Case Number: 2012-0121

Hearing Officer: Michael Risen

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

Impartial Due Process Hearing Decision
Cover Page

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

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

Parent Name James Joseph **Phone:** [redacted]
Address [redacted]
Represented by Matthew Cohen, Esq.

Parent Name [redacted] **Phone** [redacted]

Address [redacted]

Date and Timelines

Date of Written Request: 09/19/2011
Date of Pre-hearing Conf: 01/17/2012

Date of Hearing: 02/03,-03/14,-03/15,-03/20, -04/13, 04/26, 04/27, 05/02/2012
Date of Decision: June 8, 2012

Summary of Decision

Parents filed their DPCN seeking a decision on seven (7) specific issues. Parents met their burden of proof on six of the seven issues. Parents failed to meet their burden of proof on the issue of the District failing to provide peer reviewed, research-based methodologies for the Student. The District was ordered to reimburse the Parents for the full cost of the Student's ESY for the summer of 2011 at [redacted]l, the full cost of the Student's placement during the 2011-12 school year at [redacted] and to provide ESY to the Student at [redacted] for the summer of 2012 at public expense. Parents request for prospective relief to include placement of the Student at [redacted] for 2012-2013 was denied. The District was ordered to convene an IEP team no later than July 15, 2012 to develop an appropriate IEP for the Student for the 2012-13 school year and to appropriately consider the recommendations of [redacted] staff who worked with the Student during the 2011-12 school year, any IEE's completed in the last 12 months, and the input of Parents and their concerns regarding placement of the Student. The District was ordered to provide proof of compliance to the Office of Due Process at the ISBE no later than July 31, 2012.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF	)
[redacted]	) **ISBE CASE NO. 2012-0121**
	)
v.	) **Michael Risen**
	) Impartial Due Process
[redacted]	) Hearing Officer

Background

This due process complaint notice (DPCN) involves an eight (8) year old male student born prematurely on April 27, 2004. Parents reported the Student underwent numerous serious surgeries and now suffers from cognitive deficits, attention deficit hyperactivity disorder (ADHD), oppositional defiance disorder (ODD), gastro-esophageal reflux disease and chronic lung disease. The Student received early intervention services to address issues with walking, talking, eating, self-regulating, accepting touch and affection and understanding the world around him. The Student attended early childhood classes for two years in [redacted] where the Parents reported the Student enjoyed an overall positive experience. At the Student's re-evaluation in January of 2008, the IEP team recommended placement in a "small individualized structured program ... for 40 to 79% of the Student's school day."[1] Five months later, this recommendation was changed on 5/8/08 to reflect placement in regular education for "40 to 79% of the Student's school day" [2]with supports and services.

Parents' testimony reflected their concerns with this recommendation. Parents testified they consulted with the Parents' outside expert, [redacted]. Parents decided to place the Student privately where he would attend for the next three years in varying private placements at the Parents' expense (including private OT and speech and language several times per week). During the third year in private placement, the Student began demonstrating serious learning and behavior issues during the winter of 2011.[3] After seeking from [redacted] a re-evaluation of the Student during February and March of 2011, and ultimately unilaterally placing the child in a private therapeutic day school, the Parents filed this DPCN on September 19, 2011.

The Parents requested that the undersigned issue a finding that the Student's least restrictive environment (LRE) is the Student's unilateral placement at [redacted] during ESY of 2011 and the school year of 2011-12. Parents' allege that the District's predetermined the Student's recommended

[1] See Parent Document at C70.

[2] Id at C0149.

[3] See testimony generally of both Mother and Father.

placement at a local district program. Parents further allege the District is guilty of a pattern of a deprivation of a FAPE from the period of September 19, 2009 through September 19, 2011 and continuing during the pendency of this DPCN.

The undersigned has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02a(g) (2008). The IHO advised both parties of their hearing rights under 23 ILAC § 226.625 (2007) and 34 CFR 300,512 (2006). The undersigned advised the parties there were no conflicts of interest that would prevent the undersigned from conducting a fair and impartial hearing and rendering a fair and impartial decision in this cause. [redacted], (Parents) represented the Parents and J[redacted], (District) represented the District.

Procedural History

1) On September 19, 2011, the Parents submitted their request for due process. The Student is an eight year old male. The Student's most recent IEP identified the Student as eligible for special education programs and services. The Student's most recent IEP identified the Student's primary disability as other health impaired (OHI), with secondary disabilities of specific learning disability (SLD) and speech and language impairment (S/L).
2) On December 16, 2012, the parties completed mediation and resolved none of the issues.
3) On January 12, 2012, the IHO denied the District's motion for summary judgment.[4]
4) On January 17, 2012, the parties completed the Pre-Hearing conference (PHC). The IHO provided a summary of the PHC and included a copy in the administrative record as hearing officer Exhibit 50. During the PHC, the parties jointly agreed to hearing dates of February 3, 9, March 14, 15 and 20, 2012.
5) On January 25, 2012, both parties timely filed hearing disclosure documents. The Parents chose to have a closed hearing. The IHO reviewed and utilized the complete transcript when completing the decision.
6) On February 2, 2012, the IHO approved in part and denied in part the District's motion relative to prospective relief.[5]
7) On February 3, 2012, the parties stipulated to the submission into the administrative record the documents of each party and those from the hearing officer. During the eight (8) days of testimony, the following witnesses were called by the Parents to testify: [redacted] (Mother), [redacted] (Father), [redacted], expert witness, (Expert), [redacted], Head Teacher at [redacted] (Baker HT), [redacted], Director of Special Education for [redacted] (Director), [redacted] 2nd grade teacher at [redacted] (2ndT),

[4] See IHO Exhibit List at pp.330-334.
[5] See IHO Exhibit List at pp. 469-475.

Fran Chana, 2nd grade inclusion special education teacher at [redacted] (2ndI), [redacted]s, school psychologist at [redacted] (School Psych), [redacted] private occupational therapist for the Student provided at Parents' expense ([redacted]vate OT),[redacted] pediatric clinical psychologist who completed an IEE for social emotional issues for the Student, (Ped Psych), and [redacted] [redacted]e, Principal of Cove School, (Cove Principal). The District called [redacted] [redacted] to testify, speech and language pathologist for the middle schools at [redacted] (SLP).

8) On February 9, 2012, the IHO canceled the scheduled hearing date due to the illness of counsel for the Parents.
9) On February 16, 2012, the IHO conducted a status call and after a joint request for a continuance and waiver of the 45 day timeline was submitted by the parties, new hearing dates were set.

Issues and Proposed Relief

During the pre-hearing conference, seven (7) issues were identified and acknowledged by both parties. The following statement precedes each issue: "Did the District fail to provide the Student with A Free Appropriate Public Education (FAPE) by:

i. Failing to conduct necessary academic and functional evaluations and to give meaningful consideration to independent evaluations provided by the parents;
ii. Failing to conduct a functional behavior analysis and develop an appropriate behavior intervention plan;
iii. Failing to use scientifically based methodology;
iv. Failure to provide the Student an appropriate IEP;
v. Failure to provide the Student with a timely evaluation and timely IEP;
vi. Failure to provide the Student with an appropriate placement; and
vii. Failing to provide the Student with the substantive and procedural obligations provided in the IDEA."[6]

Proposed Remedy – Should the Parents prevail at hearing, the Parent seeks to have the hearing officer order:

[6] See Parents DPCN at IHO Exhibits pp. 1-7.

i. "Fully fund the Student's full time placement at [redacted] retroactive to the date the Student started there, for the 2011-12 school year; and, for ESY 2012 (including appropriate transportation costs for the Student and his parents).

ii. Order the district to provide full time placement at [redacted] [redacted]s expense during the 2012-2013 should his parents and [redacted] agree he still requires this placement."[7]

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact include the following:

