

Case Number: 2012-0017  
the Student [REDACTED] vs [REDACTED]  
Hearing Officer: Harry A. Blackburn

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

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## Impartial Due Process Hearing Decision Cover Page

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

Parent Name the Student [REDACTED] Phone: [REDACTED]  
Address [REDACTED]  
Represented by [REDACTED]

### Date and Timelines

Date of Written Request: 07/14/2011  
Date of Pre-hearing Conf: 09/09/2011

Dates of Hearing: 10/3/11, 10/4/11, 10/20/11,  
10/21/11 and 11/17, 2011.  
Date of Decision: 11/30/11

### Summary of Decision

[REDACTED] Failed to provide the student a free appropriate public education (FAPE)—District Ordered to place the student at Giant Steps Therapeutic Day School to provide ABA services at the Private Therapeutic Day School with other appropriate related services; Transportation shall also be provided; The Student shall be entitled to an additional 2 years of ESY compensatory education at the [REDACTED] Independent Educational Evaluations are to be provided at District Expense.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF  
the Student [REDACTED]

v.  
[REDACTED]

)  
) ISBE CASE NO. 2012-0017  
)  
) 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).

**BACKGROUND**

The Parents' filed a due process complaint notice ("DPCN") on July 14, 2011 and the hearing officer was appointed as the hearing officer. The parties and hearing officer participated in a telephone Pre-hearing Conference held on September 9, 2011. The Parents' were represented by [REDACTED], Attorney at Law. The District was represented by its own in-house counsel, [REDACTED], Attorney at Law. The Hearing occurred over 5 days: 10/3/11, 10/4/11, 10/20/11, 10/21/11 and 11/17, 2011. Both Parents attended each day of the hearing. The hearing was officially closed on November 20, 2011 to allow for the parties to submit their respective written closing arguments and memorandum of law with supporting case law.

**Issues Presented and Remedies Sought**

**Matters In Dispute**

**Parent Issue(s)**

1. The District did not provide a free and appropriate education during the period From July 2009 through the present time based on:
  - i. Failure to conduct 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, his learning impediments, communication impairments and behavioral management;

- ii. Failure to provide essential related services, with adequate levels of intensity, in areas of social work, speech language, occupational therapy, assistive technology and behavioral therapy;
- iii. Failure to identify and utilize effective teaching methodologies at a sufficiently intensive level that would enable the Student to make progress commensurate with his cognitive skills;
- iv. Failure to offer sufficient 1:1 instruction with the result that the Student did not make progress in communication and behavior management skills;
- v. Failure to provide regular written communication with the Parents in accordance with their requests;
- vi. Failure to conduct assistive technology and augmentative communication evaluations regarding equipment necessary to promote effective communication skills;
- vii. Failure to develop an effective functional behavior assessment and a behavior intervention plan for the Student.

2. The Parents' contend that the Student's IEPs for the past two years:

- a. Included statements of present levels of performance that do not accurately and objectively state the Student's skills and functional levels;
- b. 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;
- c. Fail to address adequately communication and behavioral limitations of the Student;
- d. Provides for an inadequate level of related services, specifically:
  - i. Speech language services are authorized at 60 minutes per week, but should be at least 120 minutes per week for a child with significantly depressed expressive and receptive language skills;
  - ii. The IEPs fail to offer direct behavioral therapy services, despite evidence of poor social interaction by the Student;
  - iii. Offers occupational therapy only 45 mpw rather than the minimum of 90 mpw indicated by the severity of his motor and sensory impairments;
  - iv. Fails to offer a full-time 1:1 aide, although constant and

consistent supervision and direction is essential for the Student to make reasonable progress;

- v. Fails to offer assistive technology resources required for the Student to make adequate progress.

**Relief being sought by Parent**

The Parent requests the following relief:

1. Placement at [REDACTED] for a comparable therapeutic day school;
2. Direct the District to provide 1:1 paraprofessional support throughout the school day;
3. Direct that the District pay for independent educational evaluations in areas of identified need, including communication, occupational therapy, behavior therapy, assistive technology, and social assessment;
4. Direct the District to offer related services in sufficient intensity to allow the Student access to educational opportunity;
5. Direct the District to provide compensatory education services for loss of FAPE during the past two years and for failure to provide ESY during summer 2010;
6. Direct the District to convene an IEP meeting that will consider results of evaluations and implement the foregoing relief; and
7. Other relief that will be determined after the receipt of additional school records.

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

The District filed a Pre-Hearing Disclosure Statement with the Hearing Officer. The District is in dispute with almost every allegation made by Parents. Specifically, the District disputes:

1. The allegation that the Student was denied FAPE from July 2009 thru the present time: To the contrary, the District avers that, the District and Parents' counsel are in possession of data that shows academic growth and marked communicative, academic and social progress for the Student;
2. The allegation that the District has failed to provide essential related services, with adequate levels of intensity, in areas of social work, speech language, occupational therapy, assistive technology and behavioral therapy: The District maintains that the measurable and tracked growth shown by the Student, as

available in the Student's records, is indicative of the exact opposite that Parent's counsel is alleging in 1.b. of the Parents' Due Process Complaint;

3. The allegation that the Student needs "sufficient" 1:1 instruction: the Student's IEP is not written as such because he does not, in the District's perspective, need it as per the IEP team. All of the academic professionals are in accord that not only does the Student benefit in a setting where he learns along with peers in a shared academic structure, but the data and the IEP report cards show this, especially the most recent data over the last year;
4. The allegation that the District has failed to conduct assistive technology and augmentative communicative evaluations regarding equipment necessary to promote effective communication skills: The District disputes this allegation because, in its opinion, it is inaccurate and vague. The District alleges that the Student is an autistic 7 year old who is moderately and cognitively impaired. It is not only questionable if he would understand how to use much of the equipment that at best could only arguably support such an area of need, but the District has offered to do these evaluations for the Parent. The District never obtained the Parents' consent and as such, to allege a failure on the District's part to conduct one is, in the District's perspective, "grossly skewing the record;"
5. The allegations suggesting that the Student's IEPs are inadequate: The District maintains that the IEPs were generated utilizing the input provided by educational/academic professionals, school staff, and the Parents. What is unclear to the District is how Parents' position towards the school has changed since obtaining counsel. The school maintains that Parents' position has radically changed, being that prior to obtaining counsel, their concern was ensuring that the Student was in as less restrictive of an environment as possible. Since obtaining counsel, however, Parents' now seek a more restrictive environment at a distance even further away from their home. It is unclear how this would benefit the Student, being that it is, in the District's perspective, irrefutable that his least restrictive environment is in an academic setting such as [REDACTED] and not a therapeutic day school, based off available data on the Student's growth.

To the issue of Relief being sought by the Parents' the District objects because the evidence available to the District does not support the requested relief and because the appropriate filings have not occurred in order to receive them. Specifically;

1. Regarding Parent's request for a therapeutic day school, the District maintains that a primary tenet of the Individuals with Disabilities Education Act is to provide students with disabilities a free and appropriate education in their least restrictive environment ("LRE"). the Student's records are, in the District's view, replete with evidence that [REDACTED] and not a therapeutic day school, is his LRE. Furthermore, his existing IEP does not call for one.
2. The Student would receive no additional education benefit at this time in receiving 1:1 paraprofessional support.

3. The District objects to the Parents' request that the District pay for independent educational evaluations in areas of "identified need." The District avers that Parents' counsel must first make a request of the District for independent evaluations on account of her disagreement with the District's independent evaluations. This has, the District alleges, never happened. The District then has the right to file its own due process complaint to defend its evaluations. While the District is confident in its existing evaluations, neither of the aforementioned has occurred here and as such, this request for relief should not be a subject to this complaint.
4. The District continues to ask for clarity and evidence in support of an allegation that the Student was denied FAPE, and thus entitled to compensatory services, prior to the 5 day disclosure date. The District avers that none has been provided by Parents' counsel, and none is available as per the District's investigation. The District demands that Parents' meet their burden of proof and persuasion in this respect.
5. The District claims to not be in receipt of any Independent Evaluations for this Student and therefore, a request for an IEP meeting to consider any such evaluations is premature.

#### **Findings of Fact**

1. The Student is seven ("7") years old and is identified as a Student with autism and moderate cognitive ability. He has been attending the [REDACTED] ("A") for the past 3 school years and is currently in 2<sup>nd</sup> Grade.
2. The District failed to conduct adequate assessments in all areas of the Student's potential disabilities, with the result that the Student's educational program for this period did not address, or addressed inadequately, his learning impediments, communication impairments and behavioral management.
  - a) The Speech evaluation conducted by the District was omitted. It failed to formally assess the Student's Apraxia, even though the District's Speech therapist [REDACTED] testified (Day 4 of Hearing) that she suspected characteristics of Apraxia in the Student. She testified that Apraxia is a condition that can be remediated but yet she failed to provide this information in her evaluation and failed to provide recommendations to address it.
  - b) The District's evaluations failed to provide recommendations based on the Student's learning impediments.
  - c) The District's evaluations failed to address the Student's behavior management across the disciplines. The District's psychology report relied on to develop the Student's latest IEP is inadequate and unreliable. [REDACTED] testified that she was not able to complete testing due to the Student's behavior.
  - d) The District failed to conduct an evaluation in Assistive Technology and Augmentative Communication. Even during the latest IEP process, the District

still has not conducted an evaluation in these areas, despite the fact that the Parents provided a universal consent to evaluate in April of 2011.

- e) Per its own stipulation, the District failed to conduct an evaluation by a school nurse despite the fact that the Parents signed a release for the District to speak to [REDACTED] the child's pediatrician, gave the District a letter from pediatrician documenting lactose intolerance, and by the District's own admission, it had knowledge of the Student's diarrhea problems since 2008. (PD 193).
- f) The District failed to conduct a functional behavior assessment that outlined behavior difficulties posed by the student and potential effective interventions on the part of the school staff.
- g) The District failed to evaluate the Student's hearing and auditory processing. The IEPs demonstrate that the Student has never had a hearing test and even after the parent's requested one at the IEP level and provided consent, the District still has not provided one. The District also failed to evaluate auditory integration, to ascertain the Student's ability to listen to two different stimuli at the same time, and how auditory integration skills relate to his ability to hear a group of sounds and pull them together with other sensory information.
- h) The District is required to evaluate in all areas of suspected disability. Despite testimony at the hearing about the Student's deficits in receptive and expressive communication, these areas have not been evaluated nor has it been proposed nor has a referral been made by the District. The District's speech therapist agreed that the Student would benefit from an evaluation in this area. She testified that hearing affects articulation and that the ability to hear affects receptive auditory processing. She also testified that she would be "very interested in seeing results of formal auditory testing." The Speech therapist also testified that she had no way of calculating exactly how much speech therapy she failed to provide due to the demands of her growing caseload. She was supposed to provide "60 mpw." [Emphasis Added] The records reflect:

"Zero speech minutes in Jan. 2010,  
Zero Speech minutes in March 2011,  
Only 45 minutes for the entire month of Feb 2011,  
Only 60 minutes in the month of April 2011."

Parents' point out that the District's speech therapist during Hearing testimony "says she 'thinks' she missed 35% of speech therapy minutes, but according to the records kept, she missed a lot more than that, without ever coming forward and attempting to make up the lost opportunity." (Parents' 11/20/11 Memorandum of Law, P. 3).

- 3. The District failed to provide essential related services, with adequate levels of intensity, in areas of social work, speech language, occupational therapy, assistive technology and behavioral therapy.

- a) In the area of speech, the District's speech therapist testified and admitted that she failed to provide speech therapy to the Student on several occasions. She never informed the parent and she did not tell anyone about this at any of the IEP meetings she attended.
  - b) In the area of Occupational Therapy ("OT"), the Student did not receive OT at all during the 2009-2010 school year.
  - c) The Student did not meet his OT goals for the 2010-2011 school year, as documented in IEP report cards and was also not making progress.
  - d) There are no progress notes at all in the Student's school records which indicate he received any related services in the summer of 2010 or the summer of 2011 whatsoever. The Student's latest IEP doesn't provide for any social work minutes and even has the "no" box checked off under social emotional time. (PD 366).
  - e) The Student did not receive any school nurse services, despite testimony acknowledging toileting issues and diarrhea attributed to being lactose intolerant. The Student's special education teacher for, [REDACTED], notified the Parents' via e-mail of the Student's ongoing diarrhea issues yet she did not refer the Student to the nurse to explore possible dietary or sanitary interventions while at school. The Student is not receiving any school nurse minutes, according to his IEPs.
  - f) The Student only recently started receiving social work minutes, but that is in a large group for only 30 mpw. [REDACTED] testified that the Student lacks fundamental skills in social functioning to be able to engage in social reciprocity. As the Vineland from 2008, 2009, and the Vineland from 2011 show, the Student has regressed in several areas. [REDACTED] the Social Worker who provided services to the Student during the 2010-2011 school year, testified the Student's results on the Vineland show that the Student continues to need services to address social emotional, daily living, communication, motor skills, and maladaptive behaviors. [REDACTED]'s most recent Vineland scores reflect the Student's regression in several areas as compared to previous years. (PD 68—SW Re-evaluation—5/17/11)
  - g) In the area of psychological services, the Student has never received these services even though an entrance form for psychological services requires that he should. (SD33).
4. The District failed to identify and utilize effective teaching methodologies at a sufficiently intensive level that would enable the student to make progress commensurate with his cognitive skills.
- a) The District failed to offer sufficient 1:1 instruction with the result being that the Student did not make progress in communication and behavior management skills.

