treatments in a way which cannot be replicated in the District. The District recommended a placement for the therapeutic day school placement for a full day.

88. The District advised against a half day placement in a therapeutic day school because Student has to "buy in" to the therapeutic system and goals, and having Student spend a half day could prevent him from accepting the new environment completely. [redacted] also testified that half-day programs can be problematic because students have to learn two different systems with two different sets of staff, and students may not commit to the therapeutic day school program.

89. [redacted] testified that Student is not getting learning or modeling behaviors from other nondisabled students, and even in preferred settings, Student occasionally acts out.

90. [redacted] is familiar with and has investigated the programs at both [redacted] and [redacted] for a prospective placement for Student and for other students in the district.

91. Based upon the testimony of the [redacted] and [redacted], the undersigned makes an inference that it is a matter of methodology to address Student's needs through an immersion setting as offered by the therapeutic day school placements at [redacted] or [redacted] The undersigned bases this inference on: (1) depending on Student's personality, he may be benefited or harmed by being with nondisabled peers as testified to by [redacted]; (2) Student is not modeling from his nondisabled peers now; (3) a smaller classroom with trained personnel allows for more rapid interventions, which is something Student needs;

(4) Student has not made sufficient social-emotional progress in a partially mainstreamed setting. The undersigned further makes an inference that the immersion methodology chosen by the District is reasonable for the reasons set forth above.

92. The undersigned makes a credibility finding in favor of [redacted] who testified that there are many different types of students at [redacted] and [redacted], not merely students with criminal backgrounds as testified to by [redacted] (Tr. 1628). The undersigned bases this credibility finding on the fact that [redacted] recently investigated the facilities and is familiar with them while [redacted] has not dealt with either facility for many years.

93. The Parent argues for a greater mainstreaming of Student and contends that if the BIP and other aspects of the IEP had been implemented, Student would not need a more restrictive placement. Moreover, the Parent argues that all interventions in the regular classroom must be tried prior to moving Student to a therapeutic day school setting.

The Behavior of the Parties Regarding the Pending Due Process Complaint

94. This matter has been continued on between 15 and 20 occasions [redacted] Ex. 959-962, 1165-1167, 1168, 1177, 1188, 1189). The parties requested continuances to conduct evaluations, IEP meetings, mediations, and settlement discussions. Many of the requested continuances were joint—meaning that under the School Code, the undersigned had to grant the continuances.

95. During the course of the litigation, both parties have attempted to invoke or claim a litigation advantage based upon events, proposed placements, and evaluations, which occurred after the due process complaint had been filed. Indeed, in opening statements, the District could not decide whether to recommend a placement in the school or in a therapeutic day school (Tr. 101-107). Neither party offered formal evidence of a placement offer (after January 13, 2010- which was rescinded) for a therapeutic day school placement.

96. Moreover, even the stay-put placement did not represent a District determined IEP but rather a placement put in place through a mediation agreement.

97. Although the IEP has been *de facto* or formally revised on several occasions, Parent still believes that the issues raised in the complaint have not been properly addressed. The District has had an opportunity to consider every evaluation in an IEP meeting and every iteration of the IEP reviewed in this case was created through an IEP meeting or imposed by a mediation agreement.

98. Even after the due process complaint was filed, the District was able to modify the IEP, except for placing Student in more restrictive placements.

Burden of Proof, Evidentiary Issues, and The Authority of The Hearing Officer

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

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

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

Therefore, even though a social worker expert witness cannot prescribe educational placements (*See e.g. Marshall Joint School District No. 2. v. C.D. ex rel Brian D.*, 616 F.3d 632, 638-642 (7th Cir. 2010), a hearing officer can override a school district's proposed placement after hearing pertinent social worker testimony. Specifically, a hearing officer can use his/her special expertise regarding special education and special education law to draw inferences as to the appropriate placement under the law—after taking into account the physical and psychological manifestations and symptoms of any given disability as testified to by a social worker expert. *School District of the Wisconsin Dells v. Z.S, supra; Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education, supra. See also Heather S. v. State of Wisconsin,* 125 F.3d 1045, 1053-1054 (7th Cir. 1997)(hearing officer characterized as having special expertise in special education law). *See also Marshall Joint School District No. 2. v. C.D. ex rel Brian D.*, 616 F.3d 632, 640 (7th Cir. 2010) (a medical expert's diagnosis is important evidence and should be considered by the IEP Team and, by extension, hearing officers, in determining a student's special education placement).