1) On April 27, 2003 the Student was born at 24 weeks gestation weighing 1.5 pounds at birth. While hospitalized as a pre-mature infant, the Student underwent numerous surgeries including heart, lung, eyes, brain and lateral hernia.[8] Parents placed the Student in early intervention services from the time the Student was discharged from the hospital until age 3.[9]

2) In August, 2006, the Student began his participation in [redacted]'s [redacted] for early childhood services. Along with the early childhood program services, the District also provided physical therapy (PT) services, occupational therapy (OT) services, and speech and language services (SL). In addition, Parents provided supplemental SL and OT services.[10] Student performed well in the small classroom environment of less than 10 students with one teacher and two assistants.[11] Parents also enrolled the Student in the [redacted], a [redacted].[12]

3) In the Spring of 2008 the IEP Team changed the Student's recommended placement from the January 2008 IEP. As a result, Parents developed concerns regarding [redacted]s newly recommended placement of regular division kindergarten with special education supports and services.[13] The Student's private providers agreed with the Parents that the Student was developmentally not ready for kindergarten.[14] Thus, Parents made the determination to retain the Student and continued his enrollment at the [redacted]

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[7] Id.
[8] February 3, 2012 Transcript at p. 60.
[9] Id. P. 65.
[10] Id. P. 66.
[11] Id. P. 67.
[12] Id. P. 67.
[13] Id. P.93.Also see PD C81, IEP dated 4/30/08
[14] See February 3, 2012 Transcript P. 93.

[redacted].[15]

4) In the Spring of 2009, the Parents consulted with their private providers who agreed they should enroll the Student in the [redacted] for the 2009-2010 school year for kindergarten. During the 2009/2010 school year, the Student participated in programs at the [redacted]) and the Parents provided outside supports through a pediatrician specializing in neurological disorders, S/L and OT several times per week.[16]
5) In the Spring of 2010, Parents consulted Baker staff, their other private providers, and decided to continue the Student's enrollment at Baker for first grade during 2010-2011.[17]
6) Sometime during the 2010-2011 school year, the District developed a new policy for full inclusion for special education students in the District.[18] After the policy was implemented, the District had fewer "self-contained" classrooms for the 2011-2012 school year. More specifically, the District did not provide SLD self-contained classrooms at the elementary level. The District did provide these in the middle schools. The District also discontinued resource room programs at the elementary level.[19]
7) In February of 2011, the Parents met with the [redacted] staff due to increasing concerns with the Student's deteriorating behaviors and the ability of [redacted] to provide an effective program in light of those behaviors. [redacted] staff described the Student's behaviors as increased anger towards the Student's peers, which precipitated anger from his peers in return. The Student disrupted the class and could not work independently or calm himself down. The Student displayed vocal and physical outbursts during class and circle time. The Student demonstrated difficulty with sitting and reading quietly on an individual basis.[20]
8) Sometime in February of 2011, the [redacted] staff indicated to the Parents [redacted] could not provide effective programming for second grade year. The [redacted] staff recommended that the Parents provide the Student with a

[15] Id. P. 95.
[16] Id. P. 103.
[17] Id. PP. 104-106.
[18] See Parent documents 11-136.

[19] See testimony of Director at the transcript dated 3/14/12 at PP. 183-202. Additionally, the Director's testimony lacked clarity on the District's inclusion policy. When asked by Parents attorney to indicate whether or not there were other inclusion classes for second grade at the Student's school her response was "I'm not sure"(p. 201). When asked by the IHO how many full time special education teachers were assigned to the second grade at the Student's school her answer was vague and unresponsive (pp.206-208). Similarly, when asked by Parents' attorney and clarified by the IHO regarding resource programs at the Student's school her answer was also unresponsive and lacked clarity (pp.214-215).
[20] Id. PP. 108-110.

smaller class size, a reduced teacher to student ratio, and recommended a class that staffed by highly trained special education teachers to meet the needs of the Student.[21]

9) Sometime in February/March of 2011, the Parents contacted r of to inform the District of the Parent's intent to return the Student to . The Mother's testified without contradiction that she asked about a full case study evaluation and IEP for the Student. informed the Parent that the evaluation was the responsibility of . When the Parent shared this information with the the volunteered to contact then relayed to the Parents that believed that should complete the evaluation. The Parents then contacted a second time and again r told the Parents that was responsible. The Parents provided uncontradicted testimony that the Parents then attempted enrollment of the Student in . Parents uncontradicted testimony also reflected they again asked for an IEP from . Parents' testified that the District staff member at the information desk denied enrollment for the Student due to the Student's current enrollment in a private school located in [22]

10) In May of 2011, and as a result of the back and forth between the two districts experienced by the Parents, the Parents returned to and were allowed to register the Student on May 9, 2011, approximately three months after their initial attempt.[23]

11) Later in May of 2011, the District informed the Parent that the District would expedite the evaluation for the Student over the summer.[24]

12) Also in May of 2011, the Parents informed the District through that the Student would attend summer school during the summer of 2011 at .[25] The Parents presented uncontradicted testimony that the District did not make an offer of ESY for the Student, nor did the District ask the Parents why the Student was attending .

13) In June of 2011, the District requested completed "Tier II and Tier III" forms from [26]

14) On June 23, 2011, the Parents submitted the completed forms to the District.[27]

[21] Id. P 112.

[22] Id. PP. 112-117.

[23] Id. P. 117 and Parent document G101.

[24] Id. P. 121

[25] Id. P. 125.

[26] See Parent documents C89 through C95.

[27] See District documents at 0092.

15) On July 6, 2011, r sent the completed documents to the responsible f. shared with the staff that the Parents' requested a full case study evaluation. also told the staff that the Parents asked the District to complete the study "as soon as possible."[28]

16) On August 3, 2011, approximately 30 days after the District's last contact with the Parents and fewer than 30 days before the start of school, the Parents notified the District via email of their concerns that nothing had occurred.[29]

17) On August 6, 2011, without the benefit of a domain meeting or completed IEP, the District informed the Parents of the Student's unilateral placement in an inclusion second grade classroom. In an email to the Lincoln Principal, directed the Principal to include the Student in the second grade inclusion classroom for the beginning of school and further stated: "we will be starting an evaluation that the Parents' requested in June."[30]

18) On the same day, r informed the Parents through an email that the evaluation would not begin until school resumed in the fall when staff returned to allow the staff to complete the evaluation.[31]

19) During the August, 2011 timeframe, and as a result of the District's email indicating placement in an inclusion classroom without the benefit of the completed re-evaluation or a completed IEP for the Student, the Parents began considering placement at Parents' uncontradicted testimony revealed this decision as a contingency placement for the coming 2011-2012 school year in case the District did not have the Student's IEP completed for the fall term.[32]

20) On August 8, 2011, the Parents informed the District in writing of their intent to unilaterally enroll the Student at for the 2011-2012 school year.[33] The Parents provided uncontradicted testimony that Parents sent the required 10 day notice to provide the District an opportunity to comply with the IDEA and secure a timely and appropriate IEP.

21) On August 19, 2011, the District and Parents completed a domain meeting. The District decided not to assess the Student's current cognitive functioning or his current communication functioning. The District secured written permission from the Parents at the conclusion of the domain meeting to

[28] Id. At 0091
[29] See Parent document G146.
[30] Id. at G110 and G18.
[31] Id. at G110.
[32] See February 3, 2012 transcript PP. 141-146.
[33] Id. at G160.

assess the Student. Parents also completed a BASC-2 behavioral assessment and Vineland adaptive behavior assessments as requested by the school's psychologist and social worker respectively.[34]

22) On August 23, 2012, the Parents' brought the Student to Lincoln Elementary School at the request of the District to complete multiple evaluations of the Student and to again interview the Parents.[35]

23) On August 26, 2011, the District conducted an IEP team meeting and the Parents participated. Parents' documents and testimony established that they provided the IEP team with numerous IEE's completed by eleven (11) different professionals. All of the evaluations reflected information, data, or comments that the private evaluators believed the Student's complex disabilities required a small class size, low teacher to student ratio and peer reviewed research based methodologies to address the Student's varied needs.[36] Despite the input from the [redacted]r staff and the Student's private evaluators and their reports, the District staff members recommended placement in a regular division second grade classroom at [redacted]ol (Student's home school) with special education "push-in" programs and supports, and an "inclusion" model of services. The Parents expressed serious concerns about the recommended placement.[37] The District did not complete the IEP and provide the Parents with a copy until after the start of school in the Fall of 2011.