- 1) The Student has never had a 1:1 aide even with the results of the own psychological evaluation (SD288) and BASC (SD 303). [REDACTED] testified she spends 1 hour per day doing 1:1 teaching with the Student.
- b) The District failed to provide regular written communication with the parents in accordance with their requests, but beyond that which is required by Federal or State law, the District is not otherwise required to do so.
  - 1) The record is clear—other than a very few emails, there has been no consistent daily communication with the parents. This, the Parents' believe, is important because the Student himself cannot tell his parents about his day. He cannot tell them what he needs. He cannot advocate for himself. In addition, there have been several instances during this hearing where the District failed to provide the Parents with school records, in accordance with their continued requests. In fact, many of the District's staff members testified that no one even asked them to produce emails pertaining to the Student.
- c) The District failed to conduct assistive technology and augmentative communication evaluations regarding equipment necessary to promote effective communication skills.
  - 1) There have been no evaluation in this area by the District and no augmentative communication devices provided to the Student even though the Student's mother provided consent to evaluate him (PD 29).
- d) The District failed to develop an effective functional behavior assessment and a behavior intervention plan for the student.
  - 1) Parents' have documented that the Student has a definite need for a behavior plan. His most recent IEP (PD 332) notes behavior needs. The Student's most recent behavior-rating scales (SD 303), completed by his special education teacher, [REDACTED], indicate the Student's need for a behavior plan. According to the BASC, the Student has many problematic behaviors, including hitting other children.

5. The District's IEPs fail:

- a) they included statements of present levels of performance that do not accurately and objectively state the student's skills and functional levels; without factual and comprehensive data or measurable objective testing, there can be no way the student's present levels of performance can be determined. All of the Students' IEPs fail to discuss his apraxia, which clearly severely impacts all aspects of his communication.
- b) the last two years' worth of IEPs 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

- c) to address adequately the communication and behavioral limitations of the student;
- d) to provide for an inadequate level of related services, specifically:
  - i. Speech language services are authorized at 60 minutes per week, but should be at least 120 minutes per week for a child with significantly depressed expressive and receptive language skills; The documents specify the student's need for 120 mpw: In 2009—from ██████████'s report, In 2010—from the North Shore Therapy report In 2011—from the Imagine Therapy report and from ██████████ herself, who sees the Student on a weekly basis and has known him since 2008. ██████████, the former social worker testified that she felt she has a moral and ethical obligation to inform the parents that Student was not receiving speech services, pursuant to his IEP. She also agrees the Student should receive 120 mpw speech services.
  - ii. to offer direct behavioral therapy services, despite evidence of poor social interaction by the student; the records reflect, even on the most recent IEP, there is no commitment for a specific amount of ABA services and there is no commitment for any type of supervision by a BCBA. For the 2010-2011 school year, there was no ABA provided. In fact, the 2010 IEP does NOT include any mention of ABA at all on PD 245.
  - iii. to offer occupational therapy only 45 mpw rather than the minimum of 90 mpw indicated by the severity of his motor and sensory impairments; Sara Brager testified that Artie requires 90 mpw of OT at school. Her testimony is credible because she has worked at both the District and as an outside OT. She has been following the Student's case since 2008, when he was not receiving OT at the District and has reviewed his records, indicating his lack of progress in this area, and the IEP report cards, which show the Student did not meet his annual goals.
  - iv. to offer a full-time 1:1 aide, although constant and consistent supervision and direction is essential for the Student to make reasonable progress; As already stated, we have presented sufficient facts, which clearly show we have met our burden in this issue.
  - v. to offer assistive technology resources required for the student to make adequate progress.
- 6. ██████████ is not the Student's least restrictive placement given his unmet identified needs.
- 7. The Parents' provided written consent for the District to move forward with a comprehensive evaluation of the Student in all areas of suspected and known areas of disability.
- 8. The Student has been denied a Free Appropriate Public Education.

## **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). The Illinois School Code clearly requires the District to present evidence at hearing that it has properly identified and evaluated the nature and severity of the student's suspected or identified disabilities including eligibility for special education and related services. 105 ILCS 5/14-8.02a(g-55). *Kerry M. v. Manhattan*, 106 LRP 58547 (N.D. Ill. 2006). At the five day hearing the testimony elicited from all witnesses, consisting of District employees, Parent experts as well as the documentary evidence provided, demonstrates that the Parents' have satisfied their burden of proof regards the allegations contained with the Due Process Complaint Notice.

## **Discussion and Conclusions of Law**

The IDEA requires that a school District provide children with disabilities with a free appropriate public education ("FAPE"). When a hearing officer reviews a school District's placement decision, he or she must engage in two inquiries: whether the school District complied with the procedures set forth in the IDEA, and whether the Student's IEP is "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). Also, the IDEA requires the IEP not only confer some educational benefit, but to do so in the least restrictive environment ("LRE"). 20 U.S.C. §1412(a)(5). Accordingly, a Student with a disability may be removed from the regular classroom when "the nature or severity of the disability... is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(a)(5).

The least restrictive environment (LRE) is one that allows the disabled child to be educated with nondisabled peers (mainstreamed) to the greatest extent appropriate. *Beth B. v. Van Clay*, 282 F.3d 493, 497 (7th Cir. 2002). This does not mean, however, that every child has a right to be educated in a regular classroom. To the contrary, as the court put it in *Wilson v. Marana Unified Sch. Dist. Of Pima County*, 735 F.2d 1178, 1182 (9th Cir. 1984):

Although the policy of mainstreaming is to be applied "to the maximum extent appropriate," where, as here, "the nature or severity of the [disability] is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily ..., " a [child with a disability] may be removed from "the regular educational environment." (Citations omitted.)

Deciding what constitutes LRE is the responsibility of the IEP team. See 23 Ill. Admin. Code §226.240(a) and (b)) (placement decision must be made by the IEP team and must be consistent with the Student's IEP). Moreover, courts have recognized that in this type of situation deference should be given to the decisions of trained educators. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997).

In this case, from the School District's perspective, the IEP team has determined, through its proposed IEP dated 5/17/2011 and finalized on 6/20/11, that the current special education program at HILA constitutes the least restrictive environment for the Student. The Parents' disagree, and because they are the moving party, they shoulder's the burden of persuasion. *Schaffer v. Weast*, 126 S. Ct. 528 (2005). For the reasons that are discussed below, the Parents' have sustained their burden.

The IEP team's recommendation for the Student's placement and services do not provide the Student with FAPE in the least restrictive environment because: 1) the District has not followed appropriate procedures under the IDEA; 2) the IEP is not designed to enable him to receive educational benefits; and 3) the Student cannot be educated satisfactorily in current and proposed educational setting at [REDACTED]

Over the five day hearing period, the following witnesses testified: Day 1: [REDACTED] Tye, Case Manager at [REDACTED], Speech Language Pathologist at [REDACTED], [REDACTED] Occupational Therapist at [REDACTED] and former the District employee; [REDACTED] P.E. Teacher at [REDACTED] Day 2: [REDACTED] Music Teacher at [REDACTED], Post-Doctoral Fellow—Clinical Psychologist [REDACTED] Student's Pediatric primary care physician; [REDACTED] School Psychologist; [REDACTED] Certified Applied Behavior Analyst currently at [REDACTED] Day 3: [REDACTED] PhD.—Clinical Psychologist—North Shore Pediatric; [REDACTED] Social Worker; [REDACTED] Special Education Teacher; [REDACTED] Certified Behavior Analyst. Day 4: [REDACTED] School Occupational Therapist; [REDACTED] M. Kinney (return testimony from day 3); [REDACTED] Speech Language Pathologist at [REDACTED], Pediatrician. Day 5: [REDACTED] Director of Related Services at [REDACTED] Certified ABA; [REDACTED] Social Worker—Formerly at [REDACTED] OT at [REDACTED] Student's Mother.

### District's Position

The District, in this case, believes that it has appropriately evaluated the student and as a result is providing the type of program IDEA requires and that program is located at [REDACTED]. It states, in its "Brief/Legal Memorandum" "In this case the evidence irrefutably showed that an IEP was appropriately developed, [The Student] made academic progress at [REDACTED] under that IEP, and as such, the District has properly identified his LRE while providing FAPE." It believes that over 5 days of "solid" testimony and documentary evidence it has shown that the Student was provided FAPE: academic progress in the classroom, social progress, an aptitude by [REDACTED] staff to adapt to meet the needs of the Student as well as address the wants of the Parent, and an ability by [REDACTED] staff to correct

<sup>1</sup> The Hearing Officer granted the parties the opportunity to submit post hearing "Memorandum's" in addition to closing arguments. Portions of the parties' respective submissions are reflected verbatim throughout the Decision.

the Student's behavior while in the academic setting. This, the District avers, all is demonstrated through IEP report cards, service logs and the testimony of skilled staff at HILA.

The District's position in a nutshell is that all Parents' "expert" witnesses, minus one, know nothing about the Student's current academic setting, yet Parents request a more restrictive environment than what is required in the law when they themselves have yet to meaningfully observe their son receive instruction in his current setting. Most of parent's witnesses were outside experts in the medical field, and [REDACTED] a parent witness who formerly worked at [REDACTED] testified to the appropriateness of the Student's social work minutes and [REDACTED]'s ability to properly provide those services.

**Regarding the District's failure to conduct adequate assessment of all areas of potential disabilities and failure to provide essential related services in social work, speech language, occupational therapy ("OT"), assistive technology ("AT") and or behavioral therapy, the District disagrees.**

The District avers that for a period greater than the relevant time period, the Student has been receiving specialized services in line with the requirements of IDEA. Further, the District states that when determining what services are appropriate for a student with disabilities, Jaccari J. vs. Chicago Board of Education, 690 F.Supp.2d 687 (2010), a case with similarly relevant facts, states that in determining whether an individualized education program is reasonably calculated to confer an educational benefit, as required to support a finding that child was provided a free appropriate public education, a court considers the following: 1) the child's potential, 2) whether his IEPs were tailored to his unique needs, 3) whether his IEPs provided access to specialized services, 4) whether they addressed disability related disruptive acts, and 5) whether the child achieved progress during the relevant time period. Id at 702. In that case, the hearing officer found, and the federal court agreed, that the District did not deny a disabled student FAPE when the District showed he made progress via his IEP's goals, despite parent's contention that student should have been making more progress. The federal court found in favor of the District in a scenario almost identical to that provided in this case, and in applying this rule and analysis to the case at hand, the Student's IEP is more than reasonably calculated to confer a benefit to the Student and [REDACTED] and he has not been denied FAPE.

All of the District's witnesses in this case, specifically those that work or worked with the Student on a daily basis in the academic setting, testified regarding the adequate provision of specialized services in their respective areas at [REDACTED] [REDACTED] the Student's Occupational therapist for the 2010-2011 academic year testified regarding her assessment of the Student in the academic setting (SD 345-348), as well as her consideration of outside occupational assessments. She testified that in the area of OT, she identified the Student's needs wrote what she believed to be appropriate goals and benchmarks, followed them, and tracked the Student's progress via IEP report cards (SD 145-146) and service log entries. In her opinion, based off her experiences with the Student in the academic setting and her observations of the same, the Student was making academic progress at [REDACTED] and the school was the Student's LRE. She testified she was in agreement with the disability label of the Student, that she and the IEP team wrote an IEP in line with what the Student's needs were, that the Student's IEP provided services in her domain, as well as in ABA strategies, speech, and was also written to include

social work in a highly structured classroom setting. She also testified that while there were issues with the Student's behavior at the beginning of the 2010-2011 academic year, the school made the necessary changes in his classroom setting to address them and minimize them while the Student was in school. She also testified, and went thru her goals, that the Student did make progress as called for in his IEP. For those areas he was not making progress, she and team took a careful look and regularly worked to re-write his goals in line with the Student's needs. The District believes that what makes her testimony compelling is that [REDACTED] is currently an Occupational Therapist working at a Therapeutic Day school, and according to her such a school is not where the Student belongs.

