

Case Number: 2010-0317

Hearing Officer: Harry A. Blackburn

2010-0317

JUN 8 6 2010

SPECIAL EDUCATION SERVICES

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

Impartial Due Process Hearing Decision Cover Page

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

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

Parent Name [Redacted]
Address [Redacted]
Represented by [Redacted]

Date and Timelines

Date of Written Request: 03/05/2010
Date of Pre-hearing Conf: 04/22/2010

Dates of Hearing: May 3, 4, 06, 07 and June 7 and June 16, 2010 (telephone call only)
Date of Decision: June 28, 2010

Summary of Decision

The [Redacted] Failed to provide the student a free appropriate public education (FAPE)—District Ordered to: 1) provide placement in a public school setting with sufficient support and structure for the student, or in the alternative, direct placement at a therapeutic day school with particular attention paid to the enumerated items Ordered; 2) pay for independent educational evaluations in areas of identified need as specified in the Order; 3) provide related services in sufficient intensity to allow student access to educational opportunity as specified in the Order; 4) provide extended school year services (ESY) for at least six weeks; 5) provide compensatory education services for the loss of FAPE during the past two years; 6) convene an IEP meeting at its earliest possible convenience, but no later than September 17, 2010 to consider the results of all evaluations and to plan and implement the requirements provided for and consistent with this Order

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) ISBE CASE NO. 2010-0317
)
) Harry A. Blackburn
) Impartial Due Process
) Hearing Officer

Decision and Order

Jurisdiction and Procedural Matters

This matter is before the undersigned-hearing officer for a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA 2004"), 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)-(D), 34 CFR 300.511(c), Section 14-8.02(b) of the Illinois School Code [105 ILCS 5/14-8.02c(b)], and 23 Illinois Administrative Code 226.630(a).

The parent, through her attorney(s), filed a due process complaint on March 5, 2010. The undersigned was appointed as hearing officer by the Illinois State Board of Education ("ISBE") on March 9, 2010, via letter, which the hearing officer received on March 11, 2010. The School District ("District") filed its response to the due process complaint on March 15, 2010. The hearing officer subsequently contacted the parties and arranged for the convening of a status teleconference call for the purpose of discussing resolution or mediation efforts and establishing prehearing conference and hearing date(s). The parties and hearing officer participated in a telephone Pre-Hearing Conference held on March 26, 2010. The Hearing took place over a five day span of time, beginning on May 3, 2010 at [REDACTED] (the school where the student began) and continuing on May 4, 6, 7 at [REDACTED] where the student is currently attending and concluding on June 7, 2010 at the administrative offices of the District. The Hearing was not officially closed until June 16 to allow for the parties to submit case summaries and supporting case law. A telephone conference was convened on June 16 to verify the hearing officer's receipt of the parties' respective submissions and to allow for questions by the Hearing Officer. There being no questions and with all information verified received, the Hearing was officially closed.

Issues Presented and Remedies Sought

MATTERS IN DISPUTE

- a) The [REDACTED] (hereafter "District") did not provide the student a free appropriate public education (FAPE) from September 5, 2008 to date, based on:
 1. Failure to conduct timely and adequate assessments of all areas of potential disabilities, with the result that the student's educational program for this

period did not address, or addressed inadequately, emotional/behavioral difficulties;

- ii. Failure to conduct a full individual evaluation and make an eligibility determination on a timely basis in violation of specific "child find" provisions, given knowledge of the student's attendance problems and his severe disturbances and hospitalizations;
 - iii. Failure to provide essential related services in the areas of psychological nursing and social work services with sufficient intensity and duration;
 - iv. Failure to develop an adequate and effective functional behavior analysis and behavior intervention plan for the student;
 - v. Failure to develop appropriate modifications and accommodations to address the student's multiple medical needs;
 - vi. Failure to provide homebound services requested by the student's physician;
 - vii. Failure to offer a placement with sufficient structure and support to manage the student's emotional disturbances.
- b) The parent contends that the student's IEPs for the 2008-09 and 2009-10 school years:

- i. Include statements of present levels of performance that do not accurately and objectively state the student's skills and functional levels;
- ii. Provide goal statements that are vague and not measurable, and where the goals set an increase in skill level, the goal is not commensurate with the student's potential for development;
- iii. Fail to address attention and organizational limitations of the student;
- iv. Fail to identify what methodology will be used to remediate the student's reading and math skills;
- v. Provide for an inadequate level of related services, specifically:
 - 1. Speech and language services are authorized at 30 minutes per week, but should have been at least 60 minutes per week for a child and additional consultative time with staff for a child with significantly depressed receptive language skills and impaired swallowing function;
 - 2. Fail to offer direct psychological services and social work services, despite evidence of poor social interaction by the student;
- vi. Fails to offer appropriate occupational therapy services to address attention, organizational and executive functioning difficulties;

- vii. Fails to provide support for use of assistive technology;
 - viii. Fails to offer extended school year services.
- c) The following procedural violations have denied the student a free and appropriate education:
- i. Failure to secure and implement the student's IEP from the school district of residence in the 2007-08 school year;
 - ii. Failure to provide accurate and timely progress reports during the 2008-09 school year;
 - iii. Failure to provide school records within 15 business days of receipt of a written request;
 - iv. Failure to provide written denial of requests for homebound services.

Relief being sought by Parents/Student:

1. Order placement at a facility with sufficient support and structure for the student, or in the alternative, direct placement at a therapeutic day school;
 - i. small class size – no more than 10 students;
 - ii. daily access to a social worker on an as needed basis;
 - iii. daily access to a school nurse on an as needed basis;
 - iv. a physical facility that meets the medical conditions imposed by the student's doctors with no stair climbing;
2. Direct that the District pay for independent educational evaluations in areas identified need where the District has conducted an inadequate assessment or failed to conduct assessments as indicated by the student's circumstances;
 - i. assistive technology;
 - ii. speech language to assess expressive language skills;
 - iii. occupational therapy to assess organization and attention deficits;
 - iv. psychological evaluation to determine;
 - a) academic skills in areas of phonological and decoding skills;
 - b) Conors, Vineland, and/or Behavioral Assessment for Children ("BASC") to assess functional/developmental delays;

- c) full cognitive testing, such as the Wechsler Intelligence Scale for Children (WISC IV) to assess processing speed.
- 3. Direct the District to offer related services in sufficient intensity to allow student access to educational opportunity, including;
 - a. Social work services and/or psychological counseling at least 60 minutes per week;
 - b. Nursing services in sufficient intensity to oversee administration of medication for the student;
 - c. Psychological counseling at least one hour per week;
 - d. Speech language therapy at least 60 minutes per week and additional consultation time with classroom staff;
 - e. Direct occupational therapy services that may be recommended by an independent evaluator.
 - f. Direct assistive technology services to be provided as may be recommended by an independent evaluator;
- 4. Direct the District to offer extended school year services for at least six weeks.
- 5. Direct the District to provide compensatory education services for loss of FAPE during the past two years, including;
 - a. Additional social work and/or psychological counseling services for 30 minutes per week for two years;
 - b. 200 hours tutoring by a certified special education teacher, by a provider, and at a location selected by the parent;
 - c. Such additional services as may be recommended by any ordered IEE's;
- 6. Order such additional relief as may be appropriate based on evidence introduced at hearing;
- 7. Direct the District to convene an IEP meeting that will consider results of evaluations and implement the foregoing relief.

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

The District maintains that it has provided the student with FAPE. The District describes the student as having asthma and per doctor's order is not to use stairs and has a swallowing disorder that requires him to only drink liquids prepared with a thickening agent added to water that makes it easier for the student to ingest. Additionally, the

District admits, the student has a mental health history, including a diagnosis of bipolar disorder. The District maintains that the student's challenges have not prevented him from attending public schools. The student was allegedly enrolled in one school during the 2009-09 school year and a different school in the fall of 2009-10 school year. The District states that the parent has withheld the student from school during the 2009-10 school year due to a concern that he would be required to use stairs, despite the school's administrative indication that they would make accommodations so that the student would not have to use the stairs to travel to class. Despite this assurance, the District states that the parent has elected to withhold him from attending school. An IEP was drafted in February 2010 and the student was placed at another school with an elevator that would not present any issues with stairs. The District concludes that it has provided the student with FAPE in the least restrictive environment, and requests that the hearing officer find no denial of FAPE and deny all relief being requested by the parents.