24) During the end of August, 2011, and after the August 26, 2011 IEP meeting, the Parents observed the proposed placement in second grade and expressed serious concerns about the efficacy of the proposed placement and the appropriateness of the August 26, 2011 IEP.[38]

25) On September 6, 2011, the District provided the Parents with the completed IEP.[39] The IEP identified OHI, SLD and speech/language impairment as the Student's eligibility. Domain documentation [40] reflected the Student functions within the moderately low range in communication and in the low range for written communication. The IEP noted the Student's receptive subdomain appeared impacted by his "difficulty with attention/focus but may

[34] Id. at C101, B37, B53..
[35] See Parent Documents G137, Par. 17.
[36] Id. At section A.
[37] Id. at C103-C141 (Students IEP).
[38] Ibid. PP. 150-161.
[39] See District documents D526.
[40] See Parent documents at C105.

also include cognitive or neurological dysfunction."[41] The Student functioned in the low range for daily living skills and moderately low range for socialization. Since the District did not assess the Student's cognitive functioning, the IEP documented that previous test results reflected the Student had average verbal skills, with non-verbal skills in the "borderline range."[42] The District did not assess the Student's Communication Status but reported in the IEP that "previous testing, observations, and parent report, (the Student) demonstrated decreased receptive, expressive language, and pragmatic skills."[43] The IEP reflected that the Student's health has been problematic since birth with "an extensive health history." Breathing difficulties were reported to be particularly problematic for the Student. The IEP reflected that the Student's right eye "has significantly reduced sight." Despite noting a concern for Visual Impairment, the IEP Team decided to wait on the results of an upcoming assessment by an ophthalmologist scheduled for September 21, 2011. The IEP also reflected the Student is challenged in the area of Motor Abilities. "Areas of challenge included difficulty with sensory processing with the following factors in the definite or probable difference range: sensory seeking, emotionally reactive, low endurance/tone, oral sensory sensitivity, and inattention/distractibility." The IEP also reflected treatment for ADHD, anxiety, and obsessive compulsive disorder. The IEP reflected significant issues in this area, including: "...fearful about being in the dark, being left alone, food not being available. He also gets anxious about being accepted by his peers. He is also described as needing a lot of repetitive reassurance from his parents that they continue to love and accept him. . . . " An evaluation was completed at Rush Neurobehavioral Center in January of 2011. It identifies that (the Student) has difficulty with social perspective taking, social language, and problem solving."[44] The IEP reflected the Student's overall complexity with this statement: "(The Student) has delayed skills in all academic areas....(The Student) continues to struggle in all academic areas even after he has received special education services since he was young."[45] Boxes checked in the IEP

[41] Id.
[42] Id. at C106.
[43] Id.

[44] Id. at C107.
[45] Id. at C108.

reflected: significantly slower rates of progress than expected, significantly discrepant progress, and " instructional needs are significantly different and exceed general education resources."[46] The IEP identified the Student's specific academic areas of deficiency as basic reading skills, mathematical calculation, reading fluency, reading comprehension, math problem solving and written expression. The IEP reflected the Student's behavior does not impede his learning or the learning of others.[47] The IEP reflected 1750 minutes of instructional time during each full week of school. During the instructional time, the IEP reflected 925 minutes of reading language arts instruction in the regular classroom with 600 minutes of the 925 devoted to specialized instruction and 325 minutes in the regular education program. Math instruction called for 150 minutes per week "with special education instruction." The remaining 1000 minutes in all other academic areas called for "general education classroom with modifications and/or supplementary aids and services."[48] The IEP called for a 1:1 aide for the Student. Parents' provided uncontradicted testimony that when they requested that the District identify the aide, provide the cost to the district of the aide, and indicate the start date for the 1:1 aide. Parents' uncontradicted testimony reflected the District did not respond to these requests. Under placement options, the IEP reflected that the Student should be placed in regular education at least 80% of the day. The only noted harmful effect for rejecting other placements included "(The Student) will spend some time away from typically developing peers," and "Would not be with typically developing peers." These comments were the only reasons written in the IEP as the rationale for not considering a therapeutic or other more restrictive placements. The IEP also provided for 30 minutes per week of S/L not in the general education classroom, and 30 minutes per week social work services in the general education classroom. The transportation plan included a bus aide and a health plan for vision impairment. The IEP reflected the following service options were considered: "General Education classroom with special education support and related services including individual teacher assistant and Parent choice for [redacted] a therapeutic school."[49] The IEP team recommended general

[46] Id. at C110.
[47] Id. at C121.
[48] Id. at C131.
[49] Id. at C136.

education with a structured program with supports and services. The Parents did not agree and stated they did not feel the Student was ready for a general education classroom. The IEP team rejected this Parent concern on the basis that the IEP team stated that the Student's general education performance documented at Baker was not a "good comparison to the public school."[50] The IEP reflected ESY should be provided for the Student.

26) On September 19, 2011, the Parents' uncontradicted testimony reflected parental cooperation throughout the process. The uncontradicted testimony detailed that they participated in the August domain meeting, provided the District access to the Student for testing, participated in the August 26, 2011 IEP, reviewed the IEP that was provided to them after the start of the 2011-2012 school year, and visited the proposed classroom placement for the Student. Once the Parents completed this participation and cooperation with the process, the Parents testified they determined the District's plan insufficient to provide the Student with a FAPE and decided to sign the contract with [redacted] (Father's signature on contract dated 9/19/11) to provide services during the 2011-2012 school term.[51]

27) As of March 31, 2012, [redacted] program provided an appropriate program for the Student. Uncontradicted documentary evidence[52] reflected that the Student received individualized services consistent with the recommendations of his private evaluators, delivered in a small classroom with low-student teacher ratios, utilizing a multi-sensory approach, individualized instruction and peer reviewed, research based methodologies. The evidence of the success of the [redacted] was corroborated by the testimony of both Parents and the [redacted] Principal and was not contradicted by the District. In the District's closing brief arguing against awarding prospective relief, the District's touts the effectiveness of the [redacted]

[50] Id. at C136.

[51] See Parent documents F14-F16.

[52] Id. at F-b.

LAW AS IT APPLIES TO THE ISSUES

28) Article 14 of the Illinois School Code, 105 ILCS 5/14-8.02a and the Individuals with Disabilities Education Act, 20 U.S.C.A. 1400 *et seq.* (IDEA) all set out State and Federal special education laws.

29) With regards to the burden of proof in due process proceedings, the U.S. Supreme Court held that the ultimate burden of proof or persuasion lies with plaintiff, or person filing the complaint.[53] Thus, Parent as plaintiff bears the burden of proof.