102. In administrative proceedings, hearsay is admissible as long as it is relevant and material. *Otto v. Securities and Exchange Commission,* 253 F.3d 960, 966 (7th Cir. 2001). To the extent hearsay is admitted without objection, the evidence can be given its natural weight. *Abbott Industries, Inc. v. Department of Employment Security,* 2011 Ill.App.(2d) 100,610 (2nd Dist. 2011); *Sykes v. District of Columbia,* 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

103. The trier-of-fact in administrative adjudications generally should accept uncontradicted factual testimony as true. *Crabtree v. Illinois Department of Agriculture, Division of Agricultural Industry Regulation*, 128 Ill.2d 510, 518 (1989). Thus, for the undersigned to disregard factual testimony, it should be contradicted by positive testimony or circumstances, the witness proferring the testimony must be impeached, or the testimony must be inherently improbable. *Bucktown Partners v. Johnson,* 119 Ill.App.3d 346, 351 (1st Dist. 1983).

104. Admissions by counsel during opening and closing argument may be treated as judicial admissions and may be treated as binding on the party making the admissions. *Lowe v. Kang*, 178 Ill.App.3d 772, 776 (1988).

105. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Smith v. Tri-R Vending,* 249 Ill.App.3d 654, 661 (1993). Hearing officers can make reasonable inferences from the evidence adduced at hearing. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart,* 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Moreover, any inference a hearing officer makes must be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support his/her conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

106. Expert opinions are admissible if the experts are considered qualified under a relaxed standard similar to the *Daubert* standard used in the federal courts. *Pasha v. Gonzalez*, 433 F.3d 530, 535 (7th Cir. 2005). To the extent the hearing officer relies upon expert opinions, the expert opinions must be inferred ultimately from facts in the record, and the inferential process by which an expert reaches his/her conclusions must be fully explained. *Zamecnik v. Indian Prairie School District No. 204,* ___F.3d____, 2011 WL 692059 (2011) (expert testimony must be grounded by material facts in the record and the inferential process by which an expert reaches his/her conclusions must be fully explained in the record); *Mid- State Fertilizer Co. v. Exchange National Bank of Chicago*, 833 F.2d 1333, 1339-1340 (7th Cir. 1989)(in litigation, expert opinions must be grounded in facts and inferred from a process of logical reasoning).

107. In determining whether an expert is qualified on a specific subject matter, education, experience, or other training can provide the appropriate qualifications for an

expert. See *Fox v. Dannenberg*, 906 F.2d 1253, 1255 (8th Cir. 1990) and *United States v. Briscoe*, 896 F.2d 1476, 1498-1497 (7th Cir. 1990); and *Valiulis v. Scheffels*, 191 Ill.App.3d 779, 785 (1990). The test to determine whether expert testimony should be admissible is whether the expert has specialized knowledge and expertise in the area where the expert expresses his/her opinion. *Valiulis v. Scheffels*, 191 Ill.App.3d 779, 785 (1990 It is not necessary to be licensed in Illinois in a field of expertise to provide expert testimony on that expertise. *Thompson v. Gordon*, 356 Ill.App.3d 447, 459-460 (2005). An expert also does not need to have a degree in the field for which the expert is providing opinions as long as the expert has an expertise in said field. *Valiulis v. Scheffels*, 191 Ill.App.3d 779, 786 (1990); *Kinsey v. Kolber*, 103 Ill.App.3d 933, 953 (1982).

108. Hearing officers are entitled to and often need to make credibility findings. However, in such cases, hearing officers should provide reasons for why they found testimony credible or not credible. *Marshall Joint School District No. 2. v. C.D. ex rel Brian D.*, 616 F.3d 632, 638 (7th Cir. 2010)

109. Illinois law also imposes upon all administrative hearing officers the obligation to properly make an administrative record. *Meneweather v. Board of Review*, 249 Ill.App.3d 980, 984-985 (1992). As in most state administrative proceedings, Illinois administrative hearing officers have an obligation not only to listen to evidence presented by the parties, but to affirmatively find facts necessary to properly to determine which party should prevail under the law. *Meneweather, supra; See also,* Frank Cooper, State Administrative Law, Vol. 1, Bobbs-Merrill Company, Inc. (1965), pg. 336 .

