

Case Number: 2012-0085

[REDACTED] vs. [REDACTED]
Hearing Officer: Joseph P. Selbka

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 [REDACTED] Phone: [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Date and Timelines

Date of Written Request: 08/24/2011
Date of Pre-hearing Conf: 09/26/2011

Date of Hearing: 10/24/2011 to 10/27/2011
Date of Decision: 11/7/2011

Summary of Decision The Parents filed a due process request wherein they requested a 1:1 full time nurse at school and while being transported to school; full mainstreaming in the student's neighborhood school; full mainstreaming in the general education curriculum; and relief from a defective IEP notice. Both parties were represented by counsel. The undersigned found that Student was entitled to a 1:1 full time nurse at school and on the bus. The undersigned denied all other relief.

7. A prehearing conference was held on September 23, 2011, and the hearing occurred from October 24, 2011 to October 27, 2011.

8. At the hearing, the following witnesses testified: [REDACTED] the District's Director of Special Education; Nurse [REDACTED] one of the District's nurses; Nurse [REDACTED] another nurse for the District; Nurse [REDACTED] a third nurse recently hired by the District for Student's care; [REDACTED], one of the District's early childhood coordinators; [REDACTED], one of Student's special education teachers; [REDACTED], special needs kindergarten teacher; [REDACTED] one of the District's early childhood specialists; Nurse [REDACTED], an independent expert for the Parent on nursing services; Doctor [REDACTED] an independent expert for the Parent on Student's placement; and Student's Mother, [REDACTED] ("Mother").

II. Issues to Be Decided

9. The issues initially to be decided were: i) Whether the District is denying Student FAPE by failing to provide Student with 1:1 nursing services during the full school day; ii) Whether the District is denying Student FAPE by failing to provide Student with 1:1 nursing services while transporting Student to and from school; iii) Is Student's placement in the least restrictive environment; iv) Whether the District denied Student FAPE by failing to refer Student for an assistive technology evaluation; v) Whether the District denied Student FAPE by failing to timely provide written notice of the April 29, 2011, and June 8, 2011, IEP conference decisions to change services in the District's educational placement proposals.

10. The Parent is seeking prospective relief only. During the hearing, the parties settled Issue iv (whether the District denied Student FAPE by failing to refer Student for an assistive technology evaluation). That issue was withdrawn on the record during the hearing and therefore, the undersigned does not address it.

11. In addition to the ultimate issues, there were three evidentiary issues which arose on or before hearing: (1) the effect (if any) of the "snapshot rule" on the proceedings; (2) the effect of the "five day rule" on several witnesses proffered by Parent; and (3) the effect of the Parent's alleged lack of cooperation and the District's alleged failure to request appropriate medical records as to Student's needs.

12. This is not a case where either party is contesting whether Student needs to be constantly monitored and provided other nursing or health services when being transported to school and while at school. Both parties agree that Student needs to be constantly monitored and provided with nursing or health services (S.D. pg. 85). The only issue in regard to the monitoring and other nursing and health services provided to Student are the qualifications of the person providing the monitoring, nursing, and health services—an aide or a professional nurse (S.D. pg. 85).

III. Findings of Fact

Student's Physical Condition

13. Student is a medically fragile five year old who has had eleven surgeries so far during his life (P.Ex. #21). With the exception of a few small bites of food or swallows of liquid, Student cannot swallow food because his muscles in his jaws and throat are too weak to properly swallow (S.D. 87-88). Student is fed through a gastrostomy tube by pumping nutrients directly into his stomach. Student's optical nerves are underdeveloped (S.D. 87-88). Student also has recurrent respiratory infections (S.D. 86).

14. Student cannot walk and has a congenital hip dislocation (S.D. 87). Student also has club feet and limited use of his limbs (P. Ex. #21). Student also has a congenital condition (arthrogryposis multiplex congenita) which renders his joints stiff and makes it difficult for Student to extend his limbs properly (S.D. 86). This condition makes Student prone to injury from falling or from a caregiver improperly moving his arms and legs.

15. As a result of Student's numerous physical conditions, he requires aid and care to attend school. Student has to be monitored for (1) aspiration; (2) dehydration; and (3) to a lesser extent, constipation (P.Ex. #16). All three conditions can be fatal to Student (P. Ex. #16). Aspiration is the inhalation of food, saliva, medication or other foreign materials into Student's trachea and lungs (P.Ex. #16). Student can aspirate from material coming down his throat or from the contents of Student's stomach being refluxed into his throat (P.Ex. #16). Student's risk of aspiration is increased when he has respiratory or other infections.

16. Student is required to wear splints and braces and needs someone to perform range of motion exercises and aid Student in standing as a result of Student's disabilities associated with his joints, club feet, hips, and limbs (P. Ex. #17).

17. As a result of Student's being fed through a gastrostomy tube, he often vomits (P.Ex. #16). Vomiting can lead to aspiration (P. Ex. #17). In order to limit Student's tendency to vomit, he has to be kept in a relatively still, upright position to the extent possible after his feeding. Student must be monitored closely for position and movement after feeding.

18. All parties agree that Student should be fed only by a nurse, and the District has dedicated 120 minutes of direct nursing services for up to two feedings of Student in a school day.

19. Student must also be monitored for dehydration and be provided water through his gastrostomy tube if he becomes dehydrated (P.Ex. #16).

20. Because Student is unable to swallow on a consistent basis, excess saliva must be suctioned from his mouth (or removed in another manner) on a regular basis. This is usually accomplished using a suction machine or by wiping the saliva from Student's mouth.

Findings of Fact, Inferences, and Credibility Findings Related to the Adequacy of the Nursing and Health Services under the Proposed IEP

21. ██████ and ██████ testified that one of the reasons Student was not given a 1:1 nurse was because having a full time nurse inhibited Student's communications with his teachers. ██████ and ██████ testified that Student is overrelying on his nurse while communicating in school. Specifically, a 1:1 nurse has resulted in Student communicating solely with his nurse as opposed to other people in his classroom. According to ██████, this hinders District efforts to have Student communicate with others and participate in class.