30) Relevant federal special education laws related to the District's responsibility to evaluate require that Districts conduct a "variety" of assessments that gather "functional, developmental and academic information about the child."[54]

31) Further, the IDEA expects Districts to assess students in "all areas of suspected disability."[55] Per the IDEA, this also includes both assessing the Student for assistive technology (AT) needs and providing AT for the Student such that AT is "made available to a child with a disability if required as a part of the child's..." special education or related services.[56]

32) The IDEA also requires Districts completing a re-evaluation to insure IEP team members review existing evaluation data on the student, classroom-based, local or State assessments and classroom observations, and reports from teachers and related service providers.[57]

33) With regard to the assessments used, the IDEA requires that they be free of racial or cultural bias, administered in the student's native language, and used in a manner that is consistent with the design requirements or assessment model, while administered by trained personnel.[58]

34) With regard to independent educational evaluations obtained by parents and provided to the school, IDEA requires that the evaluation be "considered by the public agency...in any decision made with respect to the provision of FAPE to the child..."[59]

35) The expectations of the IDEA also include: "options, programs, services, technologies, practices and interventions based on scientifically based research, to the extent practicable."[60]

36) When a child's behavior impedes the child's learning or that of others, the IEP team must consider the use of positive

[53] *Schaffer v. Weast* 546 U.S. 49 (2005).
[54] See 34 CFR §300.304.
[55] See 34 CFR §300.304(c)(4).
[56] See 34 CFR §300.5, §300.6 and §300.105 (a)(1-2).
[57] See 34 CFR §300.305 (a)(1).
[58] See 34 CFR §300.304(c)(1)(i-v).
[59] See 34 CFR § 300.502 (1).
[60] See 34 CFR 300.320(a)(4).

behavioral interventions and supports, and other strategies, to address that behavior.[61]

37) In developing the Student's IEP, IDEA requires that the IEP be in effect "at the beginning of each school year."[62]

38) Among other requirements, the IEP must reflect "how the child's disability affects the child's involvement and progress in the general education curriculum...,"[63] articulate measurable educational goals, and must specify the nature of the special services that the school will provide."[64]

39) IDEA expects that all schools and districts will "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services..,," and that "The continuum required in paragraph (a) of this section must include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement."[65]

40) IDEA and the Courts provide guidance to IHOs and Courts when considering the award of tuition reimbursement.[66] Courts and hearing officers enjoy broad discretion in determining if relief should be awarded, and if so, to what extent.[67] When considering whether to limit that request for reimbursement IDEA requires: "at the most recent IEP meeting...parents did not inform the IEP Team that they were rejecting the placement...; or 10 business days...prior to the removal...the parents did not give written notice...; or, the public agency informed the parents...of its intent to evaluate the child...; or, upon a judicial finding of unreasonableness with respect to actions taken by the parents," then, as in the Court's ruling in [redacted][68] "Courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant."

41) When considering the award of compensatory education or "prospective relief," as debated by the parties in an

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[61] See 34 CFR §300.324(a)(2)(i)

[62] See 34 CFR 300.323 (a).

[63] See 34 CFR 300.320 (a) (1) (i).

[64] See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

[65] See 34 CFR § 300.115 (a) (b).

[66] See 20 U.S.C. § 1412(a)(10)(C)(iii)(I-III), and 34 CFR § 300.148(c)(d)(e).

[67] See *Carter*, 510 U.S. at 16; and *J.S.*, 2011 WL 5925309 at * 20, 32.

[68] See *C.H. vs. Capehenlopen School District*, 606 f.ed 59, 71 (3rd Cir. 2010.

earlier memorandum of law submitted by both parties, the only reference in the IDEA relative to compensatory education specifically as a possible remedy in the complaint resolution process reflects that an SEA "must address...The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement)...[69] Additionally, consideration must be given to the remedial authority of IHOs. *Susquehanna* makes it clear that any compensatory education awarded must not be in excess of "what is required for compliance with the Student's IEP."[70]

APPLYING THE LAW AND FINDINGS OF FACT TO THE ISSUES

42) **Issue One** - "Failing to conduct necessary academic and functional evaluations and to give meaningful consideration to independent evaluations provided by the parents." IDEA requires evaluation of students within 60 days of a request by the Parent or at such time as stipulated by the State. Illinois statutes require school districts to complete the evaluation and IEP within 60 school days after a parent submits a request to the district.[71] Numerous Courts in varying circuits make it clear that the district of residence continues responsibility for evaluating students even when the student is enrolled in a private school. Courts have ruled[72] that when the parent requests an evaluation for the purpose of re-evaluation or evaluation with the intent of seeking a FAPE from the District, then "the child find obligations of the district in which the private school is located do not relieve the district of residence of its obligation to evaluate and provide FAPE."[73] The District did not dispute the Student's eligibility for services since the Student first began receiving services from the District in the early childhood program during the 2006-2007 school year. Nor did the District dispute that as of March 1, 2011, the Parents notified the District and requested that the District re-evaluate the Student. Further, it was uncontradicted that the Parents communicated to the District on or about March 1, 2011 regarding the Parents' intention to re-

[69] See 34 CFR §300.151(b)(1).
[70] See *Susquehanna Twp Sch.Dist. v. Frances J.*, 823 A.2d 249, 257 (Pa. Commw. Ct. 2003).

[71] See 34 CFR § 300,301(c) (1) (i); and 23 Ill. Admin. Code § 226.110 (d).
[72] See *Moorestown Twp. Bd. Of Ed. V. SD.*, 811 F. Supp. 2d 1057, 1069 (D. N. J. 2011); *J.S.*, 826 F. sup. 2d at 665; *Dist. Of Columbia v. Abramson*, 493 F. Supp. 2d 80, 86 (D.D.C. 2007).
[73] See *Letter to Eig*, 52 IDELR 136 (OSEP 2009).

enroll the Student in order to secure an IEP. The District's reliance on 34 CFR § 300.131 regarding "Child find for parentally-placed private school children with disabilities" failed to consider the recent rulings of the various Courts. Even if the recent ruling did not apply, evidence indicated [redacted] deflected the Parents' request for an evaluation and IEP for approximately six months (February of 2011 through August of 2011). This deflection by the District resulted in a clear procedural violation of the IDEA and Illinois statutes. To find otherwise, would be to provide authority to school districts to delay parental requests for evaluations by simply deflecting the requests for as long as the parent is willing to allow such deflection. The statutes and Court rulings make it abundantly clear that IDEA and State statutes require a timely evaluation. In this instance, the District should have secured written permission from the Parents when the Parents first approached the District in February of 2011. Therefore, and consistent with the 60 school day requirement of the Illinois statutes, it is a finding of this IHO that as of March 1, 2011, [redacted] was responsible for conducting a re-evaluation of the Student.[74] As a result, the 60 school day requirement for completing the evaluation and having an IEP in place for the Student should have been completed by the District no later than June 4, 2011.[75] The District did not present the Parents with a completed IEP

[74] Per **OSERS,** *Questions and Answers on Serving children with Disabilities Placed by Their Parents in Private Schools,* Question B-4 (April 2011), it is clear that OSERS recognizes that "there could be times when parents request that their parentally placed child be evaluated by different LEAs." Further, in OSERS response to the same question (B-4), it notes in the closing of the response that: "if the parent chooses to request evaluations from the LEA responsible for providing the child FAPE and from another LEA that is responsible for considering the child for the provision of equitable services, both LEAs are required to conduct an evaluation." Thus, it is clear that OSERS recognizes that the LEA whose boundaries include the residence of the child and Parents can also be asked to complete an evaluation and when this occurs, then OSERS states that the LEA is "required to conduct an evaluation." Both the testimony of the Mother as documented in the *Record of Proceedings* dated February 3, 2012 at PP. 112-117 and as acknowledged in the District's memorandum of law and dated April 10, 2012 on page 1 it is clear that the District was informed by the Parents through the communications of the Mother to District administrator Pattie Seifer that the Parents had requested that Evanston-Skokie #65 complete a "case study evaluation." It was at this point that the District should have secured written permission from the Parents to proceed. Per 34 CFR § 300.309 (c), "The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§ 300.301 and 300.303." Failing to secure that written permission does not relieve the District of the responsibility to complete the evaluation and CSE in a timely manner as defined under the IDEA. Further, 34 CFR §300.300 (a) (iii) requires: "The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability." Thus the District was deemed to have been informed of the Parents' desire to have an evaluation of the Student during the February/March time frame, herein to be on or about March 1, 2011 for the purposes of determining the timeline for completing the evaluation and IEP.