In administrative litigation, the hearing officer must be concerned with not only ensuring a fair process wherein the parties can present evidence, but also a proper result under the law because there is a significant public interest in properly having the law carried out. Landis, John, "*The Administrative Process*," Yale University Press (1938) excerpted in Foundations of Administrative Law, Schuck, Peter (ed.) Foundation Press (2004), pp. 13-14. For this reason, administrative hearing officers are constitutionally permitted to depart from the adversarial model and independently obtain evidence and develop an administrative record while remaining a neutral and impartial decision maker. *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000); *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971) (social security administrative law judges constitutionally permitted to develop the record to determine all facts necessary whether benefits should be granted under law).

For this reason, the General Assembly provided impartial due process hearing officers with significant powers to independently compel the production of evidence necessary to reach a correct determination. Specifically, impartial due process hearing officers in Illinois are empowered to: (1) compel production of any evidence prior to the close of the administrative evidentiary record, 105 ILCS 5/14-8.02a(g-55); (2) order independent evaluations at school district expense, 105 ILCS 5/14-8.02a(g-55); and (3) question party witnesses during due process hearings, 23 IL ADC 226.660(b).

Standards for Deciding Procedural Violations of IDEA (Including Failures to Evaluate Properly),

110. Although the School District must comply with the procedural requirements of IDEA, hearing officers can only enter an order against the District if the procedural inadequacies: (1) impeded the Student's right to a free appropriate public education; or (2) denied the student some educational benefit; or (3) significantly impeded the parents' ability to participate in the decisionmaking process regarding the provision of a free appropriate public education. 20 U.S.C.A. 1415(f)(E)(ii)(I-III).

Standards for Determining Whether the District Complied with the Law in Evaluating the Student

111. The District has the responsibility to conduct a full and individual initial evaluation in accordance with pertinent regulations before the provision of special education and related services. 34 CFR 300.301(a). The District has the burden of showing that its evaluation was "appropriate." *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167, 1169 (7th Cir. 1994). An appropriate evaluation is one which complies with the pertinent federal and state regulations. *Krista P. v. Manhattan School District,* 255 F.Supp.2d 873, 887 (N.D.Ill. 2003)(federal and state regulations "provide the minimum requirements for an evaluation").

112. An evaluation must assess a student in all areas related to the suspected disability, 34 CFR 300.304(c)(4); and be sufficiently comprehensive to identify all of the Student's special education and related services needs, whether or not linked to the disability category(ies) in which the child has been classified. 34 CFR 300.304(c)(6).

113. The District's evaluation must be "comprehensive" to be appropriate. 34 CFR 300.304(c)(6). This means that the District must evaluate: (1) all areas of disability or suspected disability; (2) to the extent necessary to identify the needs of the child to special education and related services. 34 CFR 300.305(a)(2)(i)(A). As part of determining the nature and extent of the special education services and related services a child needs, the School District must determine the extent of the student's disability. *In Re Yuba City (CA) Unified School District*, 22 IDELR 1148 at 4 (OCR 1995)(in determining whether evaluation under Section 504 complaint was adequate, School District failed to properly evaluate Student by not determining the extent of the disability-Section 504 evaluation standards are essentially the same as evaluation standards under IDEA see e.g. 34 CFR 104.35). The District must determine the cause of Student's behaviors to the extent necessary to classify Student's disability(ies) as defined by IDEA and provide Student with special education and related services. 34 CFR 300.301(c)(2). The District must conduct assessments necessary to allow the IEP Team to properly determine the content of Student's IEP. 34 CFR 300.304(b)(1)(ii), 304(b)(7).

114. In evaluating a student, the district must also consider: (1) the present needs of the child; (2) whether the child needs special education and related services; and (3) whether any modifications or accommodations are required. 34 CFR 300.305(a)(2)(i)(B)(i-iv).

115. During an evaluation, the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. 34 CFR 304(b)(1). Moreover, a school district must properly administer tests it does use to evaluate students. 34 CFR 300.304(b)(3),(c)(iii), (c)(iv). The District is not allowed to use any single measure or assessment as the sole criterion for whether a student has a disability. 34 CFR 300.304(b)(2).

116. In addition, during an evaluation, the District must review existing evaluation data on the child, evaluations and information provided by the parents; current classroom based assessments and classroom based observations; and teacher and service provider observations. 34 CFR 300.305(a)(1)(i-iii). The School District must then determine what additional data, if any, is needed to determine whether: the child has a disability and the needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child continues to need special education and related services and whether additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP. 34 CFR 300.305(b).

117 The District must also choose assessments which are selected and administered so as not be discriminatory on a racial or cultural basis. 34 CFR 300.304(c)(1)(i). The assessments must be provided in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer. 34 CFR 300.304(c)(1)(ii), (c)(3). The assessments must be administered by trained and knowledgeable personnel; used for the purposes for which the assessments are valid; and are administered in accordance with any instructions provided by the producer of the assessments. 34 CRF 300.304(c)(1)(iii-v).