The District points to [REDACTED]'s testimony, the [REDACTED] psychologist who not only assessed the Student in his academic setting, but testified to taking into consideration outside assessments when making recommendations to the IEP team for his latest IEP (SD 288—5/14/11). She testified to 28+ years working with thousands of disabled students in the public school setting. Based off that experience, working directly with and observing the Student directly in his academic setting, consulting with all his service providers, and giving careful considering to the recommendations made by outside "experts," her opinion is that the appropriate setting for a student with a cognitive impairment and Autism, such as the Student, is [REDACTED]. In its post hearing memorandum of law, the District states that [REDACTED] even went as far as commending the outstanding job the Student's special education teacher has done with the Student. Contrary to parent's assertions, [REDACTED] as well as the District, continue to remain baffled on the idea of giving much if any weight to the consideration of outside assessments of the Student at his IEP team meetings, especially considering how long ago most of these assessments were completed, as well as considering that all outside assessments were conducted by professionals that have no idea what the Student's academic setting even looks like. Few, if any, consulted directly with the Student's service providers at [REDACTED] [Emphasis Added] (SD Memorandum—P.5) The District believes it to be ironic that none of the outside professionals who assessed the Student took time out of their busy schedules to testify at this hearing at the bequest of parent's counsel, and but for one, [REDACTED] none took the time to visit the school and observe the job [REDACTED] staff was doing with the Student in his current academic setting. The District references [REDACTED] testimony, and when he did take the time to visit the school he saw that the Student was well behaved and thriving in the highly structured classroom setting provided by [REDACTED]. Irrespective of this, [REDACTED] did at least consider those outside assessments when helping write the Student's IEP. The Hearing Officer notes that at the time of this evaluation, Parents' Due Process complaint had been filed.

[REDACTED] the speech language pathologist that provided services to the Student for this and last academic year testified at the hearing. She assessed the Student on 5/16/11, while the Parents' Due Process case was pending. She testified to her consideration of the previous speech language assessment conducted prior to her provision of services (SD 421-422) as noted in her 5/16/11 assessment. She testified to the appropriateness of the goals written for the Student, and testified to her ability to provide the services called for in the Student's May 2010 IEP (SD 69). She testified that as the year went on, the Student made progress in the majority of his goals she was responsible for. For those goals he did not progress in, she alleges to have made

adjustments and the appropriate changes were made at the end of the 2010-2011 academic year IEP meeting, albeit when the Due Process Complaint filed by Parent was pending. She testified to assessing the Student herself during the spring of 2011 (SD 370-373) and testified to the appropriateness of that assessment. She testified the Student receives 60 minutes per week direct speech language services and 30 minutes per month consultative. As a professional that works directly with the Student in this domain, it was her opinion was that this amount of service was appropriate while in school considering his disabilities. The District admits that [REDACTED] did testify that there were some speech language minutes that were not provided during the 2010-2011 academic year. This was corroborated by parent's witness, [REDACTED]. However, despite this, the Student still continued to make progress in this domain. [REDACTED] further testified to the Student's progress in his ability to communicate, an increase in his ability to communicate using small phrases (a vast improvement from being nearly non-verbal nearly a year ago), as well as an increase in his ability to communicate his alphabet. Again, this is fairly remarkable considering not only does the Student have Autism, but also a moderate cognitive impairment. [REDACTED] also testified that the Student's behavioral issues have been identified and she believes, correctly addressed in the school, and the Student has not been a behavioral problem at [REDACTED] for over a year. [REDACTED] even testified as to her issuance of an assistive technology referral at the end of the 2010-2011 academic year as per the request of the parent. The District claims, but for receipt of the Parents' signed written consent, it has been prepared to offer an evaluation. The District avers that [REDACTED] testimony supports its position that the Student's IEP is in line with the precedent set in [REDACTED].

Testimony was also provided by [REDACTED] the Student's current social worker. She testified that the Student was not only making progress, but benefitting from being in [REDACTED]. She testified that over the past few months of providing services directly to the Student, he has made progress as per his goals (SD 130-154—IEP Report Cards). She testified how she provides those services and spoke to how the Student is favorably responding socially. [REDACTED] spoke to the adequacy of the 30 MPW of direct social work services called for in the Student's existing IEP, and 10 minutes of monthly consultative minutes (PD 363—5/17/11 IEP reconvened on 6/20/11). Parent's own witness, [REDACTED] also testified to the adequacy of these service minutes for the Student, as well as the ability for [REDACTED] staff to provide these services. The District is quick to point out that it was [REDACTED] that recommended those services as per her own assessment. [REDACTED] testified to implementation of these minutes and her sworn testimony was that the Student was on track to make progress under his existing IEP for the next quarterly benchmark. She also spoke to the adequacy of the Social work assessment done by [REDACTED] found at (SD 334-344—5/16/11). [REDACTED] also testified that she knew of no existing behavior problems with the Student while in the school setting and she did not believe he needed a functional behavior analysis at this time. From [REDACTED] Testimony, the District concludes that its actions are in line with the District's obligations under [REDACTED].

The District avers that although the Mother made an issue regarding the need for a nursing goal in the Student's IEP testimony from [REDACTED] Case Manager of the Student and [REDACTED] Director of Special Services, they confirmed that no nursing goal was written, nor was there a formal nursing assessment because in both 2010 and in 2011 during the relevant IEP meetings, parents did not indicate this was an

area of need. [Emphasis Added]. This fact is evident in parent's own documents on pages PD 248 from the May 2010 IEP meeting, as well as PD 29 and PD 30 - the consent for re-evaluation signed by the Student's Mother for the 2011 IEP meeting. Health was a non-relevant issue for the Student as far as domains are concerned. (Note: Parents' testimony differs in that Mother states she did not check nor was she aware that the "non-relevant" box had been checked until receipt of the document after a records request was tendered by her attorney in preparation for Hearing). The District avers that the record shows that after the May 17, 2011 IEP meeting, in part to accommodate parent's request, the District met again in June and built into the Student's IEP medically related accommodations and modifications addressing health (see PD 343).

In light of the above evidence and the precedent in [REDACTED] is clear, the District avers that the Student's IEP was comprehensive, appropriate, and the Student was making progress as called for therein. As such, the District concludes that the Parents cannot meet their burden of proof and as such the Hearing Officer must rule in favor of the District.

### **Parents' Position**

The District's Speech evaluation was flawed and deficient in that it omitted assessing areas of suspected disability. The speech evaluation failed to formally assess the Student's Apraxia, even though the District's speech therapist, [REDACTED] ki, testified that she suspected noticed characteristics of Apraxia and that it is a condition that can be remediated. She failed, however, to provide information in her evaluation and she failed to provide adequate recommendations. Additionally, all of the District's evaluations failed to address the Student's behavior management across the disciplines. The District's psychology report relied upon to develop the Student's latest IEP is inadequate and unreliable. [REDACTED] testified that she was not able to complete testing due to the Student's behavior. Further, the records show that the District failed to conduct an evaluation in Assistive Technology and Augmentative Communication Even during the latest IEP process, the District still has not conducted an evaluation in these areas, despite the fact that the Parents provided a universal consent to evaluate in April of 2011. And according to the District's stipulation, the District staff failed to conduct an evaluation by a school nurse despite the fact that the Parents signed a release for the District to speak to [REDACTED] the child's pediatrician, gave the District a letter from pediatrician documenting lactose intolerance, and despite ample evidence that the District had knowledge of diarrhea problems since 2008. (PD 193). The Parents' are adamant that a nursing evaluation should have been a part of the evaluation process in order to address the Student's ongoing diarrhea and to address the Student's lactose intolerance during school hours. This is especially important, Parents' aver, in light of the fact that the Student's pediatrician wrote prescriptions, were given to the District but never implemented. The Parents' also maintain that the District failed to conduct a Functional Behavior Assessment ("FBA") that outlined behavior difficulties posed by the student and potential effective interventions on the part of the school staff. Parents' aver that the District has failed to evaluate both the Student's hearing and his auditory processing—which are two completely different areas of concern. The IEPs clearly state that the Student's has never had a hearing test and even after the parent's requested one at the IEP level and provided consent, the District still has not provided one. The District also failed to evaluate auditory integration, the Student's ability to listen to 2 different stimuli at the same time, and how auditory integration skills relate to his ability to hear a group of

sounds and pull them together with other sensory information. The District is required to evaluate in all areas of suspected disability, and given all the testimony presented over 5 days of hearing about receptive and expressive communication, the District did not evaluate nor was a referral for testing made in these areas. Even the District's speech therapist agreed that the Student's would benefit from an evaluation in this area. She testified that hearing affects articulation. And that the ability to hear affects receptive auditory processing, and that she would be very interested in seeing results of formal auditory testing.

### **Hearing Officer Conclusion**

The District has failed to adequately assess the Student in accordance with 34 CFR 300.304 and specifically in the following areas:

- 1) **Speech:** Testimony and documentary evidence offered at hearing indicated that the Student has suspected areas of Apraxia, characterized as a motor speech disorder where children have problems saying sounds, syllables and words.<sup>2</sup>
- 2) **School Psychological Report of Re-Evaluation:** Does not provide recommendations based on the Student's "possible" diagnosis of Autism Spectrum Disorder and Attention Deficit-Hyperactivity Disorder. (PD 48—5/14/2011).
- 3) **Behavior Assessment (FBA/BIP).**
- 4) **Hearing Assessment:** Speech-Language Assessment Summary (PD 73)—box for Hearing Screening bearing date of 7/31/2008 marked "unable." Also, School Nurse Report, 7/31/08 indicates "unable." (PD 194).
- 5) **Auditory Processing & Integration Assessment**
- 6) **Vision Screening:** School Nurse Report, 7/31/08 indicates "unable." (PD 194).
- 7) **Health/Nurse Assessment**
- 8) **Augmentative Communication.**
- 9) **Assistive Technology**

### **District's Position**

**Regarding the District's alleged failure to identify and utilize effective teaching methodologies at a sufficiently intensive level that would enable the Student to make progress commensurate with his cognitive skills the District "vehemently" disagrees.**

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<sup>2</sup> The District's own Speech Therapist testified to recognizing signs of Apraxia displayed by the Student.

Referencing the [REDACTED] precedent the District points to the testimony given by the Student's special education teacher, [REDACTED] regarding the academic instruction the Student receives. District avers that many of the teaching methods used by [REDACTED] are directly in line with what parents are requesting. It references McKinney as an Applied Behavioral Analysis (ABA) trained teacher who is supervised by a Board Certified Behavioral Analyst - [REDACTED]. She testified as to how she applies ABA methodologies in her class in line with what is called for in the Student's IEP; and the District states that the record shows that she has been providing this type of instruction to the Student even before it was called for in his IEP. As such, the District avers, she was going above and beyond for nearly an entire academic year. [REDACTED] testified that prior to coming into her highly structured classroom, supported by 2 full time aides, and 1 floating aide, the Student had some behavioral issues. However, once the Student came into her classroom over a year ago, the behavioral concerns almost immediately stopped. This was corroborated by all of the Student's service providers, and by Parents' witness [REDACTED] a former District social worker. [REDACTED] testified that the vast majority of instruction she provides the Student is 1 to 1. This point, the District avers, is substantiated through her testimony and by going through the relevant IEP progress reports (SD 130-154), the data sheets as they pertain to the Student's behavior in her classroom, as well as going thru her data sheets showing the Student's academic progress in the relevant goals she is responsible for implementing (SD 431-548). Furthermore, a series of questions asked by parent's counsel regarding the information on those sheets, as well as inferences from other witnesses who, again, never visited [REDACTED] in her classroom. What was suggested was that those sheets do not follow "ABA" format, a Parent argument the District characterizes as "nothing more than smoke and mirrors - an argument of form over substance." (SD Memorandum—P.8). The District points out that what is relevant is that [REDACTED] herself is the party that created those sheets, she explained the data therein, she verbalized the relevant time period they reference, and testified under oath the progress the Student was making academically and behaviorally as tracked therein.<sup>3</sup> [REDACTED] also explained how the Student receives a sensory diet on a daily basis via her classroom set up, and she testified working in collaboration with the Student's other IEP service providers in implementing the Student's IEPs. She also testified as to her participation in IEP meetings for the Student, and the appropriateness of the services called for during those meetings. At the conclusion of her testimony she made a heartfelt plea to keep the Student at [REDACTED] as [REDACTED] is, in her opinion, the Student's least restrictive environment and he is progressing academically with people who actually know his needs in the academic setting. The District points to the tremendous weight behind this plea in that [REDACTED] was previously a teacher at a separate/therapeutic day school. According to her, such a school is not the Student's LRE. The District concludes [REDACTED] type of instruction and alleged careful implementation of the Student's IEP, and teaching methodologies that they are far above the "basic floor" required [REDACTED]

<sup>3</sup> The Hearing Officer makes note that the data sheets appear unorthodox to accepted ABA record keeping practices through testimony of Parents' expert Dr. Richmond. The forms created by the special education teacher served their purpose for that teacher and the data recorded was explained by the author, the special education teacher, sufficiently to the Hearing Officer's concern provided that Ms. McKinney remains teaching at HILA. However, in the event Ms. McKinney was, for some reason, unable to continue her teaching responsibilities in the future at HILA it is questionable as to whether a teacher standing in her place would be able to make sense of the data sheets due to their non-descript, unorthodox format.