22. One of the primary goals of the IEP Team in developing the IEP was to improve Student's desire and ability to communicate directly with his teachers and fellow students. ██████ and ██████ testified that a 1:1 nurse inhibited that goal.

23. ██████, ██████, and ██████ all testified on behalf of the District. ██████ has been a registered nurse since 1967, has a BS in Nursing, and a received a School Nurse certification in 1992. Since that time, ██████ has often had as many as 3-5 medically fragile children coming through the District on a yearly basis. ██████ has been involved with the care of Student at the District since he was three. ██████ is also a certified school nurse with a bachelor's degree in psychology and a bachelor's and master's degree in nursing. ██████ has been a school nurse since 1975 and has worked for the District since 2007. ██████ has never treated Student but she did assess Student by reviewing school records, observing Student for approximately one hour, and by discussing the matter with Student's other nurses. ██████ also spoke to other school nurses about Student. ██████ has been employed at District 63 for eight weeks prior to the hearing. She has been a nurse since 1982 and has been a school nurse since 1996. ██████ holds a bachelor's in nursing and is a certified school nurse.

24. ██████ and ██████ all testified that Student does not need a full time 1:1 school nurse while at school or while on the bus. All three nurses testified that 120 minutes is an appropriate amount of time if Student has two feedings per day. ██████ also prepared the report in the April 29/June 8, 2011 proposed IEP. All three nurses testified that Student needed a nurse for feedings. ██████ also testified that Student needed to be monitored by a nurse after the feedings and that a nurse needed to do fluid assessments. All three nurses testified that all of Student's other needs could be adequately addressed by a school aide trained and closely supervised by a nurse.

25. ██████ testified that suctioning could be done by an aide, but suctioning would be done by ██████ in Student's case.

26. ██████ testified that when Student returned to school, she would be responsible for only two classrooms at ██████ (the instructional needs preschool and kindergarten). Her primary responsibility would be Student.

27. ██████ testified on behalf of Parent. ██████ has a bachelor's of science in nursing and a master's of arts in nursing. She has been a nurse since 1971 and has taught nursing since 1973. ██████ has had extensive experience with home health agency nursing services as well. ██████ submitted a report labeled as Parent Exhibit #16.

28. ██████ testified that Student does not need any deep oral suctioning at school, but respiratory problems might trigger the need for deep suctioning (suctioning not only of the mouth but deep suctioning of the throat).

29. ██████ testified that ██████'s report was largely accurate, but that the report didn't address Student's individual needs and the actual health risks to this individual student. ██████ also testified that ██████'s discussion of interventions was good. ██████ testified that she was unaware of any requirement to provide deep suctioning for Student. The Parent submitted Student's treatment plans which clearly have required a nurse to undertake deep suctioning (suctioning with a French catheter) as needed as well as oral suctioning (P. Ex. #17, 7/1/11 plan, pg. 3 of 5; 5/2/11 plan, pg. 3 of 5; 3/3/11 plan, pg. 3 of 5; 1/3/11 plan, pg. 3 of 5; 11/3/10 plan, pg. 3 of 5; 9/2/10 plan, pg. 2 of 5). The plans state that deep suctioning must be undertaken by a skilled nurse. *Id.* The plan also states that a nurse should undertake CPT (cardio pulmonary tamponade) three times per day. *Id.*

30. ██████ also testified that there was no need for a nurse on the bus. Specifically, ██████ testified that the care that Student would need on the bus wouldn't require a registered nurse; and that an aide could be trained to respond to Student's needs on the bus. ██████ stated that if Student did aspirate on the bus, there was nothing a nurse or aide could do except call an ambulance.

31. ██████ also testified that the fact that Student successfully completed swallow studies puts into doubt that Student is at severe risk for aspirating as Student has better control in swallowing than his treatment plans would indicate. All other medical witnesses contradicted this claim, and the District admitted in closing argument that Student can aspirate at any time.

32. ██████ testified that if aspiration occurred, in addition to calling an ambulance, a nurse should undertake deep suctioning to prevent as much material as possible from getting into the lungs and use CPT. These treatments are in Student's plan of treatment. ██████ testified that if Student aspirated (in addition to calling an ambulance), the nurse would attempt to resuscitate; would check airway breathing, circulation; would suction the mouth; or possibly use an emergency defibrillator. ██████'s report states that in the case of aspiration, Student should be positioned to enhance formula remaining in the stomach.

33. ██████ also testified that prevention and monitoring is a key to keeping Student from aspirating or becoming dehydrated. Student is not aware of his need for suctioning or intent to vomit, and thus, Student's caregiver must be assessing Student constantly. ██████'s report (which the school nurses did not disagree with when directly asked or affirmatively agreed with) states that Student must be consistently monitored for gagging and choking, excessive saliva, persistent coughing after a feeding, and vomiting or the odor of vomit or formula after meals.

34. ██████'s report (which the school nurses did not disagree with when directly asked or affirmatively agreed with) stated that monitoring requires frequent assessment for dehydration including dry skin, extreme thirst, dry, sticky mucous, lethargy and decreased alertness, fever, increased heart rate and decreased blood pressure, decreased urination, dark colored urine and concentrated urine smell.

35. ██████ report (which the school nurses did not disagree with when directly asked or affirmatively agreed with) states that application of splints, positioning, and joint protection must be done by a trained person to prevent fractures. The school nurses did testify that an aide could be trained to do these actions. ██████ stated that only a nurse or other professional should be able to do these actions.

36. ██████'s report (which the school nurses did not disagree with when directly asked or affirmatively agreed with) states that vomiting episodes are not predictable, and that a nurse needs to take immediate action to begin suctioning. ██████ testified that, in this situation, deep suctioning of Student's throat would be an appropriate response along with close monitoring for aspiration.

37. ██████ testified that gastrostomy tube feeding, assessment for dehydration and aspiration, suctioning, responses to aspiration, application of splints, joint protection, and range of motion exercises are nursing acts under the nurse practice act which require skill and experience to do properly. ██████ testified further that, given the need for a rapid response in the case of aspiration and the need for assessments. ██████ further testified that many of these activities require knowledge of anatomy and physiology.