FINDINGS OF FACT

1. The student has recently turned 10 years of age, and his current placement is in a regular 4th Grade classroom at a regular District school ([REDACTED]) with special education related services provided.
2. The District's Psychologist, [REDACTED] conducted a Psychological Special Evaluation on 1/20/2010. ([REDACTED] 136 & SD 53) The Psychologist described the student's academic history as follows:
 - a). The student received Early Intervention (EI) speech therapy services through [REDACTED] from December of 2002 through June 2003. He received speech therapy once per week attending 14 of 21 scheduled sessions. Speech therapy was discontinued in June 2003 when the student turned age 3 and no longer eligible for EI services.
 - b). School records reveal attendance at multiple schools and a long history of high absenteeism.
 - c). The student was first enrolled at [REDACTED] public school during the 2003-04 school year in a pre-kindergarten program. He received speech-language impaired services and nursing services related to a diagnosis of asthma.
 - d). Records suggest the student attended [REDACTED] public schools during the 2006-07 school year for 1st grade. The student began attending [REDACTED] public school on 11/15/06 and records indicate 108 days of attendance and 15 absences during first grade. He received a final grade of "D" for reading and a final grade of "B" for mathematics.
 - e). The student attended 2nd grade during the 2007-08 school year. Records show he attended [REDACTED] public school up until 10/30/07 with 14 days of attendance and 5 absences. Records show the student moved to [REDACTED] Illinois where he attended the [REDACTED] in [REDACTED] in November 2007. He received speech-language impaired services for 60 minutes

per week ("mpw"). Records further indicate he attended [REDACTED] in [REDACTED] in April of 2008.

f). The student was in 3rd grade during the 2008-09 school year and enrolled at [REDACTED] in the [REDACTED] schools. Records show 137 days of attendance and 33 absences during third grade. The cumulative record card indicates a final grade of "C" for reading and a final grade of "B" for mathematics. A full and individual evaluation (FIE) completed at [REDACTED] school during 3rd grade found the student eligible for special education services to address both a learning disability and other health impairment. (PD 137) The student's current IEP indicates his eligibility to receive 450 mpw of special education services to address his learning disability and direct services from the school social worker and speech pathologist as well as consultative services from the school nurse.

g). The student transferred to [REDACTED] public school on 9/22/09 for fourth grade. He was not physically in attendance since his enrollment. Records further indicate 10 days of attendance earned via a District Intermittent Home and Hospital Program (IHHP).

h). The student demonstrates academic lags in reading and mathematics. Overall the student's academic skills are developed similarly to the typical first grader at the end of the school year. In terms of basic reading skills, the student identifies all of the letters and knows all of the letter-sound relationships. He reads most basic sight words, but has difficulty using phonetic rules to decode unfamiliar words. He seemed to lack knowledge of phonetic rules related to silent letters, long vowel sounds, inflected endings, unpredictable patterns, diphthongs and digraphs. The student tends to default to a 'whole word' or sight approach to reading unfamiliar words. He often substitutes words with similar visual configurations. The student is able to spell many basic sight words but at times confuses the sequence of letters when spelling. He has difficulty encoding consonant digraphs.

i). In terms of reading comprehension skills, the student was able to match picture words and read simple sentences to follow directions. He had difficulty reading short passages. He is not a fluent or accurate reader. He reads many miscues and does not use context clues to self correct miscues. The student reads some reversals of common letters. His comprehension improved when passages were read to him.

j). In terms of mathematics, the student uses his fingers or draws tally marks to complete basic addition and subtraction computations for facts to ten. He can complete some double digit addition and subtraction computations that do not require regrouping. He has not been exposed to the concept of multiplication. In terms of math applications, the student can read a calendar and can order two digit numbers and can read three digit numbers. He does not yet tell time to the hour using an analog clock. His measurement skills are weak. (Kaufman Test of Educational Achievement II [KTEAII]). (PD 137-138)

k). Parent interview expressed concerns for child's health and long history of medical concerns. Mother expressed concerns regarding [REDACTED] location because of her child's health concerns and inability to climb stairs. Mother explained that her child needs an accessible school building related to his health concerns and significant psychiatric history. Significant Additional Data listed:

- i. Student has difficulty swallowing thin liquids; requires a modified diet along with therapeutic swallowing precautions;
- ii. Student has history of two psychiatric hospitalizations [REDACTED] 2005 and [REDACTED] /2008);
- iii. Student self administers an Albuterol inhaler at school;
- iv. A physician's report dated 9/24/09 from [REDACTED] indicates the student has major health problems to include: mild persistent asthma, attention deficit hyperactivity disorder, bipolar disorder, learning disorder, and speech delay;
- v. [REDACTED] the student's allergist/immunologist states that the student "cannot climb stairs—can cause asthma exacerbation." (PD 138)

l). Previous Evaluation Data: The District 2/25/09 Psychological Evaluation found the student demonstrated low average range cognitive ability as per the results of the Wechsler Intelligence Scale for Children – Fourth Edition with a full scale intelligence quotient of 8:1. The student was further found to demonstrate academic skill development commensurate with measured potential. Results of the Kaufman Test of Educational Achievement II found the student's academic skills to fall within the low average range.

m). [REDACTED] interpretation of the Psychological data: Assessment took place in a lower level classroom at [REDACTED] public school because the student was unable to climb the stairs to the main level of the school building; the student coughed periodically and expressed he was having difficulty swallowing especially after yawning; the student established rapport easily and maintained appropriate eye contact; the psychologist found the student to be cooperative and motivated throughout the evaluation.

n). During the formal testing portion of the evaluation the student demonstrated a high degree of physical activity, rocking in his chair as he completed tasks. At times he stood as he responded and his body was in "constant" motion. The psychologist noted the student requiring frequent redirection to task, but was very compliant with adult redirection. The student's test behavior was found consistent with his medical diagnosis of ADHD.

o). A learning environment screening was unable to be completed for the student because he is not able to climb the stairs to the main level of the school building where the classrooms are located. Therefore he was not observed in the classroom setting.

p). Current cognitive assessment results suggest the student demonstrates overall ability which falls within the average range as per the Reynolds Intellectual Assessment Scales (RIAS) and is ranked at the 27th percentile when compared to other children his same age. While the student's verbal and nonverbal abilities both fall within the average range, his verbal ability is less developed.

q). Within the verbal domain the student struggled with word knowledge/usage skills. His vocabulary and fund of general information emerge as somewhat underdeveloped. The student, at times, experienced difficulty with word retrieval; his short-term auditory memory skills are average; he is able to encode, briefly store, and then recall auditory information an age appropriate degree.

r). Within the nonverbal domain, the student showed good attention to visual detail. He had difficulty with a short-term visual memory task.

s). The psychologist noted difficulty to assess correlation with the student's absenteeism and affect on academic skills. She noted that "it appears that the student had a lack of appropriate instruction in reading and mathematics." "The District records document only 269 days of attendance over the past four years. Complete attendance data for the period from November 2007 – June 2008 when the student attended other Illinois schools is not available. However, even if the student attended school every day during that period, a lack of appropriate instruction is certainly suggested." (emphasis added) [REDACTED] 140)

t). In terms of social emotional function, the student demonstrated appropriate behavior during the assessment process, with some characteristics of ADHD observed, but behavior was "easily" re-directed. Although the student's mother reports a history of significant emotional concerns and medical records note a diagnosis of bipolar disorder, school records do not document a significant history of emotional concerns. The student's social-emotional functioning in the school setting was not evaluated as he has not been attendance during the 2009-2010 school year.

u). The student is independent for toileting and dressing but needs some support/supervision related to his medical conditions.