Testimony was given from the Student's music instructor, [REDACTED], and his gym teacher, [REDACTED] about the Student's abilities in those classrooms and his interactions with general education peers. They both testified about how in their general education classrooms, the Student is not a behavioral problem. Instead, he exhibits politeness, an eagerness to participate, is well liked by all his peers, and has the added benefit of being able to model exemplary behavior by typically developing peers – a very important part of the learning process for student like the Student. They testified about how important this type of inclusion is - an opportunity that is not available at a therapeutic/separate day school. The District further characterizes their testimony According to both general education instructors, the District avers, "the Student is receiving superior instruction in his special education classroom, participating fully in their classrooms, is modeling his typically developing peers and is unquestionably making progress in his least restrictive environment." (SD Memorandum, P.8-9) The District also points to the importance of [REDACTED]'s testimony and plea to reconsider any desire to remove the Student from [REDACTED] without even having taken the time to observe or get to know the type of instruction the Student is receiving his classroom. The believes that "incredible weight behind this statement" is primarily because [REDACTED] is the parent of a student with Autism himself and understands the importance of students with Autism having the opportunity to model typically developing peers while in school. Again the District concludes that this is precisely the opportunity the Student currently benefits from – and this opportunity, also, provides the Student with access to services above and beyond what is called for in [REDACTED]. The District finds it troubling, from the Mother's testimony, that she took but 90 minutes of opportunity to observe the Student's academic setting at [REDACTED] for at least the last year and a half; and the Mother's sworn testimony was that one 60 minute visit was to celebrate the Student's birthday with his peers, accompanied by a brief 30 minute visit at the beginning of the year. District's witnesses testified that at any time, parents could have and still can observe the Student's academic setting and communication with any of his service providers, and [REDACTED] testified the parent never observed her provide instruction to the Student. From this, the District concludes that despite this very limited interaction and observation of the Student in his school setting, parents request a more restrictive environment than the one he currently is progressing in academically. Such a request, the District argues, is contrary to what is legally required, and contrary to what the record before the hearing officer clearly supports – the appropriateness of HILA as his placement and the appropriateness of the academic instruction provided to the Student under his existing and previous IEPs.

### **Parents' Position**

Parents' aver that initially, they were open to trying whatever the "unnamed District method" is in teaching their son. Mother testified to trusting the staff and gave deference to their judgment. But as the years went on and when they were informed that their son had not made progress, they recognized a need for systematic, researched based interventions. If the District had provided "actual data", then maybe, Parents' suggest, they would not have had to file for Due Process. Parents' also aver that had the District at least agreed to follow the recommendations of outside evaluators and providers, then maybe the dispute could have been resolved without having to go through a hearing. In all the most recent evaluations, Parents allege, there is no evidence of academic progress,

social progress, or objective testing. There is no evidence that their son is learning in a progressive fashion and there is no evidence that being around typically developing peers is helping their son achieve his IEP goals.

Parents' point to the fact that many children need a therapeutic school to stabilize and to make educational progress. Parents' witness, [REDACTED] an expert in Autism with extensive knowledge in developing and implementing ABA programs, and not only is she certified in administering the ADOS, but she also has extensive professional and clinical experience in this field, has direct experience evaluating the Student. At time of her evaluation the Student benefited from typical peers. But now, since two years have gone by without progress, [REDACTED] testified that when a student is not making progress, it's less important for exposure from typical peers and more important to provide intensive therapeutic interventions. Parents' point to repetitive testimony from District witnesses that the Student currently does not spend any time being educated along typical peers in "academic" areas [Emphasis Added] (Parent "Memorandum" P 10). In Parents' viewpoint, keeping the Student at [REDACTED] for gym, art, and library with typical peers is simply not a good enough reason especially looking at the minutes he is exposed to typical peers, that only make up 20% of the Student's time at [REDACTED] School. Furthermore, Parents' aver, there is no data or progress notes showing that the Student is doing well in these non-academic areas. The Parents' believe their efforts to provide opportunities to interact with typical peers would suffice for the time being while great efforts by the District or preferably, a therapeutic day placement, were placed on providing more focused academic schedule. Concerns by some of the District staff suggested that perhaps the Student would be "harmed" by transferring to another school, but yet they still send him to random schools for ESY in a different building and with different teachers, and have never, Parents' point out, initiated any type of transition support even though [REDACTED] stated that the Student "takes transitions hard." Parents' point to the fact that, if the Student goes to Giant Steps Therapeutic Day School, he will already be familiar with [REDACTED] is BCBA who he has known for the past 4 years. Parents' believe and their experts confirm that with the proper support the Student could successfully transfer to another school. (Parent "Memorandum" P. 11). Parents' refer to BCBA expert, [REDACTED] testimony who referred to [REDACTED] School's program as a "Skeleton" ABA program. Parents' believe the Student needs a fully implemented ABA program with all the necessary components, including 1:1 teaching. Parents' characterize HILA's program as "ABA TYPE instruction" which they believe bears a "huge" difference to an evidence-based one. Parents' point to the fact that there is "no" evidence of a master plan, no direct supervision, and no proper data collection, which Parents' experts agree are major components of ABA. To this point Parents' attribute the lack of a BCBA supervising the program: referring to [REDACTED] testimony affirming that [REDACTED] only consults with her about 20-30 minutes each week with no documentation of these meetings. Without specific action steps on how to accomplish IEP goals and objectives, without ways to address barriers, Parents' conclude that the implementation of the Student's program is not effective and not appropriate. With reference to [REDACTED] "data sheets" and the difficulty associated with their being understood/interpreted, Parents' point to expert testimony and some of the District's witness testimony including the District's speech therapist who could not explain them. [REDACTED] the BCBA who has been working with the Student since 2008 testified that she could not interpret the so-called data and that ABA programs need supervision by a BCBA. Parent expert, [REDACTED] testified that there is "no prompt

hierarchy, no name, no date, and that there should be a master program to cross reference data.” (Parent “Memorandum” P. 11). Parents’ do not place much reliability on the record keeping system created by [REDACTED], despite her ability to interpret data recording sheets that she developed stating that the sheets do not contain enough information to be useful or factual and “no reasonable person can understand them.” (Id. FN3). In fact, the only benefit seems to be to amplify the District’s case. Parents’ reference the testimony of 2 medical doctors who testified and agreed that the Student needs 1:1 support in order to make progress. [REDACTED] (Day 2 Hearing) that the Student should receive 1:1 support from someone who is trained and certified. [REDACTED] testified (Day 4 Hearing) that “the Student can learn, that there is a direct correlation of success in improving autism/cognitive/and speech delays with the number of hours of ABA. He testified that the more direct services the better the outcome.”

### **Hearing Officer Conclusion**

The Hearing Officer believes the Student can directly benefit from a formal ABA program under the direct supervision of a BCBA and implemented by a teacher trained and certified in ABA providing 1:1 instruction with the child directly and through a 1:1 aide. The Hearing Officer is cognizant of the early evaluations presented on behalf of Parents’ experts dating back to 2008 and 2009, and believes that had more attention been paid by District staff to the recommendations, the Student could have been receiving appropriate services sooner, rather than later, thus setting a foundation for the Student to commence learning in an ABA research based education program. Particular weight was given to the testimony provided by [REDACTED], [REDACTED], and [REDACTED]. Also, the Mother’s credible and articulate testimony provided an exceptional perspective overall into the trials and tribulations Parents’ have undergone to provide a worthwhile and meaningful educational program, which they believe can be accomplished in a therapeutic day placement providing an ABA program under the direct supervision of a BCBA and taught by a certified ABA teacher such as Ms. Ori Sara.

### **District’s Position**

**Regarding the District’s alleged failure to offer sufficient 1:1 instruction with the result that the Student did not make progress in communication and behavior management skills the District believes the Record does not support such a finding.**

In response to this issue, the District alleges that Parents’ presented no evidence supporting the allegation that the Student is not receiving sufficient 1:1 instruction, that he is not progressing in his ability to communicate, or that he lacks behavior management skills in the academic setting. The District stresses that the relevant environment and/or setting we should be looking at here is the academic setting – as required under IDEA. The District points to testimony from the Student’s special education teacher, [REDACTED], [REDACTED], from all his service providers, and from other staff at the school that when the Student is in a highly structured environment he behaves well, and he communicates in line with how he is expected to in his IEP. [REDACTED] testified that the majority of the instruction he receives is 1:1 either from her or from one of the 3 aides she works with in her classroom of 10 students – above and beyond what is called for in his current

IEP. The District concedes that impressive testimony was heard from outside “experts”, and the unique opportunity to observe the Student in the hearing room presented itself for a few brief minutes. From that experience, the District concludes, the obvious was deduced; that without a highly structured environment, the appropriate prompting and the like, the Student can be somewhat disruptive. Every one of the Student’s academic service providers testified to that effect. However, the Student’s service providers also testified that [REDACTED] has figured out how to address these behaviors while the Student is at school. They testified that when he is supported appropriately, he is behaved, he learns, and he communicates in the appropriate way. The District references Parents’ providing evidence regarding a BASC assessment where [REDACTED] indicated the Student is a behavior problem. Parent’s counsel went thru each instance in that assessment where [REDACTED] indicated there was a behavior concern. However, the District believes that [REDACTED] testimony clarified what it characterized as “any misleading inferences that were drawn” from Parent counsel’s questioning. She testified that her answers were based off the entire time the Student was in the school, including the time prior to the Student being in her classroom. She testified that nearly all of the misbehaviors had subsided while the Student is in her classroom. Again, [REDACTED] has figured out how to work with the Student and help him progress while he is in class. From this the District concludes that [REDACTED] is unaware of any parent evidence supporting a requirement for additional 1:1 instruction than what the Student already receives.

The District points also to Parents’ counsel presenting evidence in the form of testimony and/or reports from a number of outside experts including [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. Among these individuals, there are years of professional experience in psychology, behavioral therapy and medicine. However, despite this repertoire of prestigious and respectable professionals, the District highlights, not one took the time to observe the Student in his current academic setting prior to testifying in conjunction with this hearing. Not one was aware if the Student was receiving instruction in line with their recommendations, nor were any of these individuals able to testify if they knew how the Student was currently behaving or progressing academically while in school. [REDACTED] testified to the stark difference between the medical needs and the academic needs of students with disabilities – a distinction the District thinks has been missed by parents based off the evidence they presented. [REDACTED] spoke of his medical familiarity with the Student, but also stressed his unfamiliarity with the Student in the Academic setting. He had no way of knowing or recommending anything with regards to the current the academic needs of the Student. The District fails to see then how his testimony is relevant. Similarly, parents called [REDACTED] Gorski as a witness, and regularly referenced her evaluation – completed in 2009 (PD 480) outside the relevant statutory period. It was unknown by Dr. Gorski, through District’s cross-examination of her direct testimony at hearing, if whether at this time, any of the recommendations therein were still applicable, or whether the recommendations therein were currently implemented at [REDACTED]. Despite this unfamiliarity with the Student in his academic setting, the District portends that “all the relevant service providers testified that they took the outside assessments into consideration when making recommendations to the IEP within their domain of expertise.” [Emphasis Added] Even the Student’s Mother testified this was communicated to her by members of the IEP team at [REDACTED]. In line with all of this, the Student has been receiving instruction, much of it 1:1, in line with what he needs so that he can progress as per his IEPs goals at [REDACTED].

The District points to testimony from [REDACTED] a post-doctoral fellow in clinical psychology. The District makes a point that he testified about his vast experience, extensive credentials, and the observations he made of the Student - a mere 4 hours of observations in a setting nothing like the Student's school. He testified that as a fellow, he is allowed to do assessments of patients, but under the supervision of an actual clinical psychologist. Yet, when asked who supervised his assessments of the Student in relation to this case, he could not name anyone, nor could he correlate how his assessments related to the Student and his needs in the academic setting. Again, when asked if he had observed the Student in his academic setting, the answer was a resounding "no." As a result the District concludes that "the relevancy of his testimony is negligible at best." The District concludes that when considering the evidence provided by the medical professionals who testified and submitted reports, it is not in the business of, nor is it legally required to medically treat a student's disability. [Emphasis Added]. Instead, the District's obligation is to provide academic services to a student with a disability specific to that student's need so that the student can make academic progress. None of these medical professionals had the requisite knowledge to testify to that effect, and again, none knew if the type of instruction the Student receives now, be it 1:1 or not, was sufficient for him to progress academically at HILA.