38. Moreover, ██████ testified that monitoring and assessing Student in regard to aspiration will sometimes require quick action and split-second determinations to either prevent further aspiration and/or to limit the damage.

39. ██████ testified that the District requires a RN or LPN to complete the following activities in regard to Student because these activities are nursing acts under the Nursing Practice Act: G Tube feeding; oral suctioning; assessment and monitoring; procedures to undertake if Student should vomit; performing range of motion exercises; application of splints; and positioning.

40. Student also submitted the opinion reports of ██████ and ██████ (P.Ex. #19, 21). The opinion reports were admitted without objection¹. ██████ is a registered nurse who had been one of Student's treating nurses. ██████ is a medical doctor and one of Student's treating physicians. ██████ reported that Student has an inability to swallow (P.Ex. #19). Both ██████ and ██████ reported that Student needs to be monitored by a medical professional in case of vomiting and/or aspiration (P.Ex. #19, 21). ██████ reported that Student's respiratory condition must be constantly monitored in light of the risk of aspiration (P. Ex. #21).

41. ██████, and ██████ all reported that a gastrostomy tube can deflate or fall out and must be replaced immediately by a medical professional (P.Ex. #16, 19, 21). No District witness disagreed with a concern about this problem. The School Nurses, when directly asked about the ██████ report, did not disagree with this risk and need for monitoring in the ██████ report.

42. In closing argument, the District admitted that Student can aspirate at any time. The District has thus admitted that there is a realistic risk of aspiration while Student is in school or on the bus.

¹ Because the reports were admitted without objection, the undersigned gives them their natural weight even though they are technically hearsay.

43. ██████ testified that a nurse could monitor Student from a few feet away so as to allow for school personnel to communicate directly with Student.

44. ██████'s opinion regarding the 120 minutes per day offered at the resolution session was modified as follows. ██████ believed that 120 minutes was an appropriate starting point for determining the true amount of nursing services Student needs. ██████ testified that as the year progressed, to the extent Student needed more nursing services, it would have to be provided.

Inferences and Credibility Findings Regarding the Provision of Nursing Services

45. The undersigned makes an inference that the monitoring and assessment of Student for signs of aspiration and dehydration are activities which require the judgment, knowledge, and experience of a professional nurse. The undersigned bases this inference on the testimony and report of ██████ setting forth the signs of aspiration and dehydration; ██████ testimony that monitoring Student's fluids is a nursing task; ██████ report setting forth that Student's respiratory system must be monitored for signs of aspiration; the fact that the school nurses did not disagree with the sections of ██████ report describing what was necessary to monitor and assess Student for dehydration and aspiration. Specifically, monitoring and assessing Student for aspiration and dehydration clearly requires knowledge of anatomy and physiology; judgment as to Student's physiology; as well as requiring the experience and expertise of a medical professional.

46. The undersigned makes an inference that monitoring, maintaining, and replacing Student's gastrostomy tube and feeding Student are activities which requires the judgment, knowledge, and experience of a professional nurse. The undersigned bases this inference on ██████ report and testimony regarding what is necessary to monitor, maintain, and keep the tube and entrance into Student's stomach working properly, as well as the descriptions of the process in the report of ██████, and the opinions of ██████ and ██████ and the fact that the school nurses did not disagree with the opinion and description of maintaining and replacing Student's g-tube in ██████'s report; and the opinion of ██████ and ██████ that feeding Student is a nursing act. Specifically, monitoring, maintaining, and replacing Student's g-tube and feeding Student clearly requires knowledge of anatomy and physiology and medical equipment; judgment as to Student's physiology; as well as requiring the experience and expertise of a medical professional; and requiring experience and expertise operating medical equipment.

47. The undersigned makes an inference that positioning, splint application, joint protection, and applying range of motion exercises are activities which require the judgment, knowledge, and experience of a professional nurse (or an occupational or physical therapist). The undersigned bases this inference on ██████'s report and testimony describing these activities and the knowledge necessary to complete these activities and the possible ramifications to Student of someone not doing these actions properly. Specifically, positioning, splint application, joint protection, and applying range of motion exercises clearly requires knowledge of anatomy and physiology and medical equipment; judgment as to Student's physiology; as well as requiring the experience and expertise of a medical professional; and requiring experience and expertise operating medical equipment.

48. The undersigned makes an inference that the actions necessary if Student aspirates are activities which require the judgment, knowledge, and experience of a professional nurse. The undersigned bases this inference on the testimony and report of

██████ setting forth actions to take in case of aspiration; ██████ and ██████ testimony regarding what should be done in case Student aspirates; and the fact that the school nurses did not disagree with most of ██████ report describing what was necessary to do in case of aspiration. Specifically, undertaking emergency procedures if Student aspirates clearly requires knowledge of anatomy and physiology; judgment as to Student's physiology; as well as requiring the experience and expertise of a medical professional.

49. The undersigned makes an inference that the actions necessary in case Student vomits are activities which require the judgment, knowledge, and experience of a professional nurse. The undersigned bases this inference on the testimony and report of ██████ setting forth actions to take in case of vomiting and ██████ description of the need for deep suctioning in order to prevent aspiration if Student vomits. Specifically, treating Student if he should vomit clearly requires knowledge of anatomy and physiology; judgment as to Student's physiology; as well as requiring the experience and expertise of a medical professional; and requiring experience and expertise operating medical equipment.

50. The undersigned makes a credibility finding against ██████ and in favor of the testimony of ██████ and the reports of ██████ and ██████ as well as the admission of the District in closing argument that Student is at risk of aspirating at any time. Furthermore, the undersigned makes an inference that Student is at risk of aspirating at any time based upon the admission of the District in closing argument; the plans of treatment of Student; and the testimony and reports of ██████ and ██████. Specifically, there was no medical evidence presented (other than the opinion of ██████) that a successful swallow study demonstrates a decreased risk of aspiration. Moreover, ██████ and ██████ have treated Student for a long period of time, whereas ██████ only assessed Student by watching him for approximately one hour. Finally, Student's diagnosis of extremely weak throat muscles and the fact that Student is still being fed through a g-tube demonstrates that Student has extremely limited control over his ability to swallow—thus being at risk of aspiration.