[75] 23 Ill. Admin. Code § 226.110 (d).

until sometime after school started in September of 2011. As noted in paragraph 34 above, the IDEA expects schools to "consider" any IEE's provided by the Parents "in any decision made with respect to the provision of FAPE." The report of the District's OT reflected that she reviewed and reported some of the findings of the Private OT. The Private OT reported on three of the four pages submitted school strategies to help with the Student's attention deficits.[76] The District's OT included in her report conclusions of the Private OT but left out of the IEP the strategies recommended by the Private OT. For example, the goal in the IEP designed to address the Student's struggle to remain seated notes: "Given a focusing strategy (i.e., "first-then" opportunities for breaks, use of timer), (the Student) will use the strategy to increase his time on task up for non-preferred activities in 10 minutes." However, the IEP does not reflect any of the Private OT's extensive strategies for addressing this goal. Additionally, the District Psychologist testified that she reviewed the IEE's submitted by the Parents. She also testified that she elected to utilize some of the findings of these IEE's (e.g., present levels of cognitive and communication functioning) instead of assessing these areas herself. Almost all of the IEE's that addressed the Student's many and varied sensory issues contained numerous strategies to address them. The District Psychologist acknowledged in her testimony that she did not include any of these in her report, nor did any of the recommendations contained in the IEE's make it into the Student's IEP. The IEP did not reflect any explanation or rationale regarding why the District did not include these identified needs and strategies. Absent at least some explanation in the IEP suggesting the District found the IEE results to be inaccurate, unnecessary or inappropriate, the IHO must conclude the District failed to consider the IEE's when developing the Student's August 26, 2011 IEP. For all of the reasons noted herein, the IHO rules in favor of the Parents on Issue One (1).

43) **Issue Two** – "Failing to conduct a functional behavior analysis and develop an appropriate behavior intervention plan." The Student's record depicted significant behavioral issues and the District had complete access to this information. The Student's record, independent providers, and private agency staff documented clear

[76] See Parent documents at PP. A31-34.

information regarding the Student's significant issues related to self-regulation. This record of serious behavioral concerns related to self-regulation from the Student's significant sensory disabilities dated back to District 65's early childhood program. The Parents informed the District through [redacted] that the Student's lack of success behaviorally constituted the primary reason for seeking re-enrollment, re-evaluation and an IEP from [redacted].[77] The District admitted seeking input from [redacted] by requesting the Parents secure from [redacted] completed Tier II and Tier III input forms designed by the District. [redacted] promptly completed the forms and the Parents returned the requested information to the District. The District argued that the District did not need to complete the FBA and BIP because the Student did not attend District #65 schools. The Student's IEP and testimony reflected that the District could not determine that the Student's behavior impeded his learning or the learning of others because the Student was not attending District 65 schools. Evidence and testimony reflects that the District had the opportunity to observe the Student during the months of March, April, or May of 2011 at [redacted]. The District also had the opportunity to observe the Student in ESY during the month of June at Cove School. Despite the Parents' expressed concerns, the evidence contained in the Student's records, the recommendations from the Student's private providers, the Tier II and Tier III input sheets completed by [redacted], and even the Student's District #65 student records from early childhood, the District reported on the Student's August 26, 2011 IEP that the Student's behavior did not "impede his ... learning or the learning of others."[78] In the District's post hearing brief, the District acknowledges the IEP Team made this conclusion: "Since (the Student) has not attended District schools for the past three years, there was no evidence that his behavior would impact his learning in the inclusion second grade classroom."[79] IDEA mandates that Districts complete the FBA for Student's whose behaviors impede their learning: "the IEP team must ... in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address

[77] See generally the testimony of both Parents.

[78] See Parent Documents at C121.

[79] See District's post hearing brief, p. 16.

that behavior."[80] The Court in *Harris*, commented: "The IDEA further recognizes that the quality of a child's education is inextricably linked to that child's behavior, and hence an effective educational evaluation must identify behavioral problems."[81] This same conclusion was reached by the Court in *Long.*[82] The Court in *Long* ruled that the District's failure to properly conduct the FBA and develop the BIP for the Student amounted to a substantial procedural error and thus a denial of FAPE. The testimony of the Parents, the Expert, the Private OT, the Ped Psych, the District's Psychologist and OT and the documents reviewed during this testimony directs a finding that the Student's behaviors indeed impeded his learning and the learning of others. Thus, the IEP Team should have completed a FBA and developed a BIP for the Student. For all of the reasons noted herein, the undersigned finds similarly as in Long on this issue and rules for the Parent on issue two.

44) **Issue Three** – "Failing to use scientifically based methodology." As noted in paragraph 33 above, IDEA requires that Districts provide "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child."[83] The District argues that the recommended second grade inclusion class fulfilled this expectation. Further, the District argues that the Parents, per the 7th Circuit ruling in [84] do not have the right "under IDEA to compel a school district to provide a specific methodology."[85] Testimony from the special education teacher assigned to the inclusion second grade classroom reflected the use of the same peer-reviewed research based programs in reading and math as recommended by the Parents' private evaluator. Evidence revealed that Cove School used the programs Fountes and Pinell for reading and Touch Math for the Student during the 2011-12 school year. 2nd I testified she used the program Fountes and Pinnell for reading and Touch Math.[86] Parents also argued that the District's proposed IEP failed to include peer reviewed, research-based, multi-sensory

[80] See 34 CFR § 300.324 (a)(2)(i)
[81] See *Harris vs. District of Columbia,* 561 F. Supp. 2d 63 (D.D.C. 2008).
[82] See *Long v. dist. Of Columbia,* 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011).
[83] See 4 CFR § 300.320(a)(4).
[84] See *Lachman v. ISBE,* 852 F. 2d 290, 297 (7th Cir. 1988).
[85] See District's post hearing brief, p. 15.
[86] See transcript from 4/13/12 at PP. 124-25.

methodologies for addressing the Student's significant issues with self-regulation. Parents noted that the Student's records and private evaluators thoroughly documented these needs in all of the Student's IEP's and evaluations. The Expert and Private OT both testified the Student required the identified peer reviewed research based methodologies in order to address the Student's self-regulation issues. The District provided evidence of the use of the aforementioned academic methodologies as reflected in the testimony of teacher 2nd I and 2nd T. Further, both teachers testified to the availability of accepted methodologies to assist the Student with self-regulation. Noted strategies included the use of assistive technology like thera-bands and a specific location in the room for the Student to calm himself when experiencing self-regulation issues. The example methodologies that the two teachers detailed in their testimony did not clearly establish compliance with the law, but the District did not bear the burden of proof. Therefore, since the District provides the same reading and math methodologies as [redacted] and the finding of a lack of clarity regarding the strategies designed to address the Student's self-regulation needs, the undersigned finds that the Parent did not meet the burden of proof on this issue. Thus, the undersigned rules for the District on Issue Three.