The District points to the testimony from two Board Certified Behavior Analysts from North Shore Pediatric Therapy - [REDACTED] and [REDACTED]. First, the District avers, [REDACTED] testified to her reports completed in December of 2008 and September of 2009 (PD 518-528). District's counsel notes that a full 2 years have elapsed since these reports were completed. Again, [REDACTED] testified she has not observed the Student's academic setting to see if her recommendations were being implemented or to see how he was progressing. There was also inferences drawn as to her credibility when questioned about the summary of her report on PD 518, completed in December of 2008 which is an exact replica of the summary report on PD 511-512, completed nearly 2 years later by Mr. Benny Howard - who happens to also work for the same company [REDACTED] did when she completed her report. Second, [REDACTED] is the only parent expert that visited the Student's academic setting. His testimony and his report both indicate that the Student was well behaved during his visit and [REDACTED] staff was doing a fine job of working with the Student in his academic setting (PD 510). The District presumes that should parent's other expert witnesses have taken the time to visit [REDACTED] and observe the Student in his academic setting, their reports would have been indicative of much the same.

The District concludes that none of these independent evaluations were necessary, nor were any of them even relevant. They do not come remotely close to being applicable to the academic setting, as were the District's evaluations. As such, the District is certain there should be no responsibility to fund these evaluations as they are inadequate, outdated, and not entirely relevant to the academic setting. The District avers the parent has not met their burden based off the evidence presented and much of the evidence presented by parents was irrelevant at best as it had nothing to do with the Student in his academic setting during the relevant time period. Yet, the District believes it provided much evidence that the Student's instruction via [REDACTED] was in line with what he needs and much of it was 1:1 throughout the academic day. To require anything

additional would be more restrictive than what the Student needs, and not in line with the LRE requirement of IDEA.

### **Parents' Position**

Parents' aver that everyone who has testified, except for District staff, agree that 1:1 instruction is extremely effective in order for this Student to make progress in communication and behavior management. They point to decades of research that shows that 1:1 instruction is an essential component of teaching children with autism, and testimony from various experts about the studies in peer-reviewed journals showing 1:1 instruction is an effective treatment for autism. Despite this, Parents' aver that the records are clear, the Student has "never" had a 1:1 aide and even with the results of their own psychological evaluation on SD288, and "glaring" results of their own BASC on SD 303, the District appears to be, in Parents' judgment, unwilling to provide the Student with one. The Student's special education teacher, [REDACTED], testified that at the most, she only spends 1 hour per day doing 1:1 teaching with him. From this, Parents' conclude, given the IEP report cards, this random approach is simply not working. And, since no aides are assigned to the Student exclusively, Parents' aver, simply having aides in the classroom is not necessarily going to be the solution to providing the Student with an education. Parents' believe that having "occasional assistance" is not a substitute for a good research based educational program. (Parent "Memorandum" P. 7).

### **Hearing Officer Conclusion**

It is the opinion of the Hearing Officer based upon testimony from the Student's ABA therapists, [REDACTED], who provided services as a District employee and private therapist since 2008 and [REDACTED] as well as the child's two medical doctors, [REDACTED] and [REDACTED] this Student can greatly benefit from 1:1 instruction since he has the potential to learn.

### **District's Position**

**Regarding the District's failure to provide regular written communication with Parents' in accordance with their requests the District denies Parents' claim of ever making the request and that the law does not require a written response to Parents' request for communication.**

District claims it is unsure of any legal obligation it has to respond to parents in writing and denies failing to provide written communication with Parent's in accordance with what is required under the law. The only legal requirements for written communication the District is aware of are responses to records requests and providing the parents Notice of Conferences for IEP meetings. The District points to the record which it states is "replete with evidence of e-mail correspondence, IEP report cards, student progress, evaluations, documented proof of conference notifications and the like, as well as a record that includes nearly one thousand pages of documents." If this is not indicative of communication via writing between the school District and parents, the District is not sure what else possibly could. Furthermore, the parents contend that the few additional records that were propounded during the hearing in response to inquiries made by Parents' counsel of witnesses giving testimony, prejudiced the parents in presenting this

case. The District contends that the few additional documents that were presented by the District during the hearing were either duplicative of documents that were already in either the parent's or District's binder, were documents generated after the 5 day deadline, or were documents that did not necessarily constitute student records. Nonetheless, the District produced these documents, despite numerous and vigorous objections and believes there to be no denial of FAPE in this respect.

### Parents' Position

Parents' point out that other than a very few emails, there has been "no consistent daily communication with the parents." (Parent "Memorandum" P. 7). The reason Parents' deem this so important is because the Student himself cannot tell his parents about his day. He cannot tell them what he needs. He cannot advocate for himself. In addition, Parents point to several instances during hearing where District failed to provide the Parents with school records, in accordance with their continued requests. Parent' point to the fact that many of the [REDACTED] staff members who testified at the hearing testified that no one asked them to produce emails pertaining to the Student's. By these "procedural violations" the parents have been prejudiced by these "blatant" omissions.

### Hearing Officer Conclusion

While the Parents' have made a written records request upon the District, it is believed the District has made good faith efforts to have all requested records produced for hearing. While it is noted that some witnesses appeared to be surprised at Parents' questioning of whether anyone has inquired of them to produce e-mails or other records kept on the Student, I find that the District was willing to immediately attempt to resolve the issue and in those instances where records had to be requested, they were produced and appeared to have little prejudicial impact on Parents' case as a whole. While I do believe that increased regular communication with the Parents', written or verbal, in addition to what is required by IDEA and State Law, may have helped dramatically in this matter, the District is correct in its conclusion that it is not required by law to do more.

### District's Position

**Regarding the District's failure to conduct assistive technology and augmentative communication evaluations regarding equipment necessary to promote effective communication skills the District denies based upon the Student's improving in his ability to communicate and the District has been awaiting the parent's consent for an Assistive Technology referral, which the District avers Parents' refuse to sign.**

The District believes that the evidence is unequivocal that not only has the Student made progress in the academic setting with his ability to communicate, but part of his progress has come about using various forms of assistive technology. They point to testimony from both [REDACTED] and [REDACTED] that they utilize the [REDACTED] in helping the Student communicate his wants and needs and that the Student is progressing in his ability to verbally communicate. He has gone from communicating in short, unintelligible sounds to now utilizing short phrases and expressions to express himself. Also, based upon testimony from [REDACTED]

that since June, an Assistive Technology referral has been pending, awaiting consent from the Parents' which has yet to be returned and as such, this request by the parents has been put on hold by the District. The District maintains that it cannot be held accountable for parent's refusal to consent, and based upon Parents' refusal, the District argues, that Parents cannot meet their burden of persuasion on this issue.

### **Parents' Position**

Despite Parents' providing consent to have their son evaluated in this area (PD 29), Parents' aver that testimony at the hearing has shown that there have been no augmentative communication devices provided to the Student.

### **Hearing Officer Conclusion**

It stands to reason, if the Student has not been evaluated in this area, despite real or perceived needs, the need for Assistive Technology cannot be determined. I find the Student's needs warrant testing, and that Parents' consent provided in PD 29 is sufficient for this to occur immediately.

### **District's Position**

**Regarding the District's failure to develop an effective Functional Behavior Analysis and a Behavior Intervention Plan for this Student, the District maintains that one is not necessary because this Student does not pose a behavior problem when he is in the academic setting.**

The District maintains that there is little to no evidence to support an allegation that it has failed to develop an effective functional behavioral analysis and a behavior intervention plan. Testimony from [REDACTED] the Student's case manager, as well as the other service providers [REDACTED] demonstrate that the Student is not a behavior problem while at the school when receiving the services called for in his IEP. Testimony did confirm that when the Student first came to [REDACTED] he behaved well in a highly supported classroom. The District alleges that, as per parent's requests, the school attempted to put the Student in a less structured classroom in line with promoting education for disabled students in their least restrictive environment as required under the law. However, this did not work, and soon thereafter [REDACTED] adapted by putting the Student in a highly structured classroom with [REDACTED] as his special education teacher. This, the District alleges, corrected the behavior problem and has done so for over an academic year. The District maintains that [REDACTED] staff worked to properly identify the Student's LRE and found the appropriate recipe for improved behavior. Based upon this effort the District believes that there is no need for a Behavior Intervention Plan ("BIP") or Functional Behavior Analysis ("FBA") because the Student's behaviors are being thoroughly addressed by an ABA trained teacher in [REDACTED] supervised by a Board Certified Behavior Analyst in [REDACTED]. The District avers that a behavior intervention plan is for those students whose behaviors affect their ability to receive instruction. They point to [REDACTED]'s testimony that his behaviors in her class do not impede his ability to learn, and therefore is not necessary. The District alleges that the Student is the only student at [REDACTED] that has an IEP written so that he is the "only" student who receives ABA instruction under a BCBA at [REDACTED] as called for in his IEP.

Behavior wise, this is as close to 1:1 attention you can get in this relevant area. As such, the parents cannot meet their burden in relation to this issue.

### **Parents' Position**

Parents' believe that it is well documented, even as recently as this school year, that the Student has a need for a behavior plan. Even on his most recent IEP, PD332, there is mention of behavior needs. Parents' aver that without an effective FBA and BIP, the Student is left without the necessary intervention and support he needs to access any type of curriculum. Parents' allege that the District's staff want us to believe that all of a sudden, for no apparent reason, the Student has zero behavior problems. Parents' point out, however, that with all the different autistic behaviors the Student exhibits, it just doesn't make sense. (Parent "Memorandum" P. 8). Pointing to the Student's most recent behavior-rating scales on SD 303, filled out by ██████████ herself, Parents' aver that they tell a completely different picture than her testimony. According to the BASC, the Student has many problematic behaviors, including hitting other children. Parents' point to the fact that ██████████ filled this out in April 2011, before the IEP meeting in May when the Parents' brought legal counsel to the meeting. Parents' infer that it is curious that all of a sudden after these proceedings began, she is now changing what she reports about the Student. The reality is, Parents' conclude, that District staff have only started making these claims after the parents filed for due process and that, Parents' believe, is a shame because by not providing a BIP, despite ongoing requests, there is no systematic approach in place to track or address the Student's behavior challenges.

### **Hearing Officer Conclusion**

Much testimony was given on whether or not the Student exhibited behaviors that warranted providing conducting an FBA warranting development of a BIP. Certainly, prior to being placed in ██████████'s classroom, the documentary evidence provided and reference to pre-McKinney classroom warranted a closer look at the Student's behavior and its effect on his learning. This did not occur. Instead, relying on the apparent expertise of ██████████'s Director of Special Services, ██████████, a Board Certified Applied Behavior Analyst and ██████████, the Student's special education teacher who is also trained and certified in ABA, came up with a "strategy" to address the Student's needs. They provided a structured classroom for the Student where he would receive more personalized attention from ██████████. The Parents' however believe that the process warranted following a more standardized, research based program through the administration of an FBA and then developing an BIP. While the hearing officer recognizes the professional expertise and efforts of ██████████'s staff in attempting to come up with a solution to address the Student's hitting and acting out behaviors, I believe they were remiss in not taking a more formal approach to the problem by instituting the FBA process. Given the Student's behavioral history since first entering kindergarten and given the Student's behaviors when placed in ██████████'s classroom prior to moving him to ██████████, the District ██████████ would have better served the Student by undertaking an FBA and developing a BIP which would have then provided a "blueprint" for moving forward concerning the Student's behaviors. I find the District failed in its recognizing the need for developing a FBA/BIP for the Student.

### **District's Position**

**Regarding the District's failures associated with writing inappropriate IEPs for the last two years the District avers that the IEPs in place for the Student while at [REDACTED] were appropriate because they identified the correct amount of service minutes, had clearly articulated and measurable goals, and they provided the appropriate amount of support to not only ensure the Student made academic progress in measurable fashion, but also allowed the Student to progress socially and behaviorally**

The District responds by pointing to what it believes is the relevant law found in [REDACTED]. In determining whether an individualized education program is reasonably calculated to confer an educational benefit, as required to support a finding that child was provided a free appropriate public education, a court considers the following: 1) the child's potential, 2) whether his IEPs were tailored to his unique needs, 3) whether his IEPs provided access to specialized services, 4) whether they addressed disability related disruptive acts, and 5) whether the child achieved progress during the relevant time period. [REDACTED] at 702). The District maintains that each of the Student's IEPs indicate his areas of strength and weakness in the academic setting. In reviewing the Student's IEPs in this respect, the District maintains, "the only evidence provided contrary to those statements of performance and strengths and weaknesses are from individuals who never took the time to observe the Student at school." (SD Memorandum, P. 14). Consequently, these experts, although they testified to their experience with being involved in creating IEPs for other students, were never parties to the Student's IEP meetings. Further, the District claims, that not even the Student's parents can say they observed the Student in his current academic setting when they filed this complaint or participated in his IEP meetings. Additionally, the District maintains that all of the Student's goals are measurable and clear pointing to detailed testimony from the Student's social workers, occupational therapist, speech pathologist, special education teacher and case manager on what each of his goals meant, how it was measured, how the Student made progress, and how HILA is the least restrictive environment to implement those goals.