51. The undersigned makes an inference that monitoring and assessing Student requires constant attention and that the person monitoring and assessing Student's health must be within a few feet of Student. The undersigned bases this inference on the testimony and report of ██████ as to what observations (specifically, the character of the observations Student's caregiver must make) are necessary to properly monitor and assess Student; the fact that the school nurses did not disagree with those aspects of ██████ reports; the fact that all of Student's witnesses and all of the District's witnesses opined that Student needs a 1:1 person to constantly and closely monitor Student (the parties only disagree on the qualifications of the monitor).

52. The undersigned makes a credibility finding against ██████ and in favor of the testimony of ██████ and the report of ██████ as well as the testimony of ██████ that actions can be taken by a nurse to aid Student if he aspirates. Furthermore, the undersigned makes an inference that a skilled nurse must make very quick decisions if Student should aspirate both to address the fact that Student has foreign material in his lungs and to prevent further material from getting into Student's lungs. The undersigned bases this credibility finding and inference on the testimony and reports of ██████ and ██████ and the testimony of ██████. Specifically, the undersigned bases this credibility finding and inference on the descriptions of actions which can be taken if Student aspirates as set

forth by [REDACTED] and [REDACTED], and the descriptions of how those actions would aid Student. The listed descriptions and explanations of how Student would be aided by emergency procedures refute [REDACTED] claim that nothing can be done by a nurse if Student aspirates.

53. The undersigned makes an inference that a skilled nurse must make very quick decisions and take actions if Student should begin vomiting. The undersigned bases this inference on the testimony and report of [REDACTED] describing the actions to take in case of vomiting and [REDACTED] description of the possible physiological effects of having any regurgitation enter Student's lungs. Specifically, treating Student if he should vomit clearly requires speed because acting rapidly can prevent any regurgitation from entering into Student's lungs. Moreover, the faster a skilled nurse reacts, even if aspiration occurs, the less regurgitation that enters Student's lungs, the better it will be for Student's health (as [REDACTED] testified to).

54. The undersigned makes an inference that the District can achieve its educational objectives and prevent Student from overrelying on communication through his nurse. The undersigned bases this inference on [REDACTED]'s uncontradicted testimony that a nurse can monitor Student from three to four feet away thus allowing District personnel to force Student to communicate directly with District personnel.

Findings of Fact as to Whether the Student is Being Educated in the Least Restrictive Appropriate Environment

55. [REDACTED] and [REDACTED] testified that, although Student's IEP forms are confusing, the April 29/June 8, 2011, IEP envisions Student being mainstreamed for between 240 and 270 minutes per week at [REDACTED] School.

56. The District presented uncontradicted testimony that Student does not communicate well with his peers at school, with his teachers, and with other educational professionals.

57. The District presented uncontradicted testimony that Student tends to shut down and become even more uncommunicative in larger groups of students.

58. [REDACTED] and [REDACTED] all testified that Student is being started out in the special needs kindergarten for a large part of the day so as to encourage Student to communicate in a smaller setting with school staff and his peers. The District personnel believe that this is the best way to stimulate Student into communicating with his peers and teachers.

59. The goals of the District personnel are to have Student become comfortable communicating in a smaller setting, and then gradually mainstreaming Student completely as he becomes more comfortable communicating with his peers and teachers.

60. The nurse hired to care for Student by the District, [REDACTED] is assigned to [REDACTED] School. The District contends and Student presented no evidence to the contrary that Student's neighborhood school, [REDACTED] does not have sufficient nursing services to care for Student.

61. Although the District has not conducted a comprehensive assistive technology evaluation, the District has used an assistive technology team to try and provide Student

with assistive technology to aid Student in communicating (SD, pp. 202-218). The assistive technology team has tried multiple types of assistive technology to aid Student in communicating. District personnel (██████████) presented uncontradicted testimony that assistive technology has been ineffective in making Student more communicative.

62. ██████████ testified on behalf of Parent. ██████████ has a Ph.D. in education and a M.Ed. in special education. Her academic appointments, research appointments, publications, and awards and honors are located at Parent Exhibit #13. ██████████ is an expert in special education. ██████████ testified that there is no reason Student couldn't be completely mainstreamed with proper assistive technology. ██████████ testified that being in a general education class is the best way to prepare Student for participating in a general education class.

63. When questioned on the District's decision and reasons for only partially mainstreaming Student now, ██████████ stated that she didn't disagree with the District's decision regarding partial mainstreaming as long as the District's purpose was to ultimately completely mainstream Student.

64. The undersigned makes a credibility finding that the District's goal is to improve Student's communication skills with the ultimate goal of mainstreaming Student. The undersigned bases this credibility finding on the lack of any evidence to the contrary and the testimony of District personnel.

65. The undersigned makes an inference that the decision to only partially mainstream Student is a determination necessary to implement a reasonable methodology to improve Student's communication in school. The undersigned bases this inference on the testimony of District personnel as to why they are only partially mainstreaming Student; the testimony of ██████████ that she could not disagree with the District's reasoning; and the fact that the District has tried different forms of assistive technology which have failed to improve Student's communication skills.

Findings of Fact Related to the Snapshot Rule in this Case

66. In creating the initial nursing assessment for the April 29/June 8, 2011, IEP, the District did not solicit the treatment plans and notes of Student's nurses (from ██████████ ██████████) and did not solicit any opinion from Student's treating physician as to Student's nursing needs. The District's IEP Team relied upon observations of Student in the classroom and "informal assessments" to determine whether Student needed a 1:1 nurse (P. Ex. #25, pg. 2, Sec. 1(A)(b)).

67. The District's position evolved during the resolution proceedings because of information received before the resolution proceeding and information received during the resolution session. The District increased its offer of nursing services to 120 minutes per day.

