Case Number: 2012-0511
[redacted] vs. [redacted]
Hearing Officer: Joseph P. Selbka

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: 815-577-4000**
Superintendent
Address
Represented by : [redacted]

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

Date and Timelines
Date of Written Request: 12/13/2012
Date of Pre-hearing Conf: 05/16/2013
Date of Hearing: 7/9/2013 to 12/30/2013
Date of Decision: 1/9/2014

Summary of Decision: Parent made numerous claims of procedural and substantive violations of IDEA. The IHO found in part for Parent and in part for the District.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF [redacted]	)	
	)	**ISBE CASE NO. 2012-0511**
v.	)	**Joseph P. Selbka**
[redacted]	)	Impartial Due Process
	)	Hearing Officer

FINAL HEARING OFFICER DETERMINATION AND ORDER

I. Introduction, Procedural History, and Findings of Fact Related to the Due Process Proceedings

1. [redacted] ("Parent") and [redacted] ("District") have been engaged in a long running series of related disputes over the education of Parent's [redacted] ("Student") as detailed below.

2. Parent filed an initial due process hearing request on May 25, 2012. The Parent and District conducted a mediation session and entered into a mediation agreement on July 24, 2012. On July 24, 2012, Parent withdrew her initial due process request (SD 247).

3. Parent filed her second due process hearing request (which began the proceedings in this case) on December 13, 2012. The primary issue was the appropriateness of the District's proposed transfer from Student's then current location of services, [redacted] ("[redacted]") to the District's functional behavior integration program ("FBI Program") at [redacted] ("[redacted]").

4. The District appeared to defend the due process request through its attorneys, [redacted]

5. In January, 2013, The District filed a motion to dismiss arguing that the mediation agreement barred further due process proceedings and seeking a stay put order placing Student at [redacted] Upon receipt of the motion to dismiss, Parent requested a continuance to obtain an attorney which the undersigned granted.

6. Parent subsequently retained attorneys [redacted] to represent her in these proceedings.

7. The motion to dismiss was fully briefed and denied on March 8, 2013. Part of the reason for denying the motion to dismiss was that I don't have authority to enforce a mediation agreement and that only courts have authority to enforce mediation agreements.

8. The District then filed an action to enforce the mediation agreement in the federal district court. The due process proceedings in this case ran parallel to the federal district court proceedings.

9. The undersigned also held that a hearing was required on the issue of Student's stay put placement. The stay put hearing occurred on April 20, and May 1, 2013.

10. The Parent filed an amended complaint on April 26, 2013. The District filed a response to the amended complaint on May 6, 2013.

11. The District filed a complaint on March 15, 2013, alleging that its evaluation from November, 2012 was appropriate. The Parent filed a notice of insufficiency which was denied.

12. On May 30, 2013, Parent moved for summary judgment on the evaluation portion of her amended complaint and motion for an IEE. Both motions were denied after the motion were fully briefed.

13. Parent filed a second complaint on August 9, 2013. The District filed its response on August 19, 2013.

14. The District filed a motion to dismiss the Parent's second complaint in September, 2013, which the undersigned granted in part and denied in part on November 15, 2013.

15. The hearing was held on July 9, 10, and 11, 2013, and December 11, 12, 13, 16, 17, 18, and 20, 2013.

16. Pursuant to section g-55 of the School Code, the undersigned also admitted the transcripts and exhibits from the stay put hearing and made the stay put hearing evidence part of the administrative record in this case. 105 ILCS 5/14-8.02a(g-55).

17. At the hearing, the following exhibits were admitted into evidence: the Stay put binders of both parties; all District exhibits; and all Parent Exhibits except for the supplemental declarations of Parent and two declarations which were offered as offers of proof.