3. The District's Psychologist, [REDACTED], conducted a psychological evaluation on 2/25/09. (PD142 & SD 167) This date appears to raise the issue of timeliness of conducting the evaluation as per the 1/29/10 IEP and the reference date of "Most Recent Eligibility IEP 11/15/06) (PD 82) [REDACTED] in her report, summarized her findings as follows: "This is an initial evaluation of an 8 year, 8 month old student who currently receives speech/language services. The referral was initiated due to child receiving a psychiatric diagnosis and exhibiting some maladaptive behavior at school as well as having a myriad of health issues. Current cognitive measures reflect low average abilities on the WISC IV, with verbal measures stronger than performance skills Achievements reflect delays for language arts and math involving word problems." (PD 144) The Psychologist drew the following conclusions: "1. The Child is eligible for resource services to address the amelioration/remediation of processing deficits; 2) Staff may wish to develop a behavior plan to address maladaptive behavior; 3) Staff may

wish to consider services to address emotional/behavior issues, however, such issues do not appear significant per BASC II findings.” (PD 144)

4. The Psychological Evaluation dated 2/25/09 (SD 167) did not contain the following:
 - a. no writing assessment despite teacher reports indicating need;
 - b. no Assistive Technology evaluation recommendation consistent with the student’s identified needs;
 - c. no rating scales to measure the student’s attention span;
 - d. BASC scores, relied upon by the Psychologist but administered by the classroom teacher were not given, yet it is in the report that the results say “normal”. This is not consistent with teacher reports, where teacher indicates multiple domains in “at risk” category. (protocol at PD 584-9)
5. Speech evaluations conducted throughout the student’s academic history reflect inconsistencies.
 1. [REDACTED] in its 2008 evaluation (PD 156-9) found mild-moderate expressive language impairment in the following areas:
 - a. Articulation problems (PD 159)
 - b. Language organization problems (PD 158-9)
 - c. Provided 60 mpw direct speech language therapy (PD 125)
 2. The District’s Speech Language evaluation dated 1/9/09 (PD 149-50)
 - a. reports “zero” (emphasis added) articulation problems,
 - b. provided “only” (emphasis added) 15 minutes per month (“mpm”) consultative services,
 - c. provided no assessment of written expression or phonological skills.
 3. A speech report dated 1/19/09 from the [REDACTED] found the student to possess a “moderately impaired swallowing function.” (PD 283)
 4. A 2010 District Speech Language evaluation (PD 145-7) found:
 - a. articulation errors described as “mild” despite a standard score of 40 which is 3 standard deviations below the mean;
 - b. weakness in phonology;
 - c.

- d. IEP provides for:
 - i. 30 mpw direct speech;
 - ii. 15 mpm consultative service; PD 028
 - iii. while next year PD 145-6 found 40 SS – commensurate with a severe-profound level;
- e. no assessment of written language;
- f. no assessment of phonological skills;

6. No assessment by an occupational therapist appears to have been conducted despite psychological reports of weakness in writing and problems in organization and attention (PD 142)

7. No assessment for assistive technology has been conducted by the District, despite a showing of significant academic delays and reports of weakness in writing as evidenced by both the 2/25/09 Psychological Report and the Special Psychological Reports. (PD 142-3 & SD 167 and PD 136-137 & SD SD 53)

8. The District has not undertaken a full and complete evaluation of the student and has not made an “eligibility determination” on a timely basis given its knowledge of the student’s attendance problems and his severe emotional disturbances and hospitalizations.

- a. A domain meeting held on 9/25/09 at [REDACTED] (PD 115-117)
- b. An IEP meeting to review evaluations was not convened until 4/2/09; (PD 52)
- c. District psychological evaluations conducted on behalf of the student omitted the following assessments:
 - i. academic skills in areas of phonological and decoding skills – The District’s psychologist report of 1/20/10 (PD 136) states that the student. “has difficulty using phonetic rules to decode unfamiliar works. He seemed to lack knowledge of phonetic rules...”. (PD 137)
 - ii. the lack of use of tests such as, Conors, Vineland, and/or BASC to assess functional/developmental delays;
 - iii. the lack of full cognitive testing, such as the WISC IV to assess processing speed;
 - iv. the absence of a written expression assessment, KTEA II, due to “time constraints,” according to testimony given by the District’s school psychologist [REDACTED]

9. The District has not provided related services in the areas of psychological, nursing and social work services with sufficient intensity and duration:

- i. No psychological services appear to be offered in any of the District's proposed IEP's originating at [REDACTED] in 2008, [REDACTED] in 2009 and [REDACTED] in 2009-10;
- ii. Social work services were not offered in the 2008-9 school year until April 9, 2009. (PD 052, 067) In fact, there appears that before that time, no IEP was in effect. From April to June 2009, social work services were offered at 15 mpw. (PD 067) The current IEP, 2/24/2010, offers no direct social work services, only 30 minutes per month "(mpm)" consultative service to general education and special education teachers. (PD 028) The student's treating psychiatrist, [REDACTED] recommended regular support and access to a social worker and or psychologist. Testimony provided at the hearing by therapists at [REDACTED] School, [REDACTED] and [REDACTED] also recommended regular support from a counselor at school.
- iii. Three school nurses gave testimony at the hearing: [REDACTED] and [REDACTED]. All three testified to having minimal contact with the student. [REDACTED] testified having the most familiarity, but only on a consultative basis. It was the consensus that the School Nurse was the pivotal contact person when it came to implementing the Emergency Asthma Plan developed for the student. All agreed the student's medical concerns could be addressed in the regular school setting. [REDACTED] admitted that no other back up plan should a nurse was in place other than calling "911" should he have a medical problem on a day when a school nurse is not assigned to the school. [REDACTED] recommended consultative nursing services "only" (emphasis added) for the student. (SD 62)

10. The District has not undertaken the development of an adequate functional behavior analysis and behavior intervention plan ("FBA/BIP) for the student in a timely fashion:

- i. No FBA/BIP was listed in the previously developed 504 Plan of 11/17/08;
- ii. A FBA/BIP was provided for in April 2, 2009 IEP however, the record lacks any evidence of anecdotal or other outcome measures called for in the BIP (PD 077)

[REDACTED], the student's treating psychiatrist, testified on day 5 of the hearing that lack of behavior outbursts at school in the past two months is not an assurance that behavioral problems have ended, especially in light of the student's diagnosis of bi-polar disorder which carries a long term risk of mood dysregulation

11. The District was slow in developing appropriate modifications and accommodations to address the student's multiple medical needs. The Asthma action

plan incorporated into the 11/17/08 504 Plan developed while student attending [REDACTED] elementary school (PD 102, at 108-112 & SD 143) was created after an emergency arose and the student was taken by ambulance to hospital from school. This was supported by the testimony of [REDACTED] Principal on day 1 of the hearing and the Parent on day 5 of the hearing. The Asthma action plan was left off of the 2/17/10 IEP developed at [REDACTED] school. (PD 013 & SD 41) Modifications/accommodations for swallowing disorder were also left off IEP developed at [REDACTED] School. (PD 013)

12. The District delayed providing homebound services as requested by the student's physician, [REDACTED] of [REDACTED]. No evidence was provided by the District showing that homebound services were provided the student. The administrator of Home/Hospital service [REDACTED], testified on day 4 of the hearing and could provide no additional clarifying information. She stated she could not print out data in the office computer. The Parent testified that homebound services were offered one day prior to Christmas/Winter break, and that authority had expired after the break. [REDACTED] stated she did not recall seeing the Medical Referral For Adjustment of Education Program Forms in the Student's file which are the forms utilized by the District to initiate home/hospital services. (PD 189 & 199)

13. The District has not offered a placement with sufficient structure and support to manage the student's emotional disturbances:

- i. All IEP's developed for the Student by the District provide for the majority of his time in a regular education classroom which puts into question whether sufficient structure and individualized attention is provided to address the student's medical and behavioral problems. The District developed IEP of 4/2/09 states the student "is able to work with one other child in a small group setting." (PD 066) [REDACTED] testified that based on her experience at [REDACTED], she believed the student required a small, structured classroom.
- ii. The Parent enrolled her son at [REDACTED] School in September 2009 and stayed enrolled through April, 2010 although the parent never sent her son to school due to the fact that the school did not have elevators and her child could not climb stairs to attend classes that were not on the main floor. Wentworth staff obtained the student's case file on the day parent sought to enroll him. School staff did not offer a classroom at his grade level in a facility that was consistent with his medical restrictions. Testimony of the parent and the Principal of [REDACTED] school verified that the student was offered placement in a third grade class room although he was a 4th grade student.
- iii. The student was placed at [REDACTED] after a special evaluation was conducted by the District's school psychologist and an IEP team convened. The Principal declined to accept the student at the initial referral because the IEP lacked information regarding the asthma action plan and swallowing disorder. The IEP team met at resolution session and agreed not to accept the student for enrollment, pending more information on medical needs. The student was enrolled with the addition of the elements of the 4/2/09 IEP from

██████████ School that had been omitted from the ██████████ IEP of 2/24/10 (compare amended IEP (PD 1-12) with ██████████ IEP of 4/2/09 at PD 58-63 and PD 77-78). The case manager, ██████████ at ██████████ testified on day 2 of the hearing that she could not state that the current placement was appropriate for the student. ██████████ also testified that she was his special education teacher and although the student's IEP calls for 200 mpw of support from a special education teacher (PD 28) (half in resource room and half in regular education classroom) she admits that she had not been providing special education instruction because of a schedule conflict.