68. In opening arguments, the District specifically requested that the undersigned affirm the District's position from the resolution session in regard to nursing services (120 minutes of nursing time per day). The District also solicited opinions from its witnesses that 120 minutes per day of nursing time was the appropriate.

69. Parent provided numerous reports and medical evidence which were created months after the April 29/June 8, 2011, IEP was created.

Findings of Fact Related to Evaluating District and Parent Behavior During the IEP Development Process and During the Litigation Process

70. Parent did not provide medical records or nursing plans of treatment to the District at the April 29, 2011 or June 8, 2011, IEP meetings. Nor did Parent provide these documents to the District prior to filing a due process hearing request. There is no evidence the District ever asked for these documents prior to creating the April 29, 2011, or June 8, 2011, IEP. There is no evidence the District ever asked for these documents prior to the due process hearing request. In May, 2011, Parent did provide a letter to the superintendent from her and a letter from her doctor stating Student needs a 1:1 nurse in school (S.D. pg. 73-75). Parent did provide a second letter on June 15, 2011 to the District from [REDACTED] stating Student needs a 1:1 nurse (P Ex. #19). Parent did provide a second letter from Student's treating physician on or about September 23, 2011 stating Student needed a 1:1 nurse and why Student needed a 1:1 nurse (S.D. pp. 15-17).

71. Parent did refuse to attend an IEP meeting on August 18, 2011, to discuss concerns regarding the nursing services and Parent's other issues related to the April 29, 2011, IEP. The Parent has also refused requests of school nurses to observe Student at home after the due process request was filed..

72. The undersigned makes a credibility finding that Parent acted in good faith in providing the District with records up until the Parent refused to attend the August 18, 2011, IEP meeting.

73. The undersigned finds that Parent's refusal to attend an IEP meeting in August, 2011, and refusal to allow the school nurses to observe Student at home after the filing of the due process request much more troubling.

74. However, the undersigned finds that: (1) any lack of good faith by the Parent was cured by the resolution meeting; and (2) even after obtaining all evidence in Parent's possession five business days before the hearing, the District did not change its stance on addressing the concerns of the due process complaint as demonstrated by the District's position and opinions in the hearing. Thus, any failings of Parent failed to make any substantive difference as to the hearing.

75. Moreover, the District failed to present any motion to compel an IEP meeting; a motion to dismiss the complaint without prejudice pending cooperation; or a motion to compel an observation of Student prior to the hearing. By waiting until the hearing to present the issue of good faith, the District prevented the undersigned from entering interim orders warning Parent to cooperate. As such, it is unclear whether the Parent was aware of her duty to continue cooperating in the IEP process after she decided to file for due process.

Findings of Fact Related to Alleged Procedural Violations of IDEA

76. The Parent admitted to receiving a notice of the IEP meeting, and the purpose of the meeting was clearly set out in the notice- to decide on a new IEP.

77. The District held a second IEP meeting to address Parent's concern about nursing services, and Parent clearly knew this was a topic in the second IEP meeting.

78. The April 29/June 8, 2011 IEP was first to be implemented on August 23, 2011 (S.D. pg. 81). Parent had already retained counsel and was in the process of protecting her rights in June, 2011 (P.Ex. #22).

79. In closing argument, in response to direct questioning, Parent only could say that she lost some time as a result of the unclear notice. Parent had enough time to retain counsel and protect her rights prior to implementation of the IEP.

Findings of Fact Related to the Five Day Rule in this Case

80. The District had a right to demand that every one of Parent's witnesses be disclosed five business days before their testimony. ██████ testified five days before her testimony.

IV. Conclusions of Law

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

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

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

83. In determining whether a placement is proper under IDEA and the School Code, the hearing officer does not need to defer to the school district witnesses. *School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002)(like Wisconsin ALJ's, Illinois Impartial Due Process Hearing Officers are presumed to be experts on special education and special education law, see 105 ILCS 5/14-8.02c); *Board of Education of*

Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education, 41 F.3d 1162, 1167 (7th Cir. 1994)(hearing officer characterized as expert witness in determining whether placement is proper).

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

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

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

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

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

that a reasonable mind might accept as adequate to support his/her conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

88. Expert opinions are admissible if the experts are considered qualified under a relaxed standard similar to the *Daubert* standard used in the federal courts. *Pasha v. Gonzalez*, 433 F.3d 530, 535 (7th Cir. 2005). To the extent the hearing officer relies upon expert opinions, the expert opinions must be inferred ultimately from facts in the record, and the inferential process by which an expert reaches his/her conclusions must be fully explained. *Zamecnik v. Indian Prairie School District No. 204*, 636 F.3d 874 (2011) (expert testimony must be grounded by material facts in the record and the inferential process by which an expert reaches his/her conclusions must be fully explained in the record); *Mid- State Fertilizer Co. v. Exchange National Bank of Chicago*, 833 F.2d 1333, 1339-1340 (7th Cir. 1989)(in litigation, expert opinions must be grounded in facts and inferred from a process of logical reasoning).

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

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

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

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

The Snapshot Rule and Its Relation to this Case

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

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

93. As discussed above, hearing officers in Illinois have significant abilities to obtain independent evaluations and additional evidence after a due process complaint has been filed and during a hearing. See Paragraph #90, above in regard to the discussion of 105 ILCS 5/14-8.02a(g-55), 23 IL ADC 226.660(b). This suggests that Illinois state law allows for or mandates a proceeding which designs an appropriate prospective placement for the child as envisioned by Judge Hutchinson’s dissent. Illinois is, under the principles of cooperative federalism, allowed to design education laws to protect a disabled child’s welfare to a greater extent than IDEA.