45) **Issue Four** – "Failure to provide the Student an appropriate IEP." **Issues Five and Six:** "Failure to provide the Student with a timely evaluation and timely IEP: and "Failure to provide the Student with an appropriate placement." When considering issues 4, 5 and 6 through the lens of the law explained in paragraphs 36-38 above, the issues clearly overlap. Issue four (4) reflects a compound issue and the undersigned addressed the Parents' allegations related to timely evaluation in paragraph 42 above. Further, the issues of appropriate IEP and timely IEP cannot be separated completely since it is unlikely an appropriate IEP could be untimely or an untimely IEP could be appropriate. The IDEA requires that students first be assessed in all areas of expected disability. Next, and based upon that assessment and other required factors for consideration, develop an appropriate and timely IEP. The IEP team, in conjunction with parental input, should then determine the most appropriate program of services and supports and the location or "placement" for those programs and services. When

considering the "appropriate placement," IDEA requires schools and districts to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services..,," and that "The continuum required in paragraph (a) of this section must include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement."[87] The Parents argue, and the IHO concurs, that *Gellert* is directly on point with the key principles involved in this DPCN. As noted in the Parents' written closing brief, the Court in *Gellert* found: "finding denial of FAPE where district insisted that small class size was not required for student with emotional disturbance, yet 'failed to show that [student] could receive FAPE without the specific accommodations of small class size and a quiet, calm learning environment."[88] This ruling in *Gellert* directly correlates with the issues considered in this DPCN and the facts identified through testimony and review of documents. The comparison of the facts and documentary evidence in this DPCN to the ruling in *Gellert* supports the direct link between the finding in *Gellert* and the facts in this case. The Student's IEP reflects a provision for 80% of instructional services delivered in a classroom with two teachers teaching simultaneously with at least 19 other students. Additionally, at least one other student with special needs currently in the second grade classroom experiences significant levels and degrees of behaviors related to complex disabilities. Parents' presented uncontradicted testimony that revealed the other student caused regular disruptions to the classroom.[89] Despite this, the IEP called for delivery of many of the Student's related services in the same regular classroom environment. The IEP team recommended this placement in spite of the universal view of the educated professionals who worked with the Student for the previous five years. This universal view of the

[87] See 34 CFR § 300.115 (a) (b).

[88] See *Gellert v. D.C. Pub. Sch.*, 435 F. Supp. 2d 18, 27 (D.D.C. 2006).

[89] See transcript for April 27, 2102 at PP. 92-97 and transcript for April 13, 2012 at PP. 46-48.

Student's disregulation issues included the view of the [redacted] staff who served him during the [redacted] early childhood program through January of 2008. All of the testimony and Student records from the previous five years reflected that the Student required a smaller and more controlled classroom environment to succeed. Testimony from several [redacted] staff members reflected the District members of the IEP team dismissed this evidence. When the District Psychologist was asked the following question: "hypothetically, if a student moved from another community and there was information indicating that they had had behavioral problems in a prior school setting - - ... would the fact that there was indication of a need for lots of support be another reason to trigger the FBA or BIP?" Tthe District Psychologist and LRE Coordinator testified: "Often times we like to see the child in the classroom setting before we go ahead with an FBA or BIP." The follow up question was: "Is that a policy?" Response: "It's a standard we follow." Follow up question: "Even if the reporting coming in to the school is that they have significant problems already in other settings?" Response: "Well we would like not to assume that. Each school is different and our structure is different, maybe, from the previous school." The District Psychologist provided other testimony indicating a failure to comply with the IDEA. The District Psychologist testified that the evaluation results in the Student's records reflected consistent and similar results with her own testing of the Student. She also testified to the adequacy of some of the information from the [redacted]r Demonstration School for determining adverse effects for eligibility purposes, but not for the purpose of determining the impact of the Student's behaviors on his learning and those of other students. It becomes difficult to understand how on the one hand the District could achieve similar testing results as reflected in the Student's records provided to the District, and the District could utilize some of the information from those records to determine adverse effects for eligibility purposes, but the District rejected the information relative to class size and the impact of the Student's behavior on his success. The District Psychologist acknowledged she had reviewed the information from [redacted] relative to the Student's behavior issues. She agreed the record reflected that the Student's behaviors included arguing, overly active, losing his temper,

was stubborn and had poor self-control and these behaviors impacted the Student's learning. When asked to interpret the information from the Tier II and Tier III reports from [illegible] she testified "That was based on [illegible] Demonstration's report." In addition, she reported "We ... didn't want to assume that his behavior would impede his learning or the learning of others." Parents asked a follow-up question asking her to assume that the information presented to the District sufficiently documented the Student's behavior issues and that they impeded his learning, and based upon this hypothetical information, would the District want to have a plan in place to address those documented needs? She responded: "The structure of – I don't know the structure of [illegible] Demonstration School. So I don't know if it is the same structure that we have in place at [illegible]." This raised the question why the District even asked [illegible]er to complete these reports if the District did not intend to use the information as part of the decision making process. When asked to respond whether or not it was acceptable for the IEP team to make a decision at a later date on a significant part of the Student's educational plan, namely the need to design effective behavior interventions, she responded "If need be." With regards the August 26, 2011 placement decision, the testimony of the Parents and several District staff members reflect a single focus of the District, the District's inclusion second grade classroom. The IEP of August 26, 2011 reflects only two considerations for placement for the Student, the inclusion second grade classroom and [illegible] Testimony from both the Parents and District staff confirmed the IEP team did not discuss possible placements in a resource room or self-contained classroom. Since the facts reflect that resource rooms and SLD self-contained classrooms no longer exist at the elementary level in [illegible] there was no reason for the IEP team to consider them since they are not available to any student who might demonstrate the need for them. Testimony from the Parents and [illegible] staff also reflect that the discussion of [illegible]l only occurred at the close of the IEP team meeting. Testimony also revealed [illegible]l placement did not receive serious discussion or consideration by any IEP team member other than the Parents. Testimony and email documents reflect that the IEP team only gave serious consideration to

the second grade inclusion class. It is clear from the evidence the regular education placement resulted from the District's new inclusion policy recently implemented at [redacted][90] An email from District Administrator [redacted] [redacted] sent to the Parents on August 6, 2012, (which occurred prior to the start of the school year, the domain meeting, and the IEP meeting of August 26, 2012), reflected that the District already decided on the placement in the inclusion second grade classroom at [redacted]. Per the uncontradicted testimony of the Parents, and just prior to adjournment, the IEP team briefly discussed [redacted] as a possible placement. Without contradiction, the Father testified that because the discussion was so brief, the Parents asked each member to indicate their position on placement at [redacted]. Parents' testimony reflected that individual team members seemed surprised at the discussion. The Father testified that the body language among most District IEP team members revealed their surprise during Cove School discussion. Testimony given by the Father, the District Psychologist, and the District SLP all support the allegation presented by the Parents that the District predetermined the Student's placement. The Father's uncontradicted testimony also reflected the staff members' limited knowledge of the programs and services provided by [redacted] [redacted]l. Thus, these team members could not provide meaningful consideration of the placement. Testimony of the District Psychologist revealed she could not recall how the discussion of [redacted]e came up at the IEP team meeting of August 26, 2011. She testified: "I can't recall exactly, but I know parents had asked about [redacted] as an option, and it was discussed." When asked as a follow-up whether or not any other team member raised the consideration of [redacted] for discussion, the Psychologist responded: "We would never choose an option that is not part of our district. We would feel that we can service our child – not never. We -- I'm sorry. We would feel that we can service our students in our district. And so we felt that those would be appropriate for him."[91] When Parents asked District SLP if the IEP Team discusse[redacted]l as a possible option she responded: "I – I don't remember that [redacted] was brought up in the meeting." It was clear that the discussion of [redacted] at the August 26, 2011 IEP Team meeting was not

[90] See Parents Documents at I1 – I36.

[91] See transcript for April 13, 2012, P. 266.

substantial or meaningful. This conclusion is supported by the admission of staff to their limited knowledge of [redacted] programming, the testimony of the District Psychologist and District SLP. As noted by the Parents in their closing brief in the Court's decision in *Deal,*[92] "there was no way that anything [the Student's Parents] produced, could have changed the [District's] determination of appropriate services."[93] The IEP team when considering the placement considerations for the Student, only focused on the single issue of the Student's need to be with typically developing peers, but failed to reflect any meaningful consideration for the significantly complex and varied academic, speech/language, OT, vision and social emotional development needs of the Student. The Student's lengthy and substantive school records reflected the Student's significant and complex needs. These were duly noted in the August 26, 2011 IEP which clearly detailed and documented the Student's varied needs as noted herein. The undersigned rules that the IEP described a student with significant and complex impairments, that required specialized instruction, or modifications and supports, in all academic areas, including speech/language, OT, social/emotional development and vision. The District chose to focus on the single issue of the Student's purported need to be with his typically developing peers. This "one size fits all" policy required the Student to adapt to the District's program. Instead, the statutes require districts adapt programs and services to meet the needs of the student. As a result of the testimony and documentary evidence noted herein, the undersigned finds that the District failed to develop a timely and appropriate IEP (Issues four and five). Further, the undersigned finds that the District failed to ensure a continuum of placement options that the IEP team could consider in order to meet the complex needs identified in the Student's IEP. Thus, the Parents met their burden of proof on issues four, five and six and the IHO rules in favor of the Parents on all three issues.