### **Parents' Position**

The parents contend that the student's IEPs for the past two years:

a) Included statements of present levels of performance that do not accurately and objectively state the student's skills and functional levels. Parents' aver that without factual and comprehensive data or measurable objective testing, there can be no way the student's present levels of performance can be determined. Parents' contend that all of the Student's IEPs fail to discuss his apraxia, which clearly severely impacts all aspects of his communication.

b) Furthermore, the last two years' worth of IEPs 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. Parents' allege, from the evidence they presented and the testimony heard, the goals in the IEPs were vague and not measurable. Parents point to testimony given by [REDACTED] the District OT (Day 4 of Hearing) who on cross examination attempted to explain what a "prompt" was failed to fully explain what should have been obvious that a prompt could also be visual,

physical, etc. Parents' maintain that the goals are un-measurable and vague. Parents' also pointed to testimony on cross examination by the District speech therapist that she also could not explain exactly what a prompt is, as it relates to the IEP goals. (Day 4 of Hearing). She even said that because the Student is not meeting his current goal, she is going to revise it to an easier goal, rather than providing the Student with additional support. Parents' allege that even though the District's speech therapist stated that the Student has severe phonological processing issues, she never wrote an IEP goal to address this challenge. There were also no goals drafted to address the Student's behavior. [REDACTED] the BCBA who has known the Student since 2008, reviewed the current IEP and testified that the current ABA goals are not measurable. If the IEP goals are not measurable, Parents' conclude, they are inappropriate.

c) The IEPs also fail to address adequately the communication and behavioral limitations of the student. (See above discussion)

d) The IEPs provide for an inadequate level of related services, specifically:

i. Speech language services are authorized at 60 minutes per week, but should be at least 120 minutes per week for a child with significantly depressed expressive and receptive language skills. The documents specify the student's need for 120 mpw: In 2009—from [REDACTED] report; In 2010—from the North Shore Therapy report; In 2011—from the Imagine Therapy report and from [REDACTED] herself, who sees the Student on a weekly basis and has known him since 2008. The only appropriate amount of speech services at this point, Parents' contend, especially since District failed to provide so many speech therapy minutes, is 120 mpw. Testimony from [REDACTED] the former [REDACTED] District social worker, who felt she had a moral and ethical obligation to inform the Parents' that the Student was not receiving speech services, pursuant to his IEP, also agrees the Student should receive 120 mpw. Even though [REDACTED] is not a speech language pathologist, Parents' believe it is not necessary for her to be one to realize when one of her students cannot communicate.

ii. The IEPs fail to offer direct behavioral therapy services, despite evidence of poor social interaction by the student. According to the Parents', as the records reflect, even on the most recent IEP, there is no commitment for a specific amount of ABA services and there is no commitment for any type of supervision by a BCBA. For the 2010-2011 school year, there was no ABA provided. In fact, the 2010 IEP does not include any mention of ABA at all on PD 245.

iii. They offer occupational therapy only 45 mpw rather than the minimum of 90 mpw indicated by the severity of his motor and sensory impairments. [REDACTED] testified that the Student requires 90 mpw of OT at school. Parents' aver that [REDACTED]'s testimony is credible, because she has worked at both the District and as an outside OT. She has been following the Student's case since 2008, when he was not receiving OT at the District and has reviewed his records, indicating his lack of progress in this area, and the IEP report cards, which show the Student did not meet his annual goals.

iv. They fail to offer a full-time 1:1 aide, although constant and consistent supervision and direction is essential for the Student to make reasonable progress. (see discussion above)

v. They fail to offer assistive technology resources required for the student to make adequate progress. Testimony was received from [REDACTED] an expert in Autism with extensive knowledge in developing and implementing ABA programs, not only is she certified in administering the ADOS, but she also has extensive professional and clinical experience in this field. She also has direct experience evaluating the Student. At time of her evaluation the Student benefited from typical peers. But now, since two years have gone by without progress, [REDACTED] pointed out through her testimony that when a student is not making progress, exposure with typical peers is less important than to provide intensive therapeutic interventions.

### **Hearing Officer Conclusion**

For all the reasons proffered by Parents' above, I find that the District's IEPs developed up to and including its most recent 6/20/11 are insufficient to benefit the Student's education at [REDACTED] so that he may show reasonable and consistent progress. I find the District's reliance on [REDACTED] to be somewhat ironic, in that they claim it mirrors much of the facts we are faced with in this case, but yet, they have not provided an opportunity to this Student's Parent's as they did with [REDACTED] s...i.e....placement in a therapeutic day school. Granted, [REDACTED] behaviors played more significantly, perhaps, in the decisions which led the District to do what it did in that case. However, given the nature of this Student's identified disability, Autism, and especially in light of the obvious flaws in identification and getting the appropriate services to up and running for this Student since his initial referral by a day care provider, the District should have been more diligent in identifying the Student's needs and in developing an appropriate program to address those identified needs, than it has shown up to the time when the Parents' filed their Due Process Complaint and after. While the competency of [REDACTED] and District staff is not in question, the professional judgment and execution of that judgment in its overall approach to the identification and provision of services to this special needs child is, in the opinion of this Hearing Officer. It is my belief that in a more restrictive therapeutic day school setting with the proper instruction utilizing ABA accepted standards and true data collection methodology and proper related service support, this Student has the potential of learning and progressing to the point of returning to a least restrictive setting sooner rather than later. The District's attempt to limit their responsibilities to what they must provide the student in an academic setting without trying to help meld the Student's medical needs is juxtaposed to the basic tenets of IDEA. The Student would have been better served in his academic experience had the District taken a more cooperative approach with the Parents' in accepting, reviewing and attempting to apply the suggestions offered by the outside Parents' evaluators. Having spent the time, money and effort that they put forth to try to keep their child from failing given the nature of his disability is truly noteworthy. They are to be commended and

the District, at least should attempt to respond in good faith by trying to see if the more restrictive placement will work. I believe had this occurred earlier given the testimony and expertise shown by [REDACTED] and [REDACTED] this Student would be in a different place in [REDACTED] or other public school setting where he could be being educated with his typically developing peers.

### **MOTHER'S TESTIMONY**

One of the most significant aspects of this Hearing was the testimony provided by the Student's Mother. The Student's Mother testified that her son was a happy child, loves his older brother but is not able to function as a normal child: he can't read or write; can't fasten his clothing; can't sit still long enough to eat; can't distinguish instances that require safety considerations (running onto the street); concepts of being with strangers; pots on stove and can say hot but still attempts to touch them. He is not fully toilet trained. The Parents' have paid for a private ABA therapist to develop a toilet training program and provided it to the District. Mother states that it was never implemented. [REDACTED] and [REDACTED] confirmed that it was not implemented at school. Mother testified to Parents' efforts to expose their son to typically developing peers: enrolled in gymnastic classes and YMCA programs and public park playground 3-4 days a week to interact with typical peers.

Mother testified that when her son was age 4 and in a day care program the day care program referred him to for early intervention testing at the neighborhood school. The referral indicated that the Student should get a full evaluation. (PD 14-2-14-07)<sup>4</sup>. Nothing happened after a few weeks, so she went back to day care for another referral and screening. (PD 15-3-26-08). Parent testified that an evaluation didn't take place the first time because the case manager at the home school told the parent that they lost the documentation. The evaluation was completed after the 2<sup>nd</sup> referral in July 2008. Parents sought professionals to test their son's cognitive abilities due to what the Student's Mother characterized as the "District's lack of responsiveness." In April 2009, a student referral was initiated at his home school, [REDACTED], at Parents' request. (PD 19). The referral for special evaluation was requested by the Mother, "due to concerns and ineffectiveness of summer assessment." The District objected as being outside the 2 year statutory period and the Parents' attorney noted that this was the basis for the programming during 2009-2010 school year. The hearing officer overruled the objection. The Parent testified to having signed 4 "Consent For Evaluation" forms: 7/31/07, 3/26/08, 5/28/08 and 7/31/08 . based upon being told that their previous information submitted had been misplaced or lost by school personnel. Mother also testified to signing consent for testing all areas of suspected disability back in the 2009-2010 school year to attend [REDACTED] elementary school. Mother testified to her son not doing well as evidenced by crying, hitting, kicking, screaming, running out of the classroom and knocking over items. "It was a daily challenge because he did not want to go to school." Mother testified that they cooperated with the Psychological Evaluation of 7/31/08 (PD 37) and completed a Vineland Adaptive Behavior Scale. She took her son to a pediatric neurologist, [REDACTED], who specializes in children with disorders, with a follow up at the University of Illinois. The mother testified to the Student being eligible for "Direct

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<sup>4</sup> Outside scope of 2 year statute of limitations but offered and considered by the Hearing Officer for its historical perspective.

Psychological Services" on 7/31/08 entrance form signed by the School Psychologist. (PD 40). She also testified that, to her knowledge, her son has never received any direct psychological services and according to the psychological services progress notes of the School Psychologist, he has not received the services. (PD 41). OT Assessment by ██████████ ██████████ employed by HILA and Parents' paid for her private OT for their son. (PD 42). Her son attended kindergarten at ██████████. Mother stated that it did not go well: "4 teachers, 3 different classrooms, it was chaotic. It appeared to her and her husband that they had no clue what they were doing." In the Parents' opinion her son just had too many different service providers. Mother testified to specifically requesting ABA and Speech when entering ██████████. Provided ██████████ with reports from University of Illinois Developmental Disorders Clinic, showing dates of evaluation being 4/22/09, 4/29/09 and 5/6/09 (PD 480-493); North Shore Pediatric Therapy ██████████'s report, (PD 494-95); ██████████ report dated 12/8/10 (PD 500). Requested direct ABA services for 2009, 2010 and 2011. Parent testified that she was told that it wasn't in his IEP and therefore couldn't be provided until his 3 year re-evaluation for any changes to be made. Mother testified that she wasn't aware that an IEP could be amended at any time. She was told some modifications could be made but to make total changes to IEP she had to wait for the 3 year re-evaluation. Through independent research Mother learned through the Illinois State Board of Education ("ISBE") website that in fact an IEP could be changed sooner than a 3 year re-evaluation. Testified to the Student's first grade experience. Summer ESY 2010 showed up at the school they recommended and they did not have her son on their list and then went to a different school and they did not have any records for him. It took at least 2 ½ weeks for it to get straightened out. Her son attended approximately 7 days total of ESY in 2010 at Sexton school. He did not receive any related services during the summer. When he returned to ██████████ for the 2010-11 school year, 1<sup>st</sup> grade, he was not having good experiences: Wetting his pants and he was running in and out of the classroom. Mother was receiving regular daily e-mails from his teacher, ██████████, about not being able to control him and that he was unable to access the curriculum and that she really needed help trying to figure out what to do with the Student. (PD 401- 5/19/11 Mercer e-mail to Mother). Mother testified to being frustrated especially because she had given the school a behavior plan prepared by his outside ABA specialist. She gave the school the plan at the beginning of the 2010-2011 school year and 2011-2012 school year but it did not appear the school was using it. Mother testified that a school visit conducted by ██████████, the Student's paid ABA Therapist cost between \$300-\$500. ██████████ visited when the Student was working 1:1 with a teacher. Mr. Howard noted that the Student was not receiving any social work service or any occupational therapy. Parents were also paying for outside speech therapy. Letter requested by Parents from son's pediatrician, ██████████, because they were applying for a grant to offset the cost of the Student's private therapy. (PD 500—12/8/10—██████████ ██████████ ter). ██████████ recommended intensive speech therapy (8 hours per week), ABA therapy (8 hours per week) and occupational therapy (4 hours per month). He also wrote a prescription for Speech Therapy (PD 498—3/15/10) and ABA Therapy (PD 499-3/15/10). These as well as ██████████'s letter were given to the District. Parents' also gave authorization to the District to speak to ██████████ as well as providing a release of the Student's medical records for purposes of conducting a full case study evaluation (PD 501). Parents' readily made available all evaluations and reports conducted by their outside evaluators so that the Student's therapy could be integrated with his in-school education. Additionally, Mother testified that they carefully

sought professionals that had experience in an “academic” setting rather than a mere “clinical” setting. [Emphasis Added].