18. At the hearing, the following witnesses testified: [redacted] Parent; [redacted] (District AT Expert); [redacted] (District Physical Therapist); [redacted] (Elim Teacher); [redacted] (Elim Physical Therapist); [redacted], M.D.(Parent Pediatrician), [redacted] (Parent Advocate); [redacted] (Independent AT Expert), [redacted] (Access

Auditor), [redacted] (Director of Special Services, [redacted] (Independent Psychologist);

19. The following witnesses also testified at the stay put hearing and that testimony was considered and made part of the transcript for purposes of this hearing: [redacted] (assistant superintendent); [redacted]

20. The parties filed closing briefs on December 30, 2013.

21. The three complaints (Parent's Amended Complaint, District Complaint, Parent's Second Complaint) set out the issues for the hearing.

II. Issues for Hearing

22. The issues to be decided in the District's complaint are:

a) Whether the District conducted a comprehensive evaluation in November, 2012. The Parent contends the District failed to address the extent of Student's disability and unique needs related to [redacted] skin condition, mobility, and language deficits. The Parent also contends that the district failed to conduct an appropriate AT assessment. Specifically, according to Parent, the District failed to determine the extent of Student's disabilities before determining Student's need for AT. Finally, the Parent contends the District failed to conduct a neuropsychological assessment (which Parent contends was necessary to determine Student's needs and abilities).

The issues to be decided in the Parent's two complaints initially were:

b) Whether the District conducted a comprehensive evaluation in November, 2012, and if the evaluation was not comprehensive: (1) whether the evaluation led to an inappropriate IEP and placement; or (2) whether the inappropriate evaluation led to a procedural violation of IDEA. The Parent contends the District failed to address the extent of Student's disability and unique needs related to [redacted] skin condition, mobility, and language deficits. The Parent also contends that the district failed to conduct an appropriate AT assessment. Specifically, according to Parent, the District failed to determine the extent of Student's disabilities before determining Student's need for AT. Finally, the Parent contends the District failed to conduct a neuropsychological assessment (which Parent contends was necessary to determine Student's needs and abilities).

c) Whether [redacted] is an appropriate location of services (Issue IIIb and part of Issue IV in the amended complaint). Parent contends that the May, 2012, and December, 2012, IEPs cannot be implemented at [redacted] Parent also contends that the physical layout of [redacted] would prevent Student from maintaining [redacted] independent mobility and social availability. Specifically, Parent contends that:

i) the FBI Program at [redacted] has improperly trained personnel to provide Student with related services necessary for Student to receive FAPE;

ii) [redacted] does not have adaptive physical education with adaptive equipment;

iii) [redacted] does not have trained personnel and a trained aide capable of providing Student with services related to the treatment of Student's skin condition;

iv) [redacted] physical layout will not allow for Student to have freedom of movement and social development;

v) [redacted] does not have sufficiently trained personnel to accommodate the physical challenges of Student moving through the physical features of JFK LOS;

vi) JFK LOS does not have sufficiently trained personnel to accommodate the safety concerns associated with Student interacting with the rest of the student body at [redacted]

d) Whether the District failed to develop IEPs in May, 2012, and December, 2012, reasonably calculated to provide Student with an educational benefit. Specifically, Parent contends that the District failed: (1) to take into account the adverse effects of the Parent's opposition to [redacted] as Student's location of services; and (2) determine whether the IEP needed to be revised in light of Parent's opposition to Student's transfer (Issue IIId of the Amended Complaint).

e) Whether the District failed to design an IEP in December, 2012, which is reasonably calculated to provide Student with an educational benefit (developmental, functional, and academic). Specifically, the Parent contends that:

i) the IEP fails to contain a health plan to provide Student physical safety and avoid physical exhaustion, support independent mobility, effective hygiene, and management of Student's skin condition. The Parent contends the lack of a health program will cause regression, susceptibility to severe infections, and cause Student to emit a repellant odor;

ii) the IEP fails to provide appropriate related services, including appropriate assistive technology, appropriate social-emotional services, adaptive physical education with adaptive equipment, individual physical therapy and occupational therapy sessions, and embedded physical therapy and occupational therapy sessions;

iii) the IEP failed to contain a plan to transition Student from [redacted] to [redacted]

iv) the IEP failed to contain appropriate transportation. Specifically, the Parent contends that the IEP failed to provide for transportation for Student to and from the classroom;

v) the IEP fails to provide for ESY of sufficient intensity to prevent regression.