94. Moreover, in 2005, Congress enacted a requirement that the parties must conduct a resolution session after the due process complaint was filed wherein parents and the relevant members of the IEP Team were expected to exchange information and try to resolve the issues raised in a due process complaint. 20 U.S.C.A. 1425(f)(1)(B); 34 CFR 300.510. Congress specifically declined to make the contents of a resolution session inadmissible during a hearing. See *Friendship Public Charter School v. Smith*, 561 F.Supp.2d 74, 50 IDELR 192 (D.D.C. 2008). This suggests that when the parties change their positions during the resolution process, the parties’ final position as to placement should be the placement reviewed by the hearing officer.

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

Standards for Evaluating District and Parent Behavior During the IEP Development Process and During the Litigation Process

96. Parents must participate in the IEP creation process in good faith and cooperate with District efforts to provide a student with FAPE. *Friedman v. Vance*, 24 IDELR 654

(D.MD. 1996). This duty to cooperate continues after the due process complaint has been filed. *Lesesne v. District of Columbia*, 44 IDELR 250 (D.D.C. 2005) *affirmed* 447 F.3d 828 (D.C. Cir. 2006). However, parent or parental attorney malfeasance cannot be used to defeat a student and parent's substantive right to FAPE. *Gill v. District of Columbia*, 751 F.Supp.2d 104,114 (D.C. 2010) and *AG v. District of Columbia*, 57 IDELR 9 (D.C. 2011) (a child's educational needs cannot be defeated through inappropriate lawyering). Rather, the remedy for a parent's failure to cooperate should be a loss of right to recoupment of attorneys' fees from the district, *Lesesne v District of Columbia, supra*; *Friedman v. Vance, supra*, fnote 7, 34 CFR 300.517(c)(4)(i), or a right to have district attorneys fees assessed against the parent or counsel, 34 CFR 300.517(a)(iii).

97. Districts are responsible for determining and obtaining the proper information necessary to make a comprehensive evaluation of the student including any need for school nursing services. 34 CFR 300.305(a)(1)(i-iii). After an initial assessment, the district must then determine what additional data, if any, is needed to determine (among other things) the needs of the child; whether the child continues to need related services and whether additions or modifications to the related services are needed to enable the child to meet the measurable annual goals set out in the IEP. 34 CFR 300.305(b). There is no corresponding responsibility by the parent other than to act in good faith.

Standards for Deciding Procedural Violations of IDEA

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

The Five Day Rule and its Relation to this Case

99. The District objected to a number of witnesses who were disclosed less than five business days before the start of the hearing pursuant to 34 CFR 300.512 and 105 ILCS 5/14-8.02a(g-50) as well as an order by the undersigned. Hearing officers have the discretion to allow a witness to testify so long as a party is given 5 business days to prepare for the testimony. *Letter to Steinke*, 18 IDELR 739 (1992). OSEP's interpretation of its own regulations are entitled to deference as long as said interpretations are reasonable. *Walk v. Illinois Department of Children and Family Services*, 926 N.E.2d 773, 399 Ill.App.3d 1174(2010); *Joseph v. Holder*, 579 F.3d 827, 831 (7th Cir. 2009). As the School Code uses nearly identical language as the federal regulation, it should be interpreted identically.

Standards for Deciding the Adequacy of the Nursing and Health Services under the Proposed IEP

100. The District is responsible for providing nursing services and/or health services to allow medically fragile students attend school. *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 29 IDELR 966 (1999).

101. The District must use qualified personnel to provide nursing services and health services for Student. 34 CFR 300.34(b)(13). Qualifications are determined by state regulations and licensing procedures. 34 CFR 300.156(a,b). In Illinois, only licensed nurses are qualified to provide nursing services to students (whether eligible for special education or not). 105 ILCS 5/10-22.23; 23 Ill. Admin. Code 226.800(j)(2).

102. Nursing services are defined in Illinois by the Nurse Practice Act. Only licensed nurses can perform nursing activities. 225 ILCS 65/50-50; 225 ILCS 65/50-75. A nurse cannot delegate any activity requiring the use of knowledge, judgment, or skill acquired by completion of a program for licensure (including advanced education, continuing education, and experience as a licensed nurse). 225 ILCS 65/50-75; 68 Ill. Admin. Code 1300.20.

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

103. Under IDEA, the School District has an obligation to educate Student to the greatest extent appropriate with his nondisabled peers. 20 U.S.C.A. 1412(a)(5)(A); *Board of Education of Township District No. 211 v. Ross*, 486 F.3d 267, 277 (7th Cir. 2007). Placements which require “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.*

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

105. In determining whether Student is receiving a satisfactory education, some factors which the undersigned will use to evaluate the placement in this case are: (1) whether a segregated placement is superior, and if so, whether the services which make the segregated placement superior can be replicated in the classroom, *Board of Education of Township No. 211 v. Michael R.*, 2005 WL 2008919 (N.D. Ill. 2005) citing *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) affirmed 486 F.3d 267 (7th Cir. 2007); (2) whether there are educational benefits to mainstreaming, *Michael R. supra*, citing *Sacramento v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994); (3) whether there are non-academic benefits to mainstreaming, *Id.*; (4) whether there are other costs to the school district, *Id.*, See also *Z.S., supra*, 295 F.3d at 672.; (5) whether there is a danger that the student is in danger of being physically harmed in the proposed classroom placement, 23 Ill.Admin.Code. 226.330, 34 CFR 300.116(d).

106. The regulations implementing IDEA generally require that the IEP Team exhibit a preference² for a placement at a student's neighborhood school. 34 CFR 300.116(b)(3). However, a student does not have a right to a placement at a neighborhood school, and a district is entitled to place a student in a nonneighborhood school building if the child's needed related services are not available in the district school. *McLaughlin v. Holt Public Schools Board of Education*, 320 F.3d 663, 38 IDELR 152 (6th Cir. 2003); *White v. Ascension Parish School Board*, 343 F.3d 343, 39 IDELR 182 (5th Cir. 2003); *Kevin G. v. Cranston School Committee*, 130 F.3d 481, 27 IDELR 132 (1st Cir. 1997); *Murray v. Montrose County School District RE-1J*, 51 F.3d 921, 22 IDELR 558 (10th Cir. 1995); *Schuldt v. Mankato Independent School District No. 77*, 937 F.2d 1357, 18 IDELR 16 (8th Cir. 1991). At least one circuit court has held that a determination as to the physical location of District personnel is an administrative decision which a hearing officer has no ability to disturb. *White v. Ascension Parish School Board, supra*.