46) **Issue Seven** - "Failing to provide the Student with the substantive and procedural obligations provided in the IDEA." When considering a dispute regarding a student with a disability and the student's school district that alleges a failure to provide a Free Appropriate Public Education (FAPE), the hearing

[92] See *Deal,* 295 f. 3d at 858-859.
[93] See Parents' closing brief at P. 27.

officer must first consider the Supreme Court's decision in Rowley.[94] Rowley, set forth a two pronged test for determination of a (FAPE) in the least restrictive environment (LRE). The first prong directs any hearing officer or court to first consider if the District complied with the statutory procedures required by the Individuals with Disabilities Education Act (IDEA).[95] Rowley indicates that any substantial denial of procedural safeguards that result in adverse impact on the parents' participation or the Student's education in so much as the result is a loss of educational opportunity, then the District failed to meet the law's requirement for a FAPE. This first test of Rowley provides for relief only when the procedural violations result in substantial harm to the student.[96] As noted in the findings of fact and previous discussion of testimony and documentary evidence, the August 26, 2011 IEP failed to be tailored to the unique needs of the Student. Despite the substantial evidence that the Student's behavior impeded his learning, and likely the learning of others, the District did not complete a FBA and subsequent BIP. Substantial evidence submitted to the District indicated that a placement in a regular education classroom with a larger class size (20 or more students), multiple sources of stimulation (simultaneous co-teaching, other students acting out, fast paced instruction), the Student experienced failure. The IEP team determined that the inclusion second grade classroom was the appropriate place for the Student's specialized instruction and most of his related services. Testimony by the Parents, District Psychologist, and District SLP established that the IEP team did not give meaningful consideration to the Parents clear and unambiguous concerns regarding the recommended placement. The evidence established that a large and stimulating environment caused significant distress and regression. Parents testified this also caused them serious concern and distress. Testimony from [redacted] Principal [redacted]in Johnstone and the evidence reviewed during that testimony made it clear that the Student thrived in the environment of a small classroom, low teacher to student ratio. Testimony revealed that the District's IEP team reviewed similar information from the Student's records and recommendations

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[94] See *Board of Education of the Hendrick Hudson School District, Westchester County et al. V. Rowley* by her Parents, Rowley et ux. 458 U.S. 167 (1982)).
[95] See 20 U.S.C. 1401 et seq.
[96] *W.G. v. Board of Trustees*, 960F.2d 1479, 1484 (9th Circuit 1992)

from the Student's previous staff during ESY of 2011 at [redacted] that reflected the Student's progress in the smaller classroom setting. Parents provided clear testimony of the Student's progress and the impact this was having on the Student in multiple environments. Parents provided uncontradicted testimony and evidence of the Student's success at [redacted]. The District's decision to move forward with a placement that had previously failed to provide the Student educational benefit violated the Rowley standard. Evidence presented by the Parents provided documentation of the Student's sensory disabilities and the impact on his self-regulation issues. Other evidence documented in the reports and the Parents' testimony established that the District had the information necessary to address the Student's sensory disabilities, but failed to consider the information appropriately. This cumulative evidence made it clear that the recommended placement would result in regression for the Student. Thus, the IHO rules that the IEP Team's placement recommendation should have been rejected. The recommended placement would likely contribute to the regression that the Student experienced during the 2010-2011 school year at [redacted]. Therefore, the IHO rules that the District failed to provide the Student with a FBA and BIP as required by the law, failed to consider the Parents' input into the development of the Student's IEP, and therefore failed to follow the procedures required of the IDEA. The IHO rules that the Parents met their burden of proof on Issue seven (7) and rules in favor of the Parents.

47) **Equitable Considerations:** The District argues that IDEA provides support that even if the IHO rules that the District denied the Student a FAPE, Parents' decisions regarding the previous three years in private placements precludes all requested relief. District suggests that the result of these placements caused the Student to be "essentially a non-reader."[97] The District argues that the Parents' decisions to unilaterally place the Student during these three years and deny the Student the benefit of [redacted] special education programming either "caused or heavily contributed to (the Student's) need for [redacted] Put another way, (the Student's) parents for three years placed their son in educational placements that were not appropriate for (the Student). They now want the School District to

[97] See District closing statements P. 29.

pay for their errors."[98] The District's legal argument also includes [redacted] which ruled reimbursement was not warranted because the parent's "...failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their child." In [redacted][100] the Court held that IDEA requires parents first give the public school a good faith opportunity to meet its obligations before Courts order districts to fund private placement. The District argued that Courts deny parent's reimbursement requests when the Courts' rule predetermination by the parents. In the cited case, the parents claimed the District had not provided them with a placement for the child by mid-summer, thereby forcing them to place their child in a private setting.[101] The District argues that the Father's actions to apply to [redacted] on August 5, 2011, and then provide the required 10 day notice to the District on August 8, 2011 revealed an attempt on the part of the Father to "game the system."[102] The following statement reflects the essence of the District's argument: "Herein, the acts and admissions of (the Student's) parents constituting extrinsic evidence clearly establish that they had decided to send (the Student) to [redacted] before the School District had an opportunity to prepare its IEP for (the Student)."[103] This argument fails based upon the facts and subsequent application of both statutory and case law. The undersigned found that the Parents informed the District of its obligations under the IDEA to re-evaluate the Student as early as February of 2011. The District did not convene the IEP team meeting until approximately eight months later on August 26, 2011. This serious procedural violation negates the District's argument of equitable considerations and it is likely the IHO need go no further in the analysis. If the IHO hypothetically dismisses this procedural violation finding, and examines the remaining allegations in the District's argument, the District's argument still fails. Parents provided uncontradicted testimony of their regular communication and cooperation with the District throughout the process. The Parents were persistent in their efforts to secure a re-evaluation and subsequent IEP. Parents cooperated after late notice from the District to begin the IEP

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[98] Id. at P. 30.
[99] See *Patricia P. v. Board of Education of Oak park and River Forest High School District 200*, 203 F.3d 462 *6th Cir. 2000).
[100] Op. Cit. *C.H. vs. Capehenlopen.*
[101] See district closing statement at P. 32.
[102] Id. at P. 34.
[103] Id. at P. 36.