14. The student's IEP's for the 2008-9 and 2009-10 school years:
- i. Included statements of present levels of performance that do not accurately and objectively state the student's skills and functional levels;
 - (a) Reading goal in 4/2/09 IEP states that the student has difficulty decoding due to his weaknesses in visual scanning. (PD 064) Visual scanning is noted as a weakness in the psychological report at (PD 143), but no objective data reported.
 - (b) Reading goal in 2/24/10 IEP (PD 024) states that the student "knows all the letter sound relationships." The District's psychologist report of 1/20/10 (PD 136) repeats the phrase quoted above, and also states that the student "has difficulty using phonetic rules to decode unfamiliar works. He seemed to lack knowledge of phonetic rules...". (PD 137).
 - ii. Provides goal statements that are vague and not measurable, and where the goals set an increase in skill level, the goal is not commensurate with the student's potential for development. Reading goals for 4/2/09 IEP (PD 064) and 2/24/10 IEP (PD 024) do not reference objective reading levels that can be compared to the student's present level of performance;
 - iii. Fail to address attention and organizational limitations of the student. The modifications/accommodations do not reference monitoring, pre-teaching, chunking, and other strategies for monitoring and improving functional performance in the classroom that may be affected by attention and organizational deficits;
 - iv. Fail to identify what methodology will be used to remediate student's reading and math skills. None are noted in the respective IEP's;
 - v. Provides for an inadequate level of related services in Speech language; services are authorized at 30 minutes per week, but should be at least 60 minutes per week and additional consultative time with staff for a child with significantly depressed receptive language skills and impaired swallowing function;
 - (a) SD 54 created an IEP with 60 mpw of direct speech services in 2007-8 school year (PD 125& SD 99). based on findings that the student

possesses "moderate deficits with his language organization, which includes auditory comprehension, following auditory directions, and verbal problem solving." (PD 159)

(b) Despite documentation of a swallowing disorder over the last two years, no remedial support from a speech pathologist was provided other than "consultative." [REDACTED], a speech pathologist working at [REDACTED] testified that school speech pathologist has a role in remediating swallow disorders. [REDACTED] speech/pathologist at [REDACTED], admitted in her testimony that such a remedial role for school speech pathologist was appropriate.

vi. Fails to offer direct psychological and social work services, despite evidence of poor social interaction by the student. Two staff members of [REDACTED] and [REDACTED] testified regarding the need for social work and/or psychological support.

vii. Fails to offer appropriate occupational therapy ("OT") services to address attention, organizational and executive functioning difficulties. No OT services have been offered. Additionally, the student's teacher reports of weakness in writing support that the student needs an OT assessment to rule out whether he has mechanical difficulties in writing.

viii Fails to provide support for use of assistive technology ("AT"). No AT services were offered. Testimony provided by the various case managers at [REDACTED] could not recall any discussion concerning an AT need at respective IEP meetings.

ix. Fails to offer extended school year ("ESY") services. No ESY services have been offered. The student's case managers testified that no evidence of regression/recoupment problems were apparent, which, standing alone, should not be sufficient to rule out ESY under any circumstances of this case; (January 3, 2005 memo from [REDACTED] [REDACTED]s on the subject of Extended School Year). The memo lists other factors, which would apply to the student, including "behavioral need, particularly the need for highly structure programming to maintain behavioral controls established during the previous school year; areas of learning crucial to student's attainment of self-sufficiency and independence".

15. The District's shortcomings in following procedural safeguards have given rise to the denial of the student's right to a free and appropriate education:

i. The District did not secure and implement the student's IEP from the previous school district of residence in the 2007-8 school year. [REDACTED] case manager, [REDACTED] on day 1 of the hearing, testified that she could not recall when the [REDACTED] IEP (PD 118) was received and whether it was reviewed and implemented. Progress notes of related service

provider show "no IEP" in September, 2008. (PD 551) The District did not develop an IEP until 4/2/09. (PD 052)

ii. Failure by the District to provide accurate and timely progress reports during the 2008-9 school year. The Social Worker's quarterly progress report of April, 2009 is the only progress report provided through Pre-Hearing and Hearing Disclosure and incorporated into the Parent's evidence document binder. (PD 172)

iii. Failure by the District to provide school records within 15 business days of receipt of a written request.

(1) The following items were requested in a formal motion filed on March 26, 2010:

(a) email correspondence – the letter requesting records lists 18 District staff who were requested to be asked to search for email and other correspondence;

(b) IMPACT records for attendance and grades, discipline and incident reports for past three years;

(c) related service providers progress notes;

(d) IEP quarterly progress reports;

(e) written denial of requests for homebound services.

(2) Progress notes have been produced by the District in incomplete form – some reports omit narrative portion, other reports omit name of provider, a process which even though presumably unintentional on the part of the District's attorney, continued throughout the course of the hearing as testimony was elicited by District employee's called to testify at the hearing.

(3) Three incident reports, printed out in early May, 2010, were produced after the close of testimony which prevented the Parent from examining school staff about the reports.

(4) It is particularly noteworthy that no email messages have been produced, with 18 District staff involved with the student from three separate schools, central office and regional offices:

(a) School Nurse [REDACTED] testified on day 3 of the 5 hearing that she had found a few emails but none were provided to the Parent.

Burden of Proof

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

Discussion and Conclusions of Law

Failure to provide the student with a Free and Appropriate Public Education (FAPE) by the District from September 5, 2008 to the present

Determining whether a student has received a FAPE begins with the two-prong analysis set out in *Bd. Of Educ. Of Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176 (1982) ("*Rowley*"). First, the district must comply with IDEA's statutory procedures; second, it must develop an IEP reasonably calculated to enable the student to benefit from the special education and related services. Once the school district has met these two requirements, the courts cannot require more; the purpose of IDEA is to 'open the door of public education' to [disabled] children, not to educate a [disabled] child to his/her highest potential. *Board of Ed. Of Murphysboro Community Unit School Dist. No. 186 v. Illinois State Board of Educ.* 41 F.3d 1162, 1166. (7th Cir. 1994).

The student is not entitled to the "best" education. *Rowley*, 458 U.S. at 198, 200-01. Nor may parents specify what methodology must be used with their children. *Lachman v. ISBE*, 852 F.2d 290, 296 (7th Cir. 1988). However, the student is fundamentally guaranteed a FAPE.

A. Failure to conduct timely and adequate assessments of all areas of potential disabilities, with the result that the student's educational program did not address, or addressed inadequately emotional/behavioral difficulties.