107. In general, hearing officers should defer to the district on issues of methodology as long as use of the proposed methodology is reasonably calculated to providing the student with an educational benefit. *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988). Moreover, when a district's decision as to least restrictive environment is connected to implementing a reasonable methodology for educating the student, the hearing officer's deference should extend to the District's LRE determination (to the extent necessary for the District to implement its educational methodology). *McLaughlin v. Holt Public Schools Board of Education*, 320 F.3d 663, 38 IDELR 152 (6th Cir. 2003)

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

V. Application of Law to the Facts of this Case

The Adequacy of Nursing Services and Health Services

109. The undersigned finds that monitoring and assessing Student for signs of aspiration and dehydration are nursing acts under the pertinent regulations and statutes which require a professional nurse to complete. The undersigned relies on the inferences above demonstrating that such activities require judgment, knowledge, and experience of a professional nurse.

² To the extent the Third Circuit characterizes the "preference" for a neighborhood school as a rebuttable presumption, *See Oberti v. Board of Education of the Borough of Clementon School District* 995 F.2d 1204, 19 IDELR 908 (3rd Cir. 1993), this disagreement is of no relevance in this case. Both parties presented sufficient evidence regarding the appropriate location for Student's placement, and thus a presumption (if one exists) ceased to operate and the issue of whether the neighborhood school was/is a proper placement became an issue of fact for the undersigned to decide. *See Smith v. Tri-R Vending*, 249 Ill.App.3d 654, 661 (1993).

110. The undersigned finds that monitoring, maintaining, and replacing Student's gastrostomy tube and feeding Student are nursing acts under the pertinent regulations and statutes which require a professional nurse to complete. The undersigned relies on the inferences above demonstrating that such activities require judgment, knowledge, and experience of a professional nurse.

111. The undersigned finds that positioning, splint application, joint protection, and performing range of motion exercises are nursing acts under the pertinent regulations and statutes which require a professional nurse to complete. The undersigned relies on the inferences above demonstrating that such activities require judgment, knowledge, and experience of a professional nurse.

112. The undersigned finds that the actions necessary in case Student aspirates are nursing acts under the pertinent regulations and statutes which require a professional nurse to complete. The undersigned relies on the inferences above demonstrating that such activities require judgment, knowledge, and experience of a professional nurse.

113. The undersigned finds that the actions necessary in case Student vomits are nursing acts under the pertinent regulations and statutes which require a professional nurse to complete. The undersigned relies on the inferences above demonstrating that such activities require judgment, knowledge, and experience of a professional nurse.

114. The undersigned finds that Student needs constant monitoring, assessment, and a trained person within a few feet of Student at all times in case Student aspirates or vomits in order for Student to safely attend school. The undersigned relies on the inferences and factual findings set forth regarding provision of nursing services, above.

115. The undersigned finds that oral suctioning (not deep suctioning of the throat) and wiping saliva from Student's mouth is not a nursing act and may be performed by an aide.

116. In light of the above stated findings, the undersigned finds that Student needs a 1:1 nurse at school and while being transported to and from school at all times. The undersigned finds that the nurse must be in the same room or bus as Student but may be stationed a few feet from Student.

117. The undersigned finds that the District's proposed 1:1 aide is not properly qualified³ within the meaning of state and federal regulations to accomplish the tasks set forth in Paragraphs 109-113.

118. The undersigned therefore finds that the District's April 29, 2011/June 8, 2011 proposed IEP is not reasonably designed to provide an educational benefit in regard to

³ The District argued that an aide can be taught many of the skills listed above. That may be true, and the Nurse Practice Act allows for unlicensed persons to act as good Samaritans or in emergency circumstances. However, when a district hires a person to perform nursing acts, it must hire a licensed nurse to do so as those are the required qualifications under Illinois law.

provision of nursing services and health services⁴ and is therefore not in accordance with IDEA⁵. Specifically, the District's April 29, 2011/June 8, 2011 proposed IEP must contain a 1:1 nurse for the entire time which Student attends school and is being transported to school. As such, the Parent has met her burden of persuasion as to this issue. The District has not met its burden of production that the Student has been provided a placement reasonably designed to provide him with an educational benefit.

The Least Restrictive Environment

119. The undersigned finds that: (1) there is no safe way to educate Student without a 1:1 nurse in the same room with him at school; (2) no accommodations can reduce the risk of educating Student in a classroom without a 1:1 nurse in his room; (3) [REDACTED] does not have a school nurse available to be dedicated to Student⁶; (4) [REDACTED] does have [REDACTED] a school nurse available to provide services for Student ; and (5) as such, any preference for Student's home school is overcome by Student's unique needs and circumstances—specifically, the need for a 1:1 nurse to provide services for Student while he is at school.

120. The undersigned therefore finds that [REDACTED] is the closest school in the District in which Student's unique needs can be accommodated in a way to provide Student with FAPE.

121. The undersigned finds that the District's methodology to improve Student's communication skills with his peers and teachers depends on working with Student in a smaller group than the general education classroom provides. The undersigned finds there is no way to satisfactorily implement the District's methodology while fully mainstreaming Student. The undersigned finds that the District's methodology is especially reasonable and necessary in light of the failures to improve Student's communication skills through use of assistive technology.

122. The undersigned finds that: (1) the District's methodology cannot be replicated in a segregated placement; (2) the partial segregated placement is superior to full mainstreaming in light of Student's tendency to shut down in larger groups and the

⁴ The District also presented case law from other states showing an aide in similar circumstances is appropriate. Those cases are inapplicable because they do not take into account Illinois regulations and law. Moreover, the evidence received regarding Student's health is different than in the cases presented by the District.