118. The District must administer assessments which assess specific areas of educational need and not merely to provide a single general intelligence quotient. 34 CFR 3300.304(c)(2).

119. Although the School District must evaluate properly and according to the OSEP regulations, hearing officers are entitled to make a finding against the District only if the procedural inadequacies impeded the Student's right to a free appropriate public education or denied the student some educational benefit. 20 U.S.C.A. 1415(f)(E)(ii)(I-III); *Capistrano Unified School District,* 108 LRP 40490 at 29 (Cal. State Educational Agency, 2008).

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

120. Under IDEA, the School District has an obligation to educate Student to the greatest extent appropriate with his nondisabled peers. 20 U.S.C.A. 1412(a)(5)(A); *Board of Education of Township District No. 211 v. Ross*, 486 F.3d 267, 277 (7th Cir. 2007). Placements which require "special classes, separate schooling, or other removal

of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*

121. Every school district is required to have a continuum of placements available to mainstream every special education eligible student to the greatest extent possible. 34 CFR 300.115(a). However, every school district does not need to have every conceivable combination of rooms, class sizes, and facilities to accommodate every possible methodology for providing special education and related services in order to comply with the regulation. *Hough v. Indiana Board of Special Education Appeals,* 50 IDELR 131 (N.D. Ind. 2008).

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

123. In determining whether Student is receiving a satisfactory education, some factors which the undersigned will use to evaluate the placement in this case are: (1) whether a segregated placement is superior, and if so, whether the services which make the segregated placement superior can be replicated in the classroom, *Board of Education of Township No. 211 v. Michael R.* , 2005 WL 2008919 (N.D. Ill. 2005) citing *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) *affirmed* 486 F.3d 267 (7th Cir. 2007); (2) whether there are educational benefits to mainstreaming, *Michael R. supra,* citing *Sacramento v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994); (3) whether there are non-academic benefits to mainstreaming, *Id.*; (4) cost to the school district of mainstreaming, *Z.S. v. School District of the Wisconsin Dells,* 295 F.3d at 672; (5) disruptive effects on other students, *Alex R. v. Forrestville Community Unit School District, supra.*

124. In general, hearing officers should defer to the district on issues of methodology as long as use of the proposed methodology is reasonably calculated to providing the student with an educational benefit. *Lachman v. Illinois State Board of Education,* 852 F.2d 290, 297 (7th Cir. 1988). Moreover, when a district's decision as to least restrictive environment is connected to implementing a reasonable methodology for educating the student, the hearing officer's deference should extend to the District's LRE determination (to the extent necessary for the District to implement its educational methodology) *Lachman v. Illinois State Board of Education, supra* —as long as the District considered methodologies based upon less restrictive placements. *Beth B. v. Van Clay,* 282 F.3d 493 (7th Cir. 2002).

125. Relatedly, in determining whether a methodology is reasonable, the Seventh Circuit has held that a school district is entitled to determine what reasonable methodology would be "most appropriate" in educating a student. *Lachman v. Illinois State Board of Education,* 852 F.2d 290, 297 (7th Cir. 1988). However, the Seventh

Circuit has not defined whether: (1) "most appropriate" means that the District may adopt a methodology in order for the District to provide an optimal education for the student (even if this means that the student would have to be placed in a more segregated placement); or rather (2) "most appropriate" means that, if the District's decision to provide more than "the floor of educational opportunity" ("FAPE") to a student would necessarily lead to a more segregated placement, the District's discretion is limited to being able to choose among reasonable options designed to provide a disabled student the floor of educational opportunity required by IDEA (FAPE).

126. A school district must take intermediate steps whenever appropriate in partially mainstreaming a student. *Oberti v. Board of Education of the Borough of Clementon School District,* 995 F.2d 1204, 19 IDELR 908 (3rd Cir. 1993). The amount of time integrated in the regular classroom depends on the unique needs and strengths of each student. *Id.*

Standards for Determining Whether the Proposed IEP is Designed to Provide Student FAPE.