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

Every three years, the District is required by law to reevaluate the student with regard to his need for special education. 34 CFR 300.303; 23 Ill. Adm. Code 226.120. The District's Psychologist, [REDACTED] conducted a psychological evaluation on 2/25/09. (PD142) This date appears to raise the issue of timeliness of conducting the evaluation as per the 1/29/10 IEP and the reference date of "Most Recent Eligibility IEP (1/15/06)". (PD 82) [REDACTED] in her report, summarized her findings as follows:

"This is an initial evaluation of an 8 year, 8 month old student who currently receives speech/language services. The referral was initiated due to child receiving a psychiatric diagnosis and exhibiting some maladaptive behavior at school as well as having a myriad of health issues. Current cognitive measures reflect low average abilities on the WISC IV, with verbal measures stronger than performance skills. Achievements reflect delays for language arts and math involving word problems." (PD 144)

The Psychological Evaluation dated 2/25/09 did not contain the following: writing assessment despite teacher reports indicating need; Assistive Technology evaluation recommended consistent with the student's identified needs; rating scales to measure the student's attention span; BASC scores, relied upon by the Psychologist but administered by the classroom teacher were not given, yet it is in the report that the results say "normal". This is not consistent with teacher reports, where teacher indicates multiple domains in "at risk" category. (protocol at PD 584-9).

The District's Speech Language evaluation dated 1/9/09 (PD 149-50), reports "zero" (emphasis added) articulation problems; provided "only" (emphasis added) 15 mpm consultative services; provided no assessment of written expression or phonological skills.

1. A speech report dated 1/19/09 from the [REDACTED] found that the student to possess a "moderately impaired swallowing function." (PD 283)
2. A 2010 District Speech Language evaluation (PD 145-7) found articulation errors described as "mild" despite a standard score of 40 which is 3 standard deviations below the mean; weakness in phonology; an IEP provides for 30 mpw direct speech; 15 mpm consultative service PD 028; while next year PD 145-6 found 40 SS – commensurate with a severe-profound level; no assessment of written language; no assessment of phonological skills

No assessment by an occupational therapist appears to have been conducted despite psychological reports of the student's weakness in writing and problems in organization and attention. (PD 142) conducted by the District, despite a showing of significant academic delays and reports of the student's weakness in writing as evidenced by both 2/25/09 Psychological Report and Special Psychological Reports (PD 142-3 and PD 136-137)

The lack of adequate and/or omitted assessments on the part of a School District justifies the ordering of independent educational evaluations to provide better insight into a student's learning. *Independent School District No. 70, Hibbling Schools v. J.T., 45 IDELR 92, 106 LRP 12718*, (U.S. Dist. Ct. Minn.) In the instant case and by the District's own school psychologist, [REDACTED] "the student lags in reading and mathematics." [REDACTED] [REDACTED] also identified difficulty in correlating the effect of the student's absenteeism with his academic gain. These factors, along with the above noted omissions in other areas of assessment, clearly establish the need for conducting independent evaluations to be provided at public expense.

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding this issue.

B. Failure to conduct a full individual evaluation and make an eligibility determination on a timely basis in violation of specific “child find” provisions, given knowledge of the student’s attendance problems and his severe emotional disturbances and hospitalizations

The District convened a domain meeting on 9/25/09 at [REDACTED] Elementary School (PD 115-117). An IEP meeting to review evaluations was not convened until 4/2/09 (PD 52) District psychological evaluations conducted on behalf of the student omitted the following assessments:

- a. academic skills in areas of phonological and decoding skills – The District’s psychologist report of 1/20/10 (PD 136) states that the student. “has difficulty using phonetic rules to decode unfamiliar works. He seemed to lack knowledge of phonetic rules...”. (PD 137)
- b. the lack of use of tests such as, Conors, Vineland, and/or BASC to assess functional/developmental delays,
- c. the lack of full cognitive testing, such as the WISC IV to assess processing speed,
- d. the absence of a written expression assessment, KTEA II, due to “time constraints,” according to testimony given by the District’s school psychologist [REDACTED].

Given the incomplete nature of the assessments conducted, IEE’s are appropriate at public expense.

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding this issue.

C. Failure to provide essential related services in the areas of psychological, nursing and social work services with sufficient intensity and duration

The IDEA’s implementing regulations define Related Services:

General Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic evaluation purposes. Related services also include school health services and school nurse services, social work services in schools and parent counseling and training. 34 CFR §300.34(a)

Related services must also be provided at "public expense" and "without charge" to a student or their family. 20 USC 1401 §602 (9).

No psychological services appear to have been offered in any of the District's proposed IEP's originating at ██████ Elementary in 2008, ██████ in 2009 and ██████ in 2009-10. Social work services were not offered in 2008-9 school year until April 9, 2009 (PD 052, 067) In fact, there appears that before that time, no IEP was in effect. From April to June 2009, social work services were offered at 15 mpw. (PD 067) The current IEP, 2/24/2010, offers no direct social work services, only 30 minutes per month "(mpm)" consultative service to general education and special education teachers. (PD 028) The student's treating psychiatrist recommended regular support and access to a social worker and or psychologist. Testimony provided at the hearing by therapists at ██████ and ██████ also recommended regular support from a counselor at school.

Three school nurses gave testimony at the hearing: ██████ and ██████ All three testified to having minimal contact with the student. ██████ testified having the most familiarity, but only on a consultative basis. It was the consensus that the School Nurse was the pivotal contact person when it came to implementing the Emergency Asthma Plan developed for the student. All agreed the student's medical concerns could be addressed in the regular school setting. ██████ admitted that no other back up plan should a nurse was in place other than calling "911" should the student have a medical problem on a day when a school nurse is not assigned to the school.

It is the opinion of this hearing officer that given the concerns expressed by District staff at the beginning of his enrollment in the public schools in September of 2008 at ██████ elementary school and continuing at ██████ and with the current placement at ██████ better attention should be given to the student's medical needs relating to his Asthma and Swallowing Disorder and greater access to a medically trained person should be made available in the event a medical emergency arises.

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding this issue.

D. Failure to develop a timely and adequate functional behavior analysis and behavior intervention plan for student

To meet the second, substantive criterion of *Rowley*, an IEP must respond to all significant facets of the student's disability, both academic and behavioral. *Alex R.*, 375 F.3d at 613. That is why a school district's IEP team is required to assess whether the student's disability-related "behavior impedes his or her learning or that of others" in the classroom. 20 USC 1414(d)(3)(B)(i).

The IDEA further recognizes that the quality of a child's education is inextricably linked to that child's behavior, and hence an effective educational evaluation must identify behavioral problems. *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). A behavior intervention plan individualized to a student's needs is based

on a "functional behavioral assessment," which is an approach that incorporates a variety of techniques and strategies to diagnose the "functions" of, and to identify likely interventions intended to address, problem behaviors. *See generally*, Illinois State Board of Education, "Behavioral Intervention Plan," at [http://www.hbug.k12.il.us/IEPDocs/37-44K and L Instructions and Documents.pdf](http://www.hbug.k12.il.us/IEPDocs/37-44K%20and%20L%20Instructions%20and%20Documents.pdf). Such an assessment should identify the skills deficits and environmental factors that initiate, sustain or end the behavior in question. (*Id.*) The functional behavior assessment is important because it enables the IEP team to understand "functions" of the behavior (e.g., escape, avoid an unpleasant task or situation) and is a part of the IEP process that enables the team to develop a behavior intervention plan (hereinafter "BIP") that teaches and supports replacement behaviors which serve the same "functions" as the problem behaviors. (*Id.*)

Despite the student being diagnosed with bi-polar disorder, student records and hearing testimony suggested some inappropriate behaviors requiring further attention, yet no functional behavior analysis and behavior intervention plan was developed in the 504 Plan of 11/17/08. (SD 143) A BIP was incorporated into the IEP of 4/2/09 (PD 076-7) but the hearing record lacks any evidence of anecdotal or other outcome measures called for in the BIP (PD 077). [REDACTED] the student's treating psychiatrist testified that the lack of behavior outbursts at school in the past two months is not an assurance that behavioral problems have ended; indeed she testified that the student's diagnosis of bi-polar disorder carries a long term risk of mood dysregulation.

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding this issue.

E. Failure to develop appropriate modifications and accommodations to address the student's multiple medical needs

The District was slow in developing appropriate modifications and accommodations to address the student's multiple medical needs. The Asthma action plan incorporated into the 11/17/08 504 Plan was developed while the student was attending [REDACTED] elementary school (PD 102, at 108-112 & SD 143) and was created after an emergency arose and the student was taken by ambulance to hospital from school. This was supported by the testimony of Principal [REDACTED] on the 1st of the hearing and the Parent on 5th day of the hearing. The Asthma action plan was left off of the 2/17/10 IEP developed at [REDACTED] school. (PD 013) Modifications/accommodations for swallowing disorder were also left off the IEP developed at [REDACTED] School (PD 013)

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding this issue.