process, and after the Parents' put the District on notice of their intent to unilaterally enroll the Student. Parents on short notice attended the domain meeting, brought the Student to the District for testing, attended the IEP team meeting, shared their discontent for the proposed placement (even polling each IEP team member individually), visited the proposed placement, asked for a copy of the IEP, wrote the District a reminder email about receiving a copy of the IEP, and reviewed that IEP after school started before signing a contract with [redacted]l. IDEA requires a minimum 10 day notice, which parents may waive, for both the domain meeting and the IEP team meeting. If the Parents had chosen to hold the District to these time frames, the District could not have conducted the domain meeting, assessed the Student, and completed the IEP team meeting prior to the start of school. Thus, these facts preclude any finding under the ruling cited relative to [redacted] [redacted] IDEA demands parents be treated as partners in the process. Districts must follow the procedures under the IDEA to provide a timely and appropriate IEP when requested by parents and warranted by the assessments. District administrators caused delays in the process by the back and forth between [redacted] and [redacted]. The District then further delayed the process when the District denied the Parents the opportunity to enroll the Student until the middle of May of 2011. Parents provided uncontradicted testimony that the District's administration agreed to "expedite" the process. The District then failed to take any action until the Parents served the 10 day notice of unilateral placement. At that point, the District had no difficulty finding the personnel and resources to complete a domain meeting, evaluate the Student, interview the Parents, and conduct an IEP team meeting in an 18 day period. Parents asked for the IEP almost eight (8) months prior to the IEP team meeting. The District could not make the IEP process work for the prior 160+ days but found the time, personnel and resources to make it happen in 18 days when the Parents served notice of their intent to unilaterally enroll the Student. The District knew at this point of the need to have the IEP in place prior to the start of school. Despite this knowledge on the part of the District, the District did not provide the completed IEP to the Parents until after the school year had begun. This is also a violation of the IDEA. Before the Parents issued their 10 day notice, written evidence in the

email from [redacted] made it clear that the District planned to unilaterally place the Student in the inclusion second grade classroom and wait until after the start of the 2011-2012 school year to complete the IEP process. Evidence indicated that the District wanted to utilize the Lincoln School staff to complete the IEP. Once the Parents notified the District of the proposed [redacted] placement, the District utilized summer personnel per the testimony of S/L therapist [redacted] The District's allegation of "gaming the system" has absolutely no merit when all of the facts are considered. The IHO finds the facts and circumstances support a finding that the Parent's efforts related to [redacted]l during the months of August and September of 2011 amounted to a "contingency" plan, and not an attempt to "game the system" as alleged by the District. The IHO agrees with the ruling in [redacted][104] and as cited in the Parents' closing brief at P. 46 which reads: "Plaintiffs acted reasonably under the circumstances, working with the school district in good faith and keeping the school district informed of their concerns. Absent further evidence that the Parents never intended to seek a public school placement, the Court declines to infer bad faith on the part of the Parents, who sought to educate themselves about various school options and to make arrangements to preserve their options should the DOE's recommended placement prove to be inadequate." The facts identified herein support a similar ruling. The evidence directs a conclusion by the IHO of consistent good faith on the part of the Parents who diligently, and in a very caring manner, attempted to work with each service provider, both private and public. For these reasons, the District's request for denial of reimbursement on the basis of equitable considerations is denied, and the Parents' request for reimbursement for the full cost of ESY for the summer of 2011, the full cost of tuition for the school year of 2011 and 2012 at [redacted]l, and the full cost of ESY for the summer of 2012 at [redacted] approved.

48) **Prospective Relief** – As part of Parents' requested relief, Parents seek an option to place the Student at [redacted]l at the District's expense for the 2012-2013 school year. The District argues that such an award would actually be an award of compensatory education, which is essentially an order to compensate the Student for a past deficient FAPE. It is true that the District failed in a number of required areas to provide the Student

[104] R.K., 2011 WL 1131492 at *29.

a FAPE. As a result, a cursory examination of the facts and how they relate to the issues might imply an award of compensatory education should be awarded. However, as a fact cited herein by this IHO, and as the District argues in their closing brief, Parents' unilateral placement of the Student at indeed provided the Student with significant benefit during the 2011-2012 school year. This is supported by the evidence submitted regarding the Student's progress at testimony of both Parents, and testimony of Principal. The District argues that [105] is directly on point with this argument. In , the Court held that "an award of compensatory education for the time spent in private school simply does not make sense, as there was no deficiency in her education that would require compensation." The Court also found that the Parents had failed to provide proper notice to the District of their dissatisfaction with the proposed placement and services and failed to provide the required 10 day notice of unilateral placement. Neither of these two aforementioned findings of the Court in are consistent with the findings in this case. However, the point of compensatory education requires consideration in light of as well as, the guidance on compensatory education provided by the IDEA and *Susquenhanna* discussed earlier. If the purpose of compensatory education is to compensate for a past deficient FAPE, only one year of possible deficiency exists for consideration, the 2011-2012 school year. Since the undersigned ruled that provided an appropriate education for the Student during the 2011-2012 school year, and the only year that can be considered for compensatory education award is the 2011-2012 school year, then consistent with the Court's ruling in "an award of compensatory education for the time n this instance – the Student] spent in private school simply does not make sense, as there was no deficiency in her [the Student's] education that would require compensation." When considering the facts in this DPCN and the Court's ruling in the IHO must conclude in favor of the District. Thus, Parents are not entitled to an award of prospective relief or compensatory education based upon the discussion provided herein. The IHO rules in favor

[105] Marissa F. vs. The William Penn School District, 44 IDELR 94 (E.D. Pa. 2005), affirmed, 199 Fed. Appx. 151 (3rd Cir. 2006).

of the District and denies the Parents request for an award for another full year at [redacted] at the District's expense for the 2012-2013 school year.

ORDER

49) Upon receipt of a detailed invoice from the Parents documenting charges for [redacted] ESY program for the summer of 2011, and documentation for any private services provided during that summer program and directly in conjunction with the ESY services of [redacted] (e.g., speech and language therapy, occupational therapy, physical therapy, psychological services, social work services, Parents' documented transportation costs, etc.), the District shall reimburse the Parents for the full cost of the documented expenses no later than July 31, 2012.

50) Upon receipt of a detailed invoice from the Parents documenting charges for [redacted] regular school program for the 2011-2012 school year, and documentation for any private services provided at the Parents' expense for the Student in conjunction with the services and program for the regular 2011-2012 school year at [redacted] (e.g., speech and language therapy, occupational therapy, physical therapy, psychological services, social work services, Parents' documented transportation costs, etc.), the District shall reimburse the Parents for the full cost of the documented expenses no later than July 31, 2012.

51) The District shall provide the Student with ESY services and all required related services while attending [redacted] ESY program at full public expense (including transportation if the Parents request it) for the summer of 2012.

52) No later than July 15, 2012, the District will convene an IEP team for the purpose of planning the Student's program and services for the 2012-2013 school year. The District shall consider and incorporate recommendations as appropriate from [redacted] staff who have worked with the Student during the 2011-2012 school year, as well as any input available from the staff working with the Student in the [redacted] ESY program during the Summer of 2012. The IEP team must also demonstrate appropriate consideration of the Parents' concerns and any IEE's presented that were completed during the previous 12 month period. The use of the term "as appropriate" is intentional. The meaning of the term as used in the context of this order is: "suitable for a particular person or place or condition." Thus, all decisions relative to the

recommendations of [illegible]ff, the concerns of the Parents, and any submitted IEE's must reflect that the decisions are suitable for the Student. The IEP team is further directed to base all decisions on the Student's present levels of performance, attainment of goals and benchmarks during the 2011-12 school year and ESY of 2012, recommendations of [illegible]l staff, any recent (past 12 months) IEEs, and concerns of the Parents. The completed IEP must demonstrate that the District developed a program of supports and services designed to adapt to the Student's needs, as opposed to an IEP that requires the Student to adapt to a particular District program or policy.

53) No later than July 31, 2012, the District shall provide evidence of compliance of all aspects of this order to the Illinois State Board of Education, Due Process Division.

RIGHT TO REQUEST CLARIFICATION

Either party may request clarification 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 to the Illinois State Board of Education. After a decision is issued, a hearing officer may not make substantive changes to the decision. The right to request such a clarification does not permit a party to request reconsideration of the decision itself, and the hearing officer is not authorized to entertain a request for reconsideration.

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is 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 5/14-8.02(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.

Entered: June 8, 2012

D. Michael Risen
Impartial Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Findings of Fact and Conclusions of Law and the Final Written Decision was sent via electronic mail, and 1st class USPS, certified mail, return receipt, prepaid, and directed to:

And

	Mr. [redacted] Esq. Father [redacted] [redacted]1 @: [redacted]	Ms. [redacted] Mother [redacted] [redacted] @: [redacted]
@: [redacted]		

And

Mr. Andy Eulass, Esq. Due Process Coordinator
Due Process & Mediation, ISBE
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on June 8, 2012

____

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