127. A District must develop an IEP which is reasonably calculated to provide the student with an educational benefit. *Alex R. v. Forrestville Community Unit School District No. 221,* 375 F.3d 603, 41 IDELR 146 (7th Cir. 2004). An IEP must be reasonably calculated to produce progress, not regression or trivial academic advancement. *M.B. v. Hamilton Southeastern Schools,* 112 LRP 6281 (7th Cir. 2011). In determining whether IEP designs are reasonable, a hearing officer need not accept school district claims as true regarding the reasonableness of IEP design, but neither should the hearing officer substitute his/her judgment for that of the school officials who have designed the IEP as the hearing officer determines whether the District provided an IEP reasonably calculated to provide an educational benefit. *School District of the Wisconsin Dells v. Z.S.,* 295 F.3d 671, 37 IDELR 34 (7th Cir. 2002).

128. A student's failure to make progress does not necessarily mean that an IEP is inappropriate. *Shroll v. Board of Education of Champaign Community Unit School District No. 4,* 48 IDELR 155 (C.D. Ill. 2007).

129. In determining whether an IEP provides FAPE, the District must develop an IEP reasonably calculated to provide an educational benefit as defined by the standards of the state educational agency. 20 U.S.C.A. 1401(9); *Winkelman v. Parma City School District,* 550 U.S. 516 (2007).

130. Moreover, the IEP must comply with the requirements set forth in 20 U.S.C.A. 1414(d) in order to provide FAPE. 20 U.S.C.A. 1401(9). Section 1414(d) requires measurable goals designed to meet the child's educational needs that result from the student's disability. *Sarah D. v. Board of Education of Aptakisic-Tripp Community Consolidated School District No. 102,* 642 F.Supp.2d 804, 52 IDELR 281 (N.D. Ill. 2009). Thus, in order to provide substantive FAPE, an IEP must respond to all significant facets of a student's disability, both academic and behavioral. *Alex R., supra;*

Sarah D., supra. Students must also be prepared for a transition to adulthood and be prepared for employment and independent living. 20 U.S.C.A. 1414(d).

131. Put another way, the concept of FAPE is not limited to whether a student is succeeding academically. *Mary P. v. Illinois State Board of Education,* 919 F.Supp. 1173, 1179-1181 (N.D. Ill. 1996). Rather, the concept of FAPE must be viewed through: (1) state standards and definitions of education, *See L.I. v. Maine School Administrative District No. 55,* 480 F.3d 1, 47 IDELR 121 (1st Cir. 2007) for an extensive discussion on how state standards affect the definition of "educational performance" for purposes of federal law; and (2) the requirements that an IEP prepare a student for transition to postsecondary employment and independent living.

132. Illinois requires all school districts to teach students to manage emotions and behavior for both academic and life success. 405 ILCS 49/5, 15; IHO Ex. #3. Students must be taught: social and interaction skills; how to manage emotions and behavior; how to develop self-awareness and self-management skills; how to use social awareness and interpersonal skills to establish and maintain positive relationships; to develop skills to prevent, manage, and resolve conflicts in constructive ways; to consider ethical, safety, and societal factors in making decisions.

133. A District must address all of a student's unique social-emotional needs like low self-esteem, anxiety, lack of trust, and depression with specific goals and short term objectives/benchmarks. *Sarah D., supra; Los Angeles Unified School District,* 39 IDELR 257 (Cal. SEA 2003). A District must have goals which directly address a child's unique needs and feelings/behaviors. *Id.*

Standards for Determining Whether an IEP is Being Properly Implemented

134. Courts differ on the standard for determining whether the breach of a provision of an IEP is violation of IDEA. Some courts hold that a failure to implement the requirements of an IEP is a procedural violation of IDEA. *Edwin K. v. Jackson,* 2002 WL 1433722 at 13-14(N.D. Ill. 2002) (failure to provide social work related services minutes or implement IEP accommodations characterized as a procedural violation of IDEA). Thus, in order to find an actionable violation, the undersigned must find that the failure to implement the IEP denied the Student an educational benefit. 20 U.S.C.A. 1415(f)(E)(ii)(I-III). Other courts to address this issue have held that a failure of IEP implementation is only a violation of IDEA if it leads to a denial of FAPE (the floor of educational opportunity required by the statute). *See e.g. Van Duyn v. Baker School District 5J,* 502 F.3d 811, 819 (9th Cir. 2007). Relying upon a since rescinded regulation, the Seventh Circuit also noted in dicta that the school district must also act in good faith to achieve the goals and objectives of the student's IEP. *Alex R. v. Forrestville District No. 221,* 375 F.3d 603, 41 IDELR 146 (7th Cir. 2004).