F. Failure to provide homebound services as requested by the student's physician

The District delayed providing homebound services as requested by the student's physician, [REDACTED] of [REDACTED]. No evidence was provided by the District showing that homebound services were provided the student. The administrator of Home/Hospital services, [REDACTED] testified on the 4th day of the

hearing and could provide no additional clarifying information. She stated she could not print out data in the office computer. The Parent testified that homebound services were offered one day prior to Christmas/Winter break, and that authority had expired after the break. Consequently, the student received no homebound services from the District. [REDACTED] stated she did not recall seeing the Medical Referral For Adjustment of Education Program Forms in the Student's file which are the forms utilized by the District to initiate home/hospital services. (PD 189 & 199)

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding this issue.

G. Failure to offer a placement with sufficient structure and support to manage the student's emotional disturbances.

All IEP's developed for the student by the District provide for the majority of his time in a regular education classroom which puts into question whether sufficient structure and individualized attention is provided to address the student's medical and behavioral problems. The District developed IEP of 4/2/09 states the student "is able to work with one other child in a small group setting." (PD 066) [REDACTED] testified that based on her experience at [REDACTED] she believed the student required a small, structured classroom.

The Parent enrolled her son at [REDACTED] School in September 2009 and stayed enrolled through April, 2010 although the parent never sent her son to school due to the fact that the school did not have elevators and her child could not climb stairs to attend classes that were not on the main floor. [REDACTED] staff obtained the student's case file on the day parent sought to enroll him. School staff did not offer a classroom at his grade level in a facility that was consistent with his medical restrictions. Testimony of the parent and the Principal of [REDACTED] school verified that the student was offered to placement in a third grade class room although he was a 4th grade student.

The student was placed at [REDACTED] School after a special evaluation was conducted by the District's school psychologist and an IEP team convened. The Principal declined to accept the student at the initial referral because the IEP lacked information regarding the asthma action plan and swallowing disorder. The IEP team met at resolution session and agreed not to accept the student for enrollment, pending more information on medical needs. The student was enrolled with the addition of the elements of the 4/2/09 IEP from [REDACTED] School that had been omitted from the [REDACTED] IEP of 2/24/10 compare amended IEP (FD 1-12) with [REDACTED] IEP of 4/2/09 at (PD 58-63) and (PD 77-78). On the 2nd day of the hearing, the case manager, [REDACTED] a [REDACTED] School, testified that she could not state that the current placement was appropriate for the student. [REDACTED] also testified that she was his special education teacher and although the student's IEP calls for 200 mpw of support from a special education teacher (PD 28) (half in resource room and half in regular education classroom) she admits that she had not been providing special education instruction because of a schedule conflict.

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding this issue.

The student's IEP's for the 2008-9 and 2009-10 school years

Federal (34 CFR 300.320) and State (23 Ill. Admn. Code 226.30) regulations provide the parameters of an IEP.

“a) Each IEP shall include:

- 1) A statement of measurable annual goals that reflect consideration of the State Goals for Learning and the Illinois Learning Standards (see 23 Ill. Adm. Code), as well as benchmarks or short-term objectives developed in accordance with the child's present levels of educational performance.
- 2) A statement regarding the child's ability to participate in State and district-wide assessments.
- 3) A statement as to the languages or modes of communication in which special education and related services will be provided, if other than or in addition to English.
- 4) A statement as to whether the child requires the provision of services beyond the district's normal school year in order to receive FAPE (“extended school year services”) and, if so, a description of those services that includes their amount, frequency, duration, and location.

b) The IEP of a student who requires a behavior intervention plan shall:

- 1) Summarize the findings of the functional behavioral assessment;
- 2) Summarize prior interventions implemented;
- 3) Describe any behavioral interventions to be used, including those aimed at developing or strengthening alternative or more appropriate behaviors;
- 4) Identify the measurable behavioral changes expected and methods of evaluation;
- 5) Identify a schedule for a review of the interventions' effectiveness; and
- 6) Identify provisions for communicating with the parents about their child's behavior and coordinating school-based interventions.

The parent alleges that the student's IEP's included statements of present levels of performance that do not accurately and objectively state the student's skills and functional levels. Examples provided include: 1). The Reading goal in the 4/2/09 IEP states that the student has difficulty decoding due to his weaknesses in visual scanning. (PD 064) Visual scanning is noted as a weakness in the psychological report at PD 143, but no objective data reported. 2). The Reading goal in the 2/24/10 IEP (PD 024) states that the student “knows all the letter sound relationships.” The District's psychologist report of 1/20/10 (PD 136) repeats the phrase quoted above, and also states that the student “has difficulty using phonetic rules to decode unfamiliar works. He seemed to lack knowledge of phonetic rules...”. (PD 137)

The parent further states that the IEP's provide goal statements that are vague and not measurable, and where the goals set an increase in skill level, the goal is not commensurate with the student's potential for development. An example provided includes: 1). The Reading goals for the 4/2/09 IEP (PD 064) and the 2/24/10 IEP (PD 024) do not reference objective reading levels that can be compared to the student's present level of performance.

The Parent alleges the IEP's fail (emphasis added) to:

- 1) address the attention and organizational limitations of the student. The modifications/accommodations do not reference monitoring, pre-teaching, chunking, and other strategies for monitoring and improving functional performance in the classroom that may be affected by attention and organizational deficits;
- 2) identify what methodology will be used to remediate student's reading and math skills. None are noted in the respective IEP's.
- 3) provide for an adequate level of related services in Speech language i.e.....services are authorized at 30 minutes per week, but should be at least 60 minutes per week and additional consultative time with staff for a child with significantly depressed receptive language skills and impaired swallowing function. Parent points to the fact that the IEP created by the previously attended school district, [REDACTED], created an IEP with 60 mpw of direct speech services in 2007-8 school year (PD 125), based on findings that the student possesses "moderate deficits with his language organization, which includes auditory comprehension, following auditory directions, and verbal problem solving." (PD 159) Additionally, despite documentation of a swallowing disorder over the last two years, no remedial support from a speech pathologist other than "consultative." Testimony by both [REDACTED], a clinician with [REDACTED] feeding clinic and [REDACTED] the speech pathologist at [REDACTED] school, support the fact that speech pathologist has a role in remediating swallow disorders and that such a remedial role for a school speech pathologist was appropriate.
- 4) offer direct psychological and social work services, despite evidence of poor social interaction by the student. Testimony of [REDACTED] staff and [REDACTED] testified regarding the need for social work and/or psychological support.
- 5) to offer appropriate occupational therapy ("OT") services to address attention, organizational and executive functioning difficulties. No OT services have been offered. Additionally, the student's teacher reports weakness in writing support the student needs an assessment to rule out mechanical difficulties in writing.
- 6) to provide support for use of assistive technology ("AT"). No AT services were offered by the District. In fact, testimony provided by the various case managers at [REDACTED], could not recall any discussion concerning AT need at respective IEP meetings.

- 7) to offer extended school year ("ESY") services. No ESY services have been offered by the District. The student's case managers testified that no evidence of regression/recoupment problems were apparent, which, standing alone, parent avers, should not be sufficient to rule out ESY under any circumstances of this case; citing a January 3, 2005 memo from [REDACTED] on the subject of Extended School Year. The memo, provided by the parents as a part of their closing argument documents, lists other factors, which would apply to the student, including; a). "behavioral need, particularly the need for highly structured programming to maintain behavioral controls established during the previous school year; b). areas of learning crucial to student's attainment of self-sufficiency and independence".

The District places emphasis on the fact that the Parent bears the burden of proof in proving the issues raised in the Due Process Complaint. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Further, as the moving party, the parent bears the burden to prove school officials were unreasonable in their creation or implementation of the student's IEP. *Kerry M. and Kristine M. v. Manhattan School District #114*, 2006 WL 2862118 (N.D.Ill.)