f) Whether the District's alleged failures in designing an inappropriate IEP and in providing an inappropriate location of services (set forth above) resulted in an inappropriate placement for Student in May, 2012, and December, 2012.

g) Whether the District predetermined Student's placement in formulating the May, 2012, and December, 2012, IEPs. Specifically, Parent contends that the District failed to consider parental input or allow the IEP Team to make a collaborative determination as to Student's location of services in preparing the May, 2012, and December, 2012, IEPs (Issue IIIc of the Amended Complaint).

h) Whether the District committed the following procedural violations of IDEA and whether the procedural violations would allow for relief under IDEA:

i) Parent contends the District failed to provide a prior written notice which complied with 34 CFR 300.503(b) when the District proposed a transfer from [redacted] at the May 17, 2012 IEP meeting;

ii) Parent contends the District failed to provide a prior written notice which complied with 34 CFR 300.503(b) when the District proposed a transfer from [redacted] at the December 4, 2012 IEP meeting;

iii) Parent contends that after the District refused Parent's request for an IEE, the District failed to provide evaluation criteria as requested by Parent;

iv) Parent contends that the District failed to file for due process to prove that its psychological assessment was appropriate;

v) Parent contends that the District failed to provide a response which complied with 34 CFR 300.508(e) within ten days after receiving Parent's due process complaint;

vi) Parent contends that the District failed to allow Parent meaningful participation in the decision making process of formulating the May, 2012, and December, 2012, IEPs.

vii) Parent contends that the District failed to comply with the Stay Put mandate of IDEA;

viii) Parent contends that the District has failed to give Parent a full copy of Student's educational records and the proposed IEP formulated in December, 2012, in a timely manner.

The Issues initially to be decided in the Second Parent Complaint were:

i) Whether the District failed to develop an IEP in March, 2011, IEP which was reasonably calculated to provide Student with an educational benefit. Specifically, the Parent contends the March, 2011, IEP should have contained: (i) compensatory education services while Student was on homebound and while at the Rehabilitation Institute of Chicago and for outside services provided by Parent during the term of the IEP; and (ii) should have provided wheelchair accessible transportation when Student returned to school.

The District denies the March, 2011, IEP was inappropriate and further argues that this matter is barred by the statute of limitations.

j) Whether the District failed to develop IEPs in March, 2012, May, 2012, and July, 2013, reasonably calculated to provide Student with an educational benefit. Specifically, the Parent contends: (i) the IEPs were not designed to allow Student to

make progress in [redacted] functional and independent living skills, academic, social-emotional, and transitional needs (as set forth in [redacted] and [redacted] reports; (ii) the IEPs failed to consider the full nature and extent of Student's academic, developmental, and functional needs; (iii) failed to provide for ESY of sufficient intensity to prevent regression; (iv) failed to include appropriate health goals and objectives (as submitted by the Parent at the July, 2013, IEP meeting);

k) Whether the March, 2012, IEP: (i) failed to provide special transportation for Student from home to school while [redacted] used a wheelchair after surgery as a necessary related service.

l) Whether the May, 2012, IEP failed to provide: (i) appropriate accommodations in the form of special transportation within the [redacted] Location of Services as a necessary related service; (ii) failed to provide for adaptive PE or adaptive instruction; (iii) failed to provide adequate physical therapy, including aquatic therapy; (iv) failed to include a secondary transition plan; (v) failed to include a plan for assistive technology; (vi) failed to include appropriate social work, including a social thinking curriculum; (vii) failed to include a transportation plan from [redacted] to [redacted] and back again for ESY; (viii) failed to include parent training; (ix) and failed to include appropriate extracurricular programs;

m) Whether the December, 