The mother testified to what she thought some of the barriers were. Parents took their son to the [REDACTED] for vision testing because the District was unable to complete standardized testing for him. (PD 496). Parent provided the results of this testing to the District [REDACTED] the Student’s case manager. Parent also presented the Student’s Pediatrician, [REDACTED] report to the District, [REDACTED], which indicated the Student’s benefiting from private speech and language therapy. Parents’ asked that all reports given to the District be considered in development of the Student’s IEP, but none of the considerations were. Mother testified to their goal in getting outside evaluations was to determine how her son could learn and progress. The assessment obtained through the University of Illinois Developmental Disorders Clinic (PD 480) and conducted by [REDACTED], cost the Parent \$3,500 and was given to the District to assist their son and in hopes of forming some outside collaboration with the outside therapists the Parents’ hired to work with their son. It was this UIC report that 1<sup>st</sup> definitively diagnosed their son with Autism and Mild-Moderate Cognitive Impairment. Parents’ had an Occupational Therapy Evaluation conducted on 12/15 & 29/08 through North Shore Pediatric Therapy. (PD 503-509). Parent also gave the report to the District and requested it be considered in the development of an IEP. Mother stated that the District’s response was the same as others; that it would take it into consideration. Mother testified that her and her husband have lost faith in the District. They don’t believe the District has acted in a professional manner and certainly not in the best interests of their son. Parent signed a release for [REDACTED] to talk to and receive records from Imagine Pediatric Therapy, but to the Mother’s knowledge no contact by HILA was ever made. Parent testified to providing the Student’s first Board Certified Applied Behavior Analysis Behavior Specialist’s, [REDACTED], Applied Behavior Plan, to the District (PD 518-19—December 2008) and North Shore Pediatric Therapy ABA Report of Ms. Ori Sarra (PD 525-528 – 7/9/2009). Parent had a Speech Therapy Assessment conducted by the Student’s outside speech Therapist since 2008, [REDACTED] (PD 538—4/13/10). [REDACTED] diagnosed the Student with Autism Spectrum Disorder and Apraxia. Parent testified to supplying this report to the District. [REDACTED] recommended speech therapy for 120 mpw (PD 539) and made that request to the District since her son was attending [REDACTED] and [REDACTED] and was told that he was receiving the maximum amount of speech therapy allowable. Parent testified to expecting that her son would be receiving 60 mpw of speech therapy at school last school year in accordance with the IEP in existence at that time. But she first learned in June 2011 that he was not receiving the minutes prescribed in his IEP. She learned this from her attorney who had received a telephone call from the Student’s Social Worker, [REDACTED] who notified the Parents’ attorney that the Student was not receiving the required speech therapy. Parent testified to being upset upon learning of this in that they were paying for outside speech therapy of 2 hours per week and the District wasn’t doing what it was supposed to be doing. Parent reviewed the Speech Therapist’s progress notes that showed severe gaps in times and when services were provided they were in groups rather than on an individual basis. Parent testified that she may have never have found out that her son was not receiving the specified speech therapy since no one from the IEP team at the two IEP meetings held in May, 2011 and June 2011 mentioned it. The Parent testified that her son does not have the ability to express that what services he receives or doesn’t receive or the ability to express how his school day is/was.

Mother testified to requesting from the District staff frequent written communication from them reporting on her son's progress since he is unable to tell her himself. She reported that it has not been done. Mother testified that her son is not able to tell her whether or not he drank milk at school and that he has had instances of diarrhea at school but not at home. The mother concludes that because her son is experiencing diarrhea it's because he is being exposed to milk at school. Mother testified to a School Nurse Assessment in July 2008 when the student was age 4. The Student was identified as being "lactose intolerant at two years of age, but he seems to be able to tolerate dairy products better at this time." At his 3 year re-evaluation a school nurse was present at the 2011 IEP at the request of the Parent. A nurse came to the meeting and attended for about 10 minutes and requested an "emergency plan" drafted for lactose intolerance. The Parent testified to questions from her attorney regarding the May 6, 2009 IEP of the Student (PD 222). This IEP was convened at Enrico Fermi after the 2008 School Nurse report. A school nurse did not attend the meeting as evidenced by the signature page on PD 223. Drawn to the attention of PD 225 where the box for "not relevant" is checked pertaining to "the needs resulting from the child's unusual responses to sensory experiences." Parent did not agree to the "not relevant" characterization because the Student chews on his shirt collar or sleeve and its either frayed or soaked wet. The school staff were asked by the Parent how this could be addressed and Parent testified that no one seemed to know. Parents' sought the help of outside assistance it was learned that the Student could use a "chewing tube" that is attached to his shirt to divert him from chewing on his shirt. Parent testified that she also did not agree with the "not relevant" boxes checked in the "other needs resulting from the child's disability that impact progress in the general curriculum, including social and emotional development" because her son was still displaying hitting his peers and crying and screaming which to her, were social/emotional characteristics. These characteristics were also described in the "Relevant Transition Information" section of the IEP. Parent asked for Assistive technology help. As a result of this IEP he received ESY services.

In the May 2011 IEP, Parent requested a therapeutic day placement because she did not believe the [REDACTED] school placement is able to provide her son with the foundational skills he needs. The IEP team adjourned and in June 2011 reconvened the IEP and determined that the Student's needs could be met at HILA. Her son attended Fermi for ESY but did not receive any related services because he started late. She did not receive any progress notes on her son for speech or OT services for the ESY program. An ESY progress report for 2011 (PD 396) was reviewed and testified to by the Parent. She noted that her son was not making expected progress in Language Arts/English/Reading and in Speech/Language. She testified that her son cannot answer "who" and "where" questions in 8/10 attempts given prompts as needed. He also cannot recite the alphabet because he does not know all 26 letters of the alphabet. It was also that he was not making progress in his toileting goal in the "Independent Functioning" portion of the progress note. Parent testified to being in agreement with the due process complaint filed.

She also testified that although she attended a resolution session meeting on August 18, 2011 and the purpose being to talk about solutions to resolving the matter, neither her son's teacher, OT, Speech Therapist nor social worker were present. Mother testified to providing her son's outside ABA therapist with progress reports to develop strategies to help her son. Mother testified that her son cannot do things listed on June 2010 District

IEP report (SD 130;160): Create a two part pattern using 6 manipulatives, trace his name, and cannot draw a circle.

Parent gave written consent to do a comprehensive re-evaluation in all areas. (PD 129—April 14, 2011) and testified that it was her expectation that she had given full consent and that the District would do a comprehensive evaluation of all suspected areas of disability. She testified to asking [REDACTED] about what evaluations would happen and was told it was a thorough re-evaluation to include assistive technology and augmentative communication. Asked questions concerning the “Consent For Evaluation Assessment Plan” (PD 30) Parent testified that it was a computer generated document that she did not have input on. In the areas of Health and Hearing in the category of “Relevant” the “No” boxes are checked. Parent testified that she did not agree that those areas should be checked particularly because of her son’s lactose intolerance diagnosis and also because her son has never received a Hearing test from the District. On PD 31 in the area of “Communication” the category of “Relevant” is checked “Yes” and when asked whether she believed that would include an augmentative communication evaluation, she indicated testified that she thought it would. Parent testified that the reason she began considering sending her son to a therapeutic day school was because in the 3 years he has attended [REDACTED] he has made “minimal” progress and would hope he could be in an environment to offer intensive therapy and educational environment. Parent testified to receiving recommendations from her son’s outside service providers, ABA providers and speech therapist. She testified to visiting the [REDACTED] and that they received notification from them that their son would benefit from their program. (PD 547). Parent testified to what services her son would receive at the [REDACTED] as stated in the letter received: “we practice evidenced based methodologies with students with Autism and other related disabilities. These same methodologies, include but not limited, Applied Behavior Analysis (ABA) has shown to be effective with children with profiles like your child. Parent also testified to visiting [REDACTED]s to which she described as an “incredible” experience that tailors each child’s experience where they move children up through different classrooms based on abilities and they incorporate kids back into general education setting as needed which seemed to be their primary goal to succeed in the general education setting. Numerous community outings are planned and staff are extremely trained in providing “discreet trial” or ABA to children. Transition support would be offered if her son transferred to [REDACTED] and back to the regular education setting which is what she hopes will ultimately occur. Mother testified that she believes her son needs 1-2 years of intense ABA therapy and methodologies, not “ABA like” practices that she believes her son has been or in some instances should have been receiving at [REDACTED]

Mother testified that her goal is for her son be reintegrated into a regular general education public school setting after receiving the intense services she and her husband believe her son desperately needs. Her son’s not being toilet trained affects his daily education. It affects his social/emotional being as well. Parent received notification from his regular teacher, [REDACTED], of her son’s regression concerning soiling himself. This was provided through both e-mail and progress note notification, which, but for a records request made through the due process hearing, she testified should would not otherwise have known about. On or about October 11, 2011 Parent testified to receiving an e-mail from [REDACTED] about her son having a bad diarrhea where he had soiled himself and had to throw away his underwear and did not know what had caused it.

When asked by her attorney on "direct" examination as to how she believed not being toilet trained affects her son she stated that it upsets him and he's cognizant of the concept of the bathroom and gets very upset when he soils himself and is a very emotional experience for him especially when he is in a room with other students and it occurs and how embarrassed he becomes. When asked if she is concerned of a detriment to her son if he attends a private therapeutic day school she stated that she is not concerned. She alluded to his current setting and in his IEP he is now only exposed to typically developing peers 20% of his school week. The other 80% of time during the week he is with special education needs children. She believes that both her husband and herself have gone out of their way to independently expose their son to being with typically developing peers and she is not so much concerned about that 20% time rather than what is being provided for him during the 80% time. Mother was informed that at the [REDACTED], for instance, her son would be exposed to higher functioning special needs children, such as in three levels of classroom in the highest level classroom children were engaged in language, an area her son is very much in need of improving these skills through peer role modeling. Sitting in all 5 days of hearing Mother testified that not one District person has testified to show that her son can grow and instead of intervening immediately, waiting to the mandatory end of the year IEP to make or propose a change.

On cross examination, the District's attorney asked the Parent how her son was doing according to the progress reports for the 1<sup>st</sup> quarter of 2011 in terms of the goals he was meeting. Parent testified that the progress report indicated that he was doing well in all goals except for one. She also testified to having the opportunity to meet with her son's teacher who also indicated that he was doing well. Parent testified to meeting with the Student's teacher at least 3 times, April and May 2011 and the Parent/Teacher conferences. She testified to observing her son in the classroom setting. On his birthday, in April 2011, when she entered the classroom her son was off to himself in a self-contained area and other children were working in groups and one child was sleeping in a bean bag chair. When her son saw her, he ran to her and walked around the classroom together and later passed out snacks for his birthday. In May 2011 she visited with her son's teacher, [REDACTED] only for about ½ hour to discuss his calendar and visual schedule. The District's attorney asked the Mother to explain what she meant by her reference of "ABA like" services. Her response was, "if I have cancer, I don't want to go to a Medical 'like' doctor, I want to go to a Medical Doctor... This is a medical issue that her son has." She further testified as a result of sitting in on the hearing over the past 5 days, none of the staff at HILA are thoroughly trained in ABA except for [REDACTED] who does not provide direct services to her son, only consultative services to his teacher and other staff, OT, speech and social worker. These are, in her opinion, ABA like services that she has seen at [REDACTED], which is not an academic setting, but his developed plan is academic based. Counsel for District questioned the Parent as to whether any of her experts that she consulted with other than [REDACTED], visited the Student in his current academic setting, since October 2010 when [REDACTED] became his teacher none have observed her son in this academic setting. Notwithstanding, the Parent believed collaboration between the School staff and Parent "experts," she believed would have been prudent and beneficial. When asked by District counsel as to what Mother meant when she stated that her son was making minimal progress at [REDACTED] she stated: "her son can walk down the colored line in school, he can hang his coat on a hook, he is happy in the hallways, but he cannot read, write or cut, he can't use the bathroom on