The District maintains that deference is to be provided to the educational professionals and IEPs developed by District Staff and that Courts and hearing officers must defer to trained educators and their recommendations concerning the appropriateness of the educational program for a particular student. *Heather S. v. State of Wise*, 125 F.3d 1045,46 (7th Cir.1997) and *Beth B. v. Van Clay and Lake Bluff School Dist.* No. 65, 282 F.3d 493 (7th Cir. 2004). The District cites *Alex R. v. Forestville Valley Community Unit School District #221*, 375 F.3e 603 (7th Cir. 2004) in further support of the premise that the District staff "enjoy latitude in developing an IEP that is appropriate for a student, and they should be allowed to apply their professional judgment in IEP development.

The District takes the position that IEP's, when reviewed for accuracy and appropriateness, should be measured only as of the time it is offered to the student and not at some later date. Neither statute nor reason countenance 'Monday Morning Quarterbacking' *O'Toole v. Olathe District School Unified School District No. 233*, 144 F.3d 692, (10th Cir. 1996) quoting *Carlisle v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995) and *Fuhrman v. East Hanover Board of Educ.*, 993 F.2d 1031, 1040 (3rd Cir. 1993). Finally, the District cites *Roland M. v. The Concord School Committee*, 910 F.2d 983, (1st Cir. 1990) for the perspective that an IEP is to be considered a snapshot, not a retrospective.

It is the opinion of this Hearing Officer, given the nature and extent of the student's medical needs and bi-polar diagnosis, that the District failed to provide and delayed in giving the proper attention, over the past two years, to developing an IEP that accurately takes into account this student's medical needs and consequently necessary and essential services to be provided to assist him in his ability to learn.

Documentary evidence at the hearing verified that Speech language services were not offered in 2008-9 school year until April of 2009 and there is no evidence of an IEP in effect until the 4/2/09 IEP:

- a. 11/17/08 - 504 plan lists no direct services (PD 102 & SD 143)
- b. IEP of 4/20/09 lists only consultative speech at 15 mpm
- c. 2/24/10 IEP lists consultative speech 15 mpm (PD 028 & SD)

Additionally, the testimony provided on the 2nd day of the hearing by [REDACTED] a District speech pathologist at [REDACTED] and testimony provided on day 3 of the hearing by [REDACTED] a speech pathologist at [REDACTED] both acknowledged a role for a school speech pathologist in remediating swallowing difficulties, yet no goal or direct service in IEP for this support from a speech pathologist was provided for.

Given the almost two year period of time that incomplete assessments were either performed or the lack of assessments to identify needs were omitted ...i.e. AT assessment or OT assessment, offering ESY services is not unreasonable under these circumstances. *Kevin T., W.T., and K.T. v. Elmhurst Community School District No. 205*, 36 IDELR 153, 102 LRP 9030, (U.S. Dist. Ct. N.D. Ill. 2002)

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding this issue.

FAPE and Procedural Safeguards

The IDEA provides for the establishment and maintenance of procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE. 20 USCS § 1415 The procedures required shall include:

- (1) An opportunity for all parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child. 20 USCS § 1415(a)

The parent believes that the District's shortcomings in following procedural safeguards have given rise to the denial of the student's right to a free and appropriate education. The following list of examples were offered:

1. The District did not secure and implement the student's IEP from the previous school district of residence in the 2007-8 school year. On the 1st day of hearing, [REDACTED] case manager, [REDACTED] testified that she could not recall when the [REDACTED] IEP was received and whether it was reviewed and implemented. (PD 118) Progress notes of related service provider show "no IEP" in September, 2008. (PD 551) The District did not develop an IEP until 4/2/09. (PD 052)
2. The District did not provide accurate and timely progress reports during the 2008-2009 school year. The Social Worker's quarterly progress report of April, 2009 is the

only progress report provided through Pre-Hearing Disclosure and incorporated into the Parent's evidence document binder. (PD 172)

3. The District failed to provide school records within 15 business days of receipt of a written request.
 - i.) The Parent requested the following items in a formal motion filed on March 26, 2010:
 - (a) email correspondence – the letter requesting records lists 18 District staff who were requested to be asked to search for email and other correspondence;
 - (b) IMPACT records for attendance and grades, discipline and incident reports for past three years;
 - (c) related service providers progress notes;
 - (d) IEP quarterly progress reports;
 - (e) written denial of requests for homebound services.

Progress notes have been produced by the District in incomplete form. Some reports omit narrative portion, other reports omit name of provider, a process which even though presumably unintentional on the part of the District's attorney, continued throughout the course of the hearing as testimony was elicited by District employee's called to testify at the hearing.

Three incident reports, printed out in early May, 2010, were produced after the close of testimony which prevented the parent from examining school staff about the reports.

The parent also believes that it is particularly noteworthy that no email messages have been produced, with 18 District staff involved with the student from three separate schools, central office and regional offices. A School Nurse [REDACTED] testified on the 3rd day of the hearing that she had found a few emails but none were provided to the Parent.

The hearing officer delayed ruling on the parent's motion primarily because of the several telephone calls held between the hearing officer and parties where the attorney for the District gave his assurances that all was being done within his power to have requested documents produced. The hearing officer draws the conclusion that the District was not intentionally withholding documents, but it must be noted that there appears to be a severe disconnect between the attorney's ability to obtain documents deemed necessary for presenting/defending the District's position on issues raised in a hearing and the necessary parties controlling these records...i.e....the attorney on numerous occasions apologized for not having direct access to a District data base, IMPACT, where many of the records being requested would appear.

What this Hearing Officer finds most troubling in this matter is the period of time taken by the District to properly identify and assess the student's needs and therefore begin providing what it believed to be an appropriate educational program with related educational services in the appropriate educational setting given the student's unique health needs.

The Parent provided testimony on the 5th day of the hearing. She attended all 5 days and was attentive throughout. She described her son as "gifted" in displaying his problem solving skills in playing video games; detail he is able to elicit in drawing, and unique ability to re-enact movie scenes and dialogue. She also described her son's challenges: although improving, her son throws tantrums, the left side of his body is weak; he can't tie shoes and has trouble with buckling/unbuckling and zipping/unzipping pants. The parent testified to the student's hospitalization in January of 2008 and being diagnosed as Bi-Polar. She testified to his academic history: the student attended Pre-Kindergarten and kindergarten and first grade in the District; after the mother was involved in a serious automobile accident she and other siblings moved in to live with a sister and resided in [REDACTED] Illinois where her son attended 2nd grade in [REDACTED]. In July 2008 the parent and children moved back to [REDACTED] and she enrolled her son in [REDACTED]. She informed the Assistant Principal that her son had an IEP developed in [REDACTED] and was told that her son would be placed in the 3rd grade. She testified to an IEP meeting held September 25, 2008 which she attended and her son was identified as being placed in 2nd Grade. She testified to confusion about what grade her son was really in because of other testimony at the hearing of different teachers being involved. She had no knowledge that her son was being taught by [REDACTED] only [REDACTED]. She testified to receiving numerous telephone calls (2-3 times per week) from either the Assistant Principal or [REDACTED] about her son's behavior and/or medical issues. She began to question whether her son's placement was appropriate. On April 2, 2009 she attended a special evaluation eligibility meeting. She testified to being unaware of any classroom change. She stated she only received a report card for Speech but nothing else. The parent testified that she moved from the attendance area of [REDACTED] because she was unable to afford rent. She enrolled 3 of her children at [REDACTED] but her son's enrollment was held up by the school's case manager, [REDACTED] for her to provide medical records regarding Asthma, Swallowing and Bi-Polar diagnosis. She testified to having trouble with the District in accepting the medical records. She requested homebound services for her son to be provided but didn't receive notification of acceptance until 1 day before the winter break to begin. She attended an eligibility meeting on February 17, 2010. (PD 41) She stated that [REDACTED] the Home/Hospital services coordinator for the District, called her two weeks prior to the meeting asking if she could be an advocate for her. After the meeting, the parent testified that [REDACTED] complimented her about being a parent who cared and gave her more forms for homebound services. She testified that shortly after attending that meeting she spoke with [REDACTED] her son's treating pediatrician at [REDACTED] who referred her to a lawyer because of the numerous times she had been asked to provide "medical verification" of her son's medical conditions. The parent testified to attending an IEP meeting on February 24, 2010, where placement was changed to [REDACTED]. The parent recalled the Principal and other IEP members being uncomfortable regarding her son's medical problems. On cross-examination by the District's attorney, the parent was asked what she believes her son needs. She responded, "he needs to be better monitored with his

medications and asthmatic condition". She also wanted him to be able to keep his medical folder with him at all times as she was told when her son attended [REDACTED]. The parent concluded by saying that she is "concerned that people [staff at [REDACTED]] are not trained to deal with his explosive behavior, even though staff have indicated that they have not seen her son exhibit any explosive behavior."