135. Although an IEP is not governed by the law of contracts, the Seventh Circuit has instructed courts to apply the parole evidence rule to IEP disputes. *John M. v. Board of Education of Evanston Township High School District 202,* 502 F.3d 708, 715 (7th Cir. 2007)(in a stay-put proceeding, the court should determine the placement from the four corners of the document and extrinsic evidence should not be considered unless there is some vagueness or ambiguity in the IEP).

136. In implementing an IEP, the school district has the right to choose methodology, so long as the methodology chosen in reasonably calculated to achieve educational benefit as defined by the terms of the IEP. *Lachman v. Illinois State Board of Education,* 852 F.2d 290, 297 (7th Cir. 1988). Moreover, the School District personnel must be given latitude in exercising where and how to implement modifications and accommodations. *Belvidere Community Unit School District No. 100,* 108 LRP 32811 (Ill. SEA 2008).

137. Breaches in implementation of the IEP do not constitute a change of placement under IDEA. *Van Duyn,* 502 F.3d at 819.

Miscellaneous Legal Conclusions

138. In general, a settlement agreement conclusively resolves all issues fairly considered and meant to be included within the agreement's terms. *Vole, Inc. v. Georgacopolous,* 181 Ill.App.3d 1012, 1017 (1989). A mediation agreement is a settlement agreement and is binding and enforceable against the parties.

139. Federal special education law requires that a student remain in the same placement during the pendency of a due process hearing request. 20 U.S.C.A. 1415(J). The purpose of the "stay put" provision is to remove schools of the unilateral authority that the districts originally had to exclude disabled students, particularly emotionally disturbed students from school. *Kevin T. v. Elmhurst Community School District No. 205,* 34 IDELR 202, (N.D. Ill. 2001).

140. When a District does not deliver FAPE because it is constrained by stay-put, the District does not violate IDEA. *M.M. v. Special School District No. 1,* 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008).

141. Similarly, a mediation agreement is binding on the school district and parent(s) and enforceable in court. 34 CFR 300.506.

142. The District must use qualified personnel to provide counseling and social work services for Student. 34 CFR 300.34(c)(2). Qualifications are determined by state regulations and licensing procedures. 34 CFR 300.156(a,b). In Illinois, social work services can be provided by any person trained to provide counseling (including a certified counselor). 23 Ill.Admin. Code 226.800(j); 105 ILCS 5/14-1.09.2

143. Under some circumstances, courts have applied a "snapshot rule" wherein hearing officers restrict their review to the facts that the IEP Team knew or could have known at the time the proposed IEP was initially crafted. Post-IEP design evidence is only relevant under this line of cases to determine whether the original IEP was reasonably calculated to afford some educational benefit. *See e.g, Furhmann v. East Hanover Board of Education,* 992 F.2d 1031, 19 IDELR 1065 (3rd Cir. 1993)(Opinion of the Court).

144. Other judges have opined that the snapshot rule should not apply to determinations of prospective placements because the most important factor in determining a prospective placement of a child is the welfare of the child. For this purpose, post-IEP design evidence is highly relevant and the snapshot rule is inappropriate. *See e.g. Furhmann v. East Hanover Board of Education,* 992 F.2d 1031, 19 IDELR 1065 (3rd Cir. 1993) (Hutchinson, concurring and dissenting).

145. As discussed above, hearing officers in Illinois have significant abilities to obtain independent evaluations and additional evidence after a due process complaint has been filed and during a hearing. See 105 ILCS 5/14-8.02a(g-55), 23 IL ADC 226.660(b). Moreover, the School Code places a burden on all school districts in a hearing to present evidence that Student's current placement is appropriate. 105 ILCS 5/14-8.02a(g-55). This suggests that Illinois state law allows for or mandates a proceeding which designs an appropriate prospective placement for the child as envisioned by Judge Hutchinson's dissent. Illinois is, under the principles of cooperative federalism, allowed to design education laws to protect a disabled child's welfare to a greater extent than IDEA.

146. Finally, a hearing officer is required to determine a remedy in a given case based upon equitable factors including the conduct of the parties prior to and during the due process hearing proceedings. *Branham v. the Government of the District of Columbia,* 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005); *Reid v. District of Columbia,* 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). The doctrines of waiver and estoppel are clearly equitable concepts which courts and hearing officers can use to evaluate the conduct of parties. *National R.R. Corp. v. Morgan,* 506 U.S. 101, 121 (2002). Such doctrines can clearly affect the rights and defenses of parties and the relief to be provided. *Id.*

147. Compensatory education is an equitable remedy hearing officers can award to parents and students. The purpose of compensatory education is to replace lost educational opportunity. *Board of Education of Oak Park, District 200 v. Illinois State Board of Education,* 79 F.3d 654 (7th Cir. 1996). Compensatory education, if awarded, should compensate Student for the District's failure to provide FAPE. *Petrina W. v. Chicago Public School District 299,* 53 IDELR 299 (N.D. Ill. 2009); *See also Branham v. the Government of the District of Columbia,* 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005); *Reid v. District of Columbia,* 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

148. An order for a private service provider to provide compensatory education services is proper if such an award is more likely to compensate a student for a district's

failure to provide FAPE. *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (11th Cir. 2008).