his own that to me would indicate very minimum progress that's been made here." When asked about how much of the alphabet her son knew 1 year ago in comparison to now, Mother responded he knew about 6 letters a year ago and now about 18-20 letters. When asked about his ability to communicate to her, Mother stated "about the same as a year ago...1 or 2 word phrases...more mimicking as opposed to engaging in full conversation." Counsel for the District asked Parent the number of hours spent in observing her son in the academic setting, which the Parent responded to doing more than an 1 ½ hours, but because she works not much more. When asked about the District's attempt to gain Parent consent for assistive technology referral, Parent responded that a "form to sign was shoved at her at an IEP meeting but she refused to sign without her counsel being present... [REDACTED] said she would send it to her counsel." She further testified that she received a copy of the form to sign after she began the due process proceedings but did not do so because she had already signed a form in April, 2011 consenting to the District conducting a full comprehensive evaluation for all of his needs. With respect to her son's health concerns Mother admitted that the concern for her son's lactose intolerance was finally addressed in an IEP, June 2011, but after she had retained counsel and filed for due process (Id PD 30). When asked about what the one goal she believed her son to making progress in, in his current IEP she responded, "Science goal." (Id. SD 160). When asked about her testimony about her son's ability to answer "who or what" questions in relation to his ESY program, District's counsel asked if that was in relation to her son's ability to do so at home or what she observed in the academic setting to which the Mother replied "at home." District's counsel also asked Parent of her opportunity to observe her son while meeting with [REDACTED] ki, [REDACTED] n, [REDACTED] H [REDACTED] or any other of her son's service providers in the academic setting, to which Parent answered, "no." To the question by District Counsel as to whether it was her opinion that a private therapeutic day placement can only provide services to her son as called for in his IEP Parent responded, "a private placement is what's best for her son at this time." Parent also testified in response to District Counsel's question about exploring other non-therapeutic settings, that of those two other facilities she did visit, they were similar to what was being offered at [REDACTED] and nothing new would be offered. She was able to speak to the special education teachers and their assistants that would be with her son in their rooms. When asked whether they were asked if they could implement her son's IEP Parent responded that "I did not ask that specific question." In reference to questions asked about [REDACTED] s e-mail to the Parent received by her in October 2011 (Id. PD 401), Parent testified that at the end of her son's kindergarten year the IEP team identified her son as making progress and recommended moving him to a moderately supported classroom for 1<sup>st</sup> grade. In response to District Counsel's question about whether she asked to have her son stay in the more restrictive setting Parent testified that she did not agree with the District determination that her son was making progress and didn't have a clear enough understanding of what it is they wanted to do with her son; but did ask for "daily" communication specifically about his progress in that classroom. She stated that she did receive communications but mostly about complaints concerning her son not performing in the moderately structured classroom. Parent requested a meeting and one was convened involving the Parents, [REDACTED] and [REDACTED] and Parent asked for specifics about what her son was not doing so that mother could take that information to his outside ABA therapist so they could come up with a behavior plan. In the meantime, Parent testified that the school moved her son to a more restrictive classroom where his behaviors improved and was told that he was doing

well although his IEP report cards for last year, even after the move, still reflected that he was still "not making progress."

In kindergarten at [REDACTED] the Student was assigned to both general education and special education classroom per Parents' request. The Student didn't spend much time in public general education per the determination by [REDACTED] staff. Partway through the year he was removed and would the Student spent more time in a restrictive placement. Parent does not believe he should be in a general education classroom but in a private day school. When asked by District's Counsel about changes made in her son's programing since he started in kindergarten, she stated "yes" but after the fact. He was moved into more restrictive settings and has had 4 different teachers since kindergarten. Parent understood those changes to be due to staff consolidation and reduction but not because of trying to find a classroom setting to find what works with her son. When asked about her understanding of how her son was progressing since being assigned to a more restrictive setting with [REDACTED], Parent testified that it has been reported to her that there are less instances of his leaving the classroom, hitting others and throwing things. Regarding mother's testimony concerning her son's engagement in outside activities with typically developing peers, District's counsel asked whether those instances were similar to those in an academic setting following an IEP, Parent answered, "no."

On re-direct examination, Parent was asked whether she ever received notice of the change to move her son from [REDACTED]'s classroom to M [REDACTED]'s classroom she answered, "no" and only became aware of it when she was picking up her son to attend outside therapy and [REDACTED] they dropped him off and identified herself as her son's new teacher. Parents' counsel asked Mother about the other alternative public school sites offered by District's counsel that the Parents' might consider having their son attend and Mother stated she met with the Principal at one school and the Assistant principal at another school and neither knew about ABA nor did they state their schools could provide ABA services.

#### DISTRICT CONCLUSION

In its conclusion, the District references the following case, "James and Lee Anne D vs. Board of Education of Aptakisic-Tripp Comm. School District, 642 F.Supp.2d 804 (ND Ill. 2009), to which it believes holds that once a school District has satisfied the procedural and substantive requirement of IDEA, the courts cannot require more; the purpose of IDEA is to open the door of public education to handicapped children, *not to educate a handicapped child to their highest potential*. *Id* at 833. That is the law and the law contravenes what parents are requesting here." (SD Memorandum, P. 15). The District avers the case is also binding in "this forum" and also contains facts similar to those in the case at hand. In applying the James and Lee Anne D. rule of law to this case, the evidence is clear that the District maintains that it has satisfied both substantive and procedural requirements and more cannot be required of the District in this case. Substantively, the Student has made progress under 4 separate comprehensive and appropriately written IEPs for the relevant time period. Procedurally, the District has made parent aware of all IEP meetings and allowed parents an opportunity to contribute. The District believes that it has done an extensive job of documenting the Student's progress, and has worked with parents formally and informally to address the evolving needs of the Student in the academic setting. The District avers that it has also

documented nearly every instance of service provision, progress, and need of the Student under his IEPs – as evidenced by the over 1000 pages of documents submitted in conjunction with this case by both parties. the Student has made strides of progress, far more than what was contemplated in James and Lee Ann D. The District believes that the Student should be allowed to continue to be educated in his least restrictive environment, where he can continue to learn in progressive fashion, function socially with his typically developing peers, and be educated by the service providers that know him best. That environment is the one provided at [REDACTED]. The District acknowledges that Parents' have the right to place their child in a separate/therapeutic day school should they see fit or if they are not satisfied with the services provided by the District. However, District concludes, their desire to do so should not be at the District's expense under James and Lee Anne D., especially considering that, in the District's view, the Student has made measured progress under his appropriately written IEP in all domains over the relevant time period while at [REDACTED].

### **PARENT CONCLUSION**

Federal courts have recognized that a school does not satisfy IDEA by offering "mere token gestures or a trifle." *Nein V. Greater Clark County Sch. Corp.*, 95 F.Supp.2d 961, 973. (S.D.Ind.2000). In determining whether an IEP is reasonably calculated to confer an educational benefit, the Court will consider the following factors: (1) the child's potential, (2) whether his IEPs were tailored to meet his unique needs; (3) whether his IEPs provided access to specialized services; (4) whether they addressed disability related disruptive acts; and (5) whether the child achieved progress during the relevant time period.

In this case, Parents' aver they have presented ample evidence from several experts, and even District staff has agreed that the Student has the potential to learn. District averred that the District's IEPs were not tailored to meet the Student's unique needs. Additionally, most of the IEP goals are not measurable, the related services and teaching methodologies are insufficient, and the IEPs fail to address the Student's apraxia. Further, the IEPs fail to offer sufficient related services in all domain areas, despite ongoing evidence of the student struggling. Still further, there is no behavior analysis or behavior intervention plan to address disability related disruptive acts. Finally, from the documents themselves, one can easily see that the Student has not been meeting his IEP goals and has not made progress during the relevant time period.

The Seventh Circuit has held that "[t]o 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.*, 375F.3d at 613. In the instant case, Parents' conclude, the IEPs failed to address the Student's disability-related actions of disruption, inattention, aggression, running away, sensory difficulties, apraxia, and most importantly toileting accidents. These were all areas of significant concern that Parents' maintain that the District acknowledged but refused to address. Citing as an example, Parents' point to the District's own Behavior Assessment for Children Second Edition (BASC) showed several areas of clinically significant concern, yet the District refused to address these ongoing difficulties in the most recent IEP (6/20/11). These behaviors, Parents' propound, are impeding the Student's ability to learn. Therefore, the IEPs were not

reasonably calculated to enable the Student to receive educational benefits and denied him FAPE.

Moreover, as required by the substantive prong of *Rowley*, an IEP is reasonably calculated to confer educational benefit when it is "likely to produce progress, not regression or trivial educational advancement." *Alex R.* 375 F.3d at 615. Here, Parents' aver, the lack of progress is evidenced by the Student's IEP report cards, which show lack of progress in several areas. No one, not even the District staff, disputes that the Student did not master several goals at the end of the 2010-2011 school year, that a recent District evaluation shows regression according to the Vineland tests, and that the Student is functioning well below his age. Parents' further maintain that the documents also proved that the District failed to provide sufficient related services and even failed to provide speech therapy pursuant to the current IEP. These, Parents' aver, are all relevant factors in determining whether the IEPs were reasonably calculated to confer educational benefit.

Turning to the issue regarding the adequacy of the district's assessments, the Parents' acknowledge that the statute ( 20 U.S.C. § 1400(b)(3)(B) ) does not require testing in every conceivable area of disability, but rather in areas of "suspected" *disability*. In this light, Parents' believe they provided sufficient testimonial and documentary evidence to demonstrate that the district suspected that the Student had behavioral needs, apraxia, augmentative communication needs, hearing/auditory concerns, and health/medical concerns, prior to the most recent evaluations. The court in *Independent School District No. 701 v. J.T.*, 2006 WL 517648. At 10-11 (D. Minn. Feb. 26, 2006), held that "parent is entitled to an independent educational evaluation upon a showing of inadequacy in the school district's evaluation. Additionally, *Letter to Fisher*, 23 IDELR 565, establishes the right to an IEE extends to a situation where the school neglects to evaluate the student for assistive technology needs. The evaluations in the Student's case were, in the Parents' viewpoint, inadequate and Parents' conclude that the District failed to satisfy its duty under IDEA. Thus, independent educational evaluations in all requested areas are an appropriate remedy.

Parents' maintain that the *Jaccari J.* case submitted by the district is not persuasive of the district's position, given the facts of this case and by preponderance of the evidence Parents' submitted supports the Parents' position that the District's evaluations were not sufficiently comprehensive to identify all of the Student's needs. The assessments lacked recommendations to assist in the determination of the Student's educational needs, and the evaluations were therefore not in compliance with the requirements of 34 CFR 300.304.

Parents' believe that in addition to the relief requested, and because they have met their burden, appropriate compensatory services for the Student is in Order. Compensatory services are well established as a remedy under IDEA. *Evanston Cnty. Consol. Sch. Dist. No. 65 v. Michael M.*, 356 F.3d. 798, 803 (7<sup>th</sup> Cir. 2004). The language of IDEA, which allows courts to "grant such relief as [it] determines appropriate," also confers broad discretion in construing remedies. 20 U.S.C. §1415 (i)(2)(C)(iii).

## HEARING OFFICER CONCLUSION

For all the reasons and conclusions provided above, the Hearing Officer finds as a matter of law that the District has failed to provide a Free and Appropriate Public Education to the Student. Having sustained their Burden of Proof, the following is **Ordered** on behalf of the Student:

### **ORDER**

- A. The District is to take immediate steps toward the transitioning of the Student to [REDACTED] including cooperating with the [REDACTED] staff in the convening and implementation of an IEP to be developed for the Student for the remainder of this school year. This includes developing a timetable for the reintegration of the Student back to a less restrictive placement in the Public Schools when it is, in the opinion of the IEP team members and with Parents' involvement, appropriate to do so. Immediate placement shall be defined as within 30 calendar days following the date the hearing officer's decision is mailed in this matter pursuant to 105 ILCS 5/14-8.02(a)(h)(stating." Additionally, transportation to and from the [REDACTED] shall be provided at no cost to the parents.
- B. An IEP team meeting is to be convened immediately, or as soon as practicable upon the Student's enrollment at [REDACTED] to determine, what if any additional testing needed. The following areas of deficit must be tested through an independent educational evaluation at District expense:
- 1) School Psychological;
  - 2) Hearing Assessment;
  - 3) Behavior Assessment
  - 4) Auditory Processing & Integration Assessment;
  - 5) Speech & Language Assessment (noted Apraxia);
  - 6) Vision Screening;
  - 7) Health/Nurse Assessment;
  - 8) Augmentative Communication; and
  - 9) Assistive Technology

- C. The student shall be entitled to compensatory education as follows:
- a) The additional provision of 2 years of ESY compensatory education at the [REDACTED]—Transportation services shall be provided by the District.
- E. Within forty-five (45) days of receipt of this Order, the [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 30<sup>th</sup> day of November, 2011.

  
\_\_\_\_\_  
**Harry A. Blackburn**  
**Hearing Officer**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the attached **DECISION AND ORDER** was sent **VIA CERTIFIED MAIL** to [REDACTED] and [REDACTED] and placed in the U.S. [REDACTED] with first class postage prepaid and directed to:

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

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

before 5:00 p.m. on December 1, 2011.



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