⁵ The District seemed to argue that applying state law in regard to requiring nurses perform nursing acts contradicted IDEA. This is an odd argument because OSEP's regulations require the state to set qualification standards for persons performing nursing and health services. The undersigned, in this order, is only applying the state standard as to qualifications which the federal government requires the State of Illinois to enact.

⁶ The Parent argues that because Student requires a 1:1 nurse, the nurse can be assigned to any school. The undersigned is not going to tell the District how to organize its nursing services and where to assign its school nurses. This would improperly impinge on the administrative prerogatives of the District. *White v. Ascension Parish School Board*, 343 F.3d 343, 39 IDELR 182 (5th Cir. 2003)

failure of assistive technology to improve Student's communication skills; and (3) the educational and noneducational benefits to mainstreaming are limited without Student improving his communication skills at school.

123. As such, the District is mainstreaming Student to the extent possible in light of Student's unique developmental and communication needs and the District's methodology to address those needs.

124. Moreover, the District cannot provide Student with a satisfactory education in relation to communication and development goals without placing Student in the partially segregated placement.

125. In light of the above stated findings, the undersigned finds that the District's proposed placement in the April 29/June 8, 2011 IEP is the least restrictive environment.

126. As such, the District has met its burden of production that the proposed placement is the only placement reasonably calculated to provide Student with a satisfactory education. The Parent has not met their burden of persuasion that Student can be satisfactorily educated in a placement completely in the general education curriculum.

The Snapshot Rule

127. The undersigned finds that the snapshot rule should generally not apply in due process hearings in Illinois when prospective placements are at issue, and certainly should not apply when the parties shift positions in a resolution session.

128. The undersigned finds that, by their conduct, the parties waived any application of the snapshot rule and that both parties should be estopped from asserting the snapshot rule.

129. The undersigned further finds, that as to nursing services, the District's conduct in failing to provide a 1:1 nurse was objectively unreasonable at the time the April 29, 2011 (and certainly the June 8, 2011) IEP was formulated because the District failed to ask for or otherwise obtain medical records and nursing plans of treatment before proposing to reduce Student's need for nursing services.

The Behavior of the Parties

130. The undersigned finds the Parent acted in good faith prior to August 18, 2011. Parent provided all information the District requested and further provided additional medical reports wherein Parent attempted to prove that Student needed more nursing services.

131. The undersigned declines to make a finding of bad faith against the Parent for behavior after August 18, 2011. Although, the Parent did fail to attend an IEP meeting set for August 18, 2011, and did fail to allow the District's nurses to observe Student at home, there is no evidence this would have changed the District's position in any way. Moreover, in the absence of an interim order requiring Parent to cooperate and the lack of rulings on the duty to cooperate in the Seventh Circuit after the filing of a due process

request, the undersigned cannot state that the Parent acted in bad faith after the filing of the due process request.

132. Finally, the undersigned is only ruling on prospective relief. Parent was operating through counsel on and after August 18, 2011. It is thus clear that Parent's actions were taken with the advice and/or acquiescence of counsel. The undersigned will not allow a mistake in lawyering (if one did occur) by Parent's counsel to prevent a Student from receiving FAPE. *Gill v. District of Columbia*, 751 F.Supp.2d 104,114 (D.D.C. 2010) and *AG v. District of Columbia*, 57 IDELR 9 (D.D.C. 2011) (a child's educational needs cannot be defeated through inappropriate lawyering). The undersigned does not condone Parent's actions on and after August 18, 2011, and this ruling is not meant to bind any subsequent decision by a court as to Parent's (or their attorneys) right to attorneys' fees.

The Five Day Rule

133. The undersigned finds that both parties complied with the five day rule.

The Allegedly Defective Notice

134. The undersigned finds the IEP meeting notice sufficiently notified Parent of the purpose of the IEP meeting and that, even if there was some technical violation of IDEA, no harm arose from the alleged violation, and the alleged violation did not prevent Parent from effectively participating in the decision making process. As such, no relief is appropriate as to this issue.

VI. Order

135. For the upcoming school year, the District shall provide Student a 1:1 nurse to provide nursing services for the entire time Student is at school. The nurse shall be dedicated solely to providing nursing services for Student and remain in the same room as Student to monitor and assess Student for aspiration and dehydration at all times. For the upcoming school year, the District shall provide Student a 1:1 nurse to provide nursing services in transporting Student to and from school. The nurse shall be dedicated solely to providing nursing services for Student and remain on the bus with Student to monitor him for aspiration and dehydration until Student reaches his destination. The District may require that the nurse refrain from operating as a conduit for Student to communicate with school personnel and Student's peers as long as Student's health is not at issue. The District may require that the nurse remain a few feet away from Student during the school day as long as there is no risk to Student's health from the separation.

136. To the extent Student needs any services determined to be a nursing act under this order, only a licensed nurse can provide such nursing acts.

137. The District shall immediately coordinate with Parent regarding implementation of this order. The District must begin to provide the 1:1 nursing services listed above within ten days of receiving this order.

138. The IEP Team shall meet within fourteen days of the District receiving this order and consider if there are any further modifications of the April 29/June 8, 2011, proposed IEP necessary to implement the terms of this order.

139. The District shall provide proof of compliance with this order to the Illinois State Board of Education, Compliance Division, by December 15, 2011.

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

VII. Right to Request Clarification

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

VII. Finality of Decision

142. This decision shall be binding upon all parties.

IX. Right to File Civil Action

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

/S Joseph P. Selbka




Joseph P. Selbka Impartial Due Process Hearing Officer
Date: November 7, 2011

Joseph P. Selbka
53 W. Jackson, 956
Chicago, IL 60604
312-788-3310
Fax 312-788-3311
jselbka@sbcglobal.net

CERTIFICATE OF SERVICE

Joseph P. Selbka certifies under oath that on November 7, 2011, he served the following parties via certified mail, return receipt requested, the attached Impartial Due Process Hearing Decision, to the following parties at the following addresses:

- 1) [REDACTED]
- 2) [REDACTED]
- 3) [REDACTED]
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001
- 4) [REDACTED]
- 5) [REDACTED]



Joseph P. Selbka
The Hearing Officer