Application of Law to Fact

149. The undersigned finds that the parties waived any right to any snapshot rule for evaluations or proposed IEPs which were considered by the IEP Team prior to hearing.

150. The issues discussed below were set forth in the complaint despite changes in placement after the complaint was filed.

151. The undersigned finds that:

a. Any claim arising from inappropriate evaluations prior to February, 2010 is barred by the mediation agreement which resolved Parent's concerns about evaluations prior to February, 2010.

b. The [redacted] psychological and social/emotional evaluation was comprehensive in that in complied with all pertinent regulations. [redacted] observed Student in a 1:1 classroom setting which was for Student, part of his regular classroom setting. Parent was unable to demonstrate that [redacted] failed to use any of the instruments in an inappropriate manner by relying on Student's female teachers.

c. Any other flaw in the evaluation other than for purposes of the social-emotional component of the [redacted] evaluation constitutes a harmless error as Student is clearly receiving FAPE in all other aspects of his education.

d. The [redacted] recommendation for placement was reasonable and did not violate IDEA in any way.

152. The undersigned finds that:

a. The immersion therapeutic programs of [redacted] or [redacted] are matters of methodology to address Student's social-emotional needs. The methodological choice is a reasonable one as discussed earlier in this decision. As the immersion therapeutic program is a matter of reasonable methodology, the undersigned must defer to the reasonable methodological choices of the District.

b. The District considered and attempted less restrictive options[4] as demonstrated by attempting the VM BIP and utilizing a 1:1 self contained classroom with partial mainstreaming. The undersigned finds that these less restrictive options did not provide Student FAPE in the area of social-emotional progress.

c. An immersion therapeutic placement cannot be reasonably replicated in the District building, and cannot be replicated in a general education classroom because of the nature of the rapid interventions and the personnel needed to accomplish the immersion therapy.

d. A segregated therapeutic day school placement is calculated to be superior to the current placements based upon the failure of the current placement to provide Student with FAPE.

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[4] Contrary to Parent's argument, the District does not need to attempt every conceivable intervention before attempting a more restrictive placement. Rather, the District can reasonably determine what methodologies are likely to provide Student with FAPE as discussed in the conclusions of law, above.

e. Student cannot be satisfactorily educated in a general classroom or a 1:1 classroom in the area of social-emotional development, and that immersion therapy approach of [redacted] or [redacted] is a reasonable methodological choice to provide Student with FAPE in the area of social-emotional development.

f. Student is disruptive to his classmates and harms their learning experience on a regular basis.

g. The undersigned therefore finds that a therapeutic day school placement (like those described at [redacted] and [redacted]) is the least restrictive way to provide Student with a satisfactory education using the District's preferred reasonable methodology.

153. The undersigned finds that:

a. The District properly implemented the VM BIP (with one exception);

b. The District used a reasonable methodology to provide Student with social skills training as discussed above.

c. The District used a reasonable methodology to provide Student with counseling. Moreover, the District used a qualified person in [redacted] to provide the counseling in question.

d. The District used behavioral contracts and a points system/modified Boystown program as envisioned by the VM BIP.

e. The District attempted to provide therapy through a social worker but Student refused. The District was unable to implement the therapy through no fault of its own.

f. The District had no authority to unilaterally change Student's schedule as it was bound by a mediation agreement and by the stay-put. This can therefore not be a violation of implementation of the IEP.

g. The District trained its teachers to implement the VM BIP.

h. The District did not communicate with Student's Parent on a regular basis. However, for the reasons set forth above, the undersigned finds that communication with Parent would have been difficult and ineffective. Therefore, the undersigned finds this to be a harmless procedural error.

i. The 1:1 placement in the rooms toured by the undersigned was not a violation of the implementation of the IEP. Moreover, even if there were some violation of implementation, the mediation agreement and stay-put prevented the District from changing the situation, and thus any claim against the District on this basis is barred.