The student testified on the 4th day of the hearing. He recalled receiving one detention for being a "bully." He carries a book bag on his back where he keeps his inhaler and nebulizer. At first he wasn't permitted to carry inhaler with him, having to keep it in his teacher's desk. He admitted not having to use the inhaler, but sometimes feels like using but feels "scared or shy because the kids would look at him". In answer to questions posed to him by the District's attorney, he admitted that his throat and chest hurt, and that he "liked being at [REDACTED]". The student appeared friendly and alert and very responsive to questions asked. After giving his testimony, the student smiled and shook the hand of the Hearing Officer before leaving the room.

Particularly, as a result of having the opportunity to hear and observe the parent and the child, albeit the child briefly, the hearing officer believes future District placement considerations should include keeping the student enrolled in the public schools with emphasis placed on providing the proper related service support to address the medical and potential behavior concerns relating to this student. Once proper and complete assessment of the student's needs is accomplished through District evaluations and IEE's, it is believed the correct decision concerning his placement and services will be derived.

Based upon the testimony and evidence produced at hearing, the parent has met her burden of proof regarding these issue.

District's Overall Position On All Issues

The District's position on all issues raised by the parent is that it has, at all times, provided the student with a free, appropriate public education and further maintains that the student's current placement and services is meeting the student's identified needs and that his current IEP is reasonably calculated to provide him with FAPE in the Least Restrictive Environment (LRE). *Rowley*, 458 U.S. at 206-07. The District emphasizes that the issue(s) before the hearing officer is "whether school professionals were unreasonable in their determinations as to the appropriate services and placement to be provided to the student." *School Dist. Of Wisconsin Dells v. Littlegeorge*, 295 F.3d 671-77 (7th Cir. 20.02) Despite the alleged shortcomings the parent and student may have encountered when first presenting themselves to [REDACTED] school for the 2008-09 school year and [REDACTED] school for the 2009-10 school year, the District is of the position that its current placement is appropriate and consistent with placement ideology in the Least Restrictive Environment (LRE). District staff witnesses believe the student's medical issues can be properly addressed in the setting the student is currently in with consultative nursing services available. The District staff also believe that the student's behavior issues as identified by the mother are not a problem in the school setting therefore not requiring special attention. Citing *San Rafael Elementary v. California Sp. Ed. Hearing Office* 47 IDELR 259, 482 F.Supp.2d 1152 (ND Cal 2007), the District believes its it not responsible for ensuring that student behavior skills translate to the home or community.

Finally, with respect its being responsible for providing compensatory services to the student for its alleged failures, the District cites *Derek B. V. Donegel*, 47 IDELR 34 (PA 2007) for the proposition rejecting “1 year’s progress in 1 year’s time; and *Board of Ed. Of Fayette Co. v. L.M.*, 478 F.3d 307 (6th Cir. 207) “rejecting a rote hour by hour compensatory award”. The District believes that it stood ready, willing and able to provide services to the student when the parent presented him to enroll at [REDACTED]. However, due to the parent not sending her child to school for most of the regular school was the basis for the child not receiving services. Had the student come to school, the District would have provided services.

A hearing officer is empowered to provide compensatory education as a remedy. Compensatory Education is a term used to describe future educational services which courts award to a disabled student under the IDEA “for the school district’s failure to provide a FAPE in the past.” See *Kevin T.*, infra. When an IEP fails to confer some (more than de minimis) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by the IDEA. Therefore, the right to compensatory education should accrue from the point that the school district knows or should know of the IEP’s failure. *M.C. and G.C. v. Central Regional School District*, 81 F.3rd 389, 397 (3rd Cir. 1996). *Evanston Comm. Cons. S.D. No. 65 v. Michael M. and Christine M.*, 356 F.3d 798 (U.S. Dist. Ct. of Appeals 7th Cir. 2004), The hearing officer believes that the parent’s hesitancy in sending her child to [REDACTED] was justified given the student’s documented health issues related to asthma and a swallowing disorder. Furthermore, the District appeared to have dropped the ball in getting homebound services provided while it figured out how to meet the student’s needs. From the testimony heard and documents referenced at the hearing, [REDACTED] school staff were not prepared to handle or accommodate the student and his special needs. Hence, providing compensatory education for the District’s shortcomings beginning with the 2008-2009 school year is appropriate.

ORDER

A. The District is Ordered to provide placement in a public school setting with sufficient support and structure for the student, or in the alternative, direct placement at a therapeutic day school with particular attention paid to the following:

- 1) small class size – no more than 10 students;
- 2) daily access to a social worker on an as needed basis;
- 3) daily access to a school nurse on an as needed basis;
- 4) a physical facility that meets the medical conditions imposed by the student’s doctors with no stair climbing;

B. The District shall pay for independent educational evaluations in areas identified need where the District has conducted an inadequate assessment or failed to conduct assessments as indicated by the student's circumstances; These shall include but are not limited to:

- 1) assistive technology;
- 2) speech language to assess expressive language skills;
- 3) occupational therapy to assess organization and attention deficits;
- 4) psychological evaluation to determine;
 - a), academic skills in areas of phonological and decoding skills;
 - b). Conors, Vineland, and/or Behavioral Assessment for Children ("BASC") to assess functional/developmental delays;
- 5) full cognitive testing, such as the Wechsler Intelligence Scale for Children (WISC IV) to asses processing speed.

C. The District shall provide related services in sufficient intensity to allow student access to educational opportunity, including;

- 1) Social work services and/or psychological counseling at least 60 minutes per week;
- 2) Nursing services in sufficient intensity to oversee administration of medication for the student;
- 3) Psychological counseling at least one hour per week;
- 4) Speech language therapy at least 60 minutes per week and additional consultation time with classroom staff;
- 5) Direct occupational therapy services that may be recommended by an independent evaluator.

- 6) Direct assistive technology services to be provided as may be recommended by an independent evaluator;
- D. The District shall provide extended school year services (ESY) for at least six weeks.
- E. The District shall provide compensatory education services for the loss of FAPE during the past two years, including:
- 1) Additional social work and/or psychological counseling services for 30 minutes per week for two years;
 - 2) 200 hours tutoring by a certified special education teacher, by a provider, and at a location selected by the parent;
 - 3) Such additional services as may be recommended by any ordered IEE's;
- F. The District shall convene an IEP meeting at its earliest possible convenience, but no later than September 17, 2010 to consider the results of evaluations and to plan and implement the requirements provided for and consistent with this Order.
- G. The District shall undertake an extensive records search especially in the areas of:
- 1) all e-mail correspondence from all District staff who were requested to be asked to search for email and other correspondence;
 - 2) IMPACT records for attendance and grades, discipline and incident reports for the past three years;
 - 3) related service providers progress notes; IEP quarterly progress reports; written denial(s) of requests for homebound services.
 - 4) The District shall provide the document results of its search to the parent no later than October 1, 2010. The District shall also undertake providing monthly progress updates to the parent regarding her child's successes, failures and other relevant information that describes how her child is progressing in the public school setting.

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

[REDACTED] shall submit proof of compliance to:

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

Right to Request Clarification:

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

Right to File Civil Action

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

Dated this 28th day of June, 2010.



HARRY A. BLACKBURN
HEARING OFFICER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Decision and Order** was sent [REDACTED] Certified Mail and directed to:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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

before 5:00 p.m. on June 28, 2010.



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