154. The undersigned finds that:

a. The 1:1 placement was not a design flaw of the IEP, and in any regard, the District was bound to and/or entitled to implement the 1:1 placement because of the mediation agreement and the stay-put. The District complied with the continuum of placements by creating the 1:1 self contained classroom. That other classrooms in other districts might be more appropriate is a matter of methodology within the reasonable discretion of the District in determining how to allocate scarce resources. Moreover, the issue in this District was not lack of placements but lack of other students with similar disabilities.

b. The lack of therapy was a matter of methodology. The District's choice not to provide therapy was reasonable because Student turned down therapeutic and counseling services on a regular basis making therapy largely useless.

c. The District did fail to propose or implement proper goals in relation to Student's disability in the areas of: self esteem, anxiety, sadness, and trust with authority figures.

d. The District does have an appropriate goal in regard to interacting with peers.

e. Except for the failure to properly set out goals, any failure to provide FAPE arose because the District could not implement it preferred methodology because of the mediation agreement and the stay-put. The District should not be held liable because of these two circumstances.

155. The undersigned finds that it is more likely than not that with proper goals, Student would have made more social-emotional progress and Student's appropriate placement and services could have been determined more quickly. Specifically, forming proper goals and measuring benchmarks could have given the District much more information as to Student social-emotional needs and growth. With this greater information, the District could have provided Student much more of an educational benefit. The undersigned finds that 104 weekly sessions of 60 minutes each by Student's social worker, [redacted] will be likely to compensate Student for the failure to properly design social-emotional goals.

156. The Parent has met her burden of proof on the issue of failure to design the IEP with proper goals as required by the law. The District has not met its burden of production on the issue of IEP design in regard to having appropriate goals in the proposed and actual IEP(s).

157. The Parent has not met her burden on all other issues in this hearing. The District has met its burden as to all other issues in this hearing.

VI. Order

158. For this school year (from March, 2012 until May, 2012) the District shall place Student in a therapeutic day school placement. The placement may be in [redacted] or [redacted] If neither of those placements are available, the District shall place Student in a program with similar characteristics and a similar therapeutic philosophy to [redacted] and [redacted]

159. The District may maintain the therapeutic day school placement for the next school year as well (the 2012-2013 school year). Student may return to the District's main building for part or full days if the IEP Team and the administration at the Therapeutic Day School agree.

160. The District shall begin efforts to place Student in a therapeutic day school placement as soon as practicable and, at the lastest, within 10 days of receiving this order.

161. Within thirty days of Student being placed in a therapeutic day school, the IEP Team will meet along with members of the therapeutic day school staff. The IEP Team shall draft goals and short term objectives and bench marks designed to address Student's

needs in self esteem, anxiety, trust with authority figures, and sadness/depression. [redacted] shall also take part in the meeting and the District shall pay [redacted] his regular hourly rate to attend this IEP meeting. [redacted] shall attend so as to coordinate his compensatory education services with the social work and therapeutic services with the revised IEP at the revised placement. The IEP Team shall also revise Student's current IEP in any other way necessary to accommodate the therapeutic day school placement.

162. Within thirty days of receipt of this order, the District shall coordinate with [redacted] to compensate [redacted] for 104 weekly one hour sessions of social work services awarded to Student as compensatory education. The District shall compensate [redacted] for the social work services in a way which is acceptable to [redacted] except that [redacted] shall not be paid more than $150.00 per hour for his social work services to Student.

163. The District shall provide proof of compliance with this order to the Illinois State Board of Education, Compliance Division, by April 30, 2012.

140. All of Student and Parent's other requests are denied. The District need take no further action in regard to Student and Parent's other requests made in the due process complaint.

VII. Right to Request Clarification

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

VII. Finality of Decision

165. This decision shall be binding upon all parties.

IX. Right to File Civil Action

166. Any party to this hearing aggrieved by the final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS 5/14-8.02a(I) that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.

/S Joseph P. Selbka

Joseph P. Selbka Impartial Due Process Hearing Officer
Date: February 27, 2012

Joseph P. Selbka
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Chicago, IL 60604
312-788-3310
Fax 312-788-3311
jselbka@sbcglobal.net

CERTIFICATE OF SERVICE

TO: [redacted]
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001

[redacted]

[redacted]

[redacted]

The above stated parties have been served a copy of the HEARING ORDER AND DECISION Via certified mail, return receipt requested.

/S Joseph P. Selbka
Joseph P. Selbka
The Hearing Officer

2/27/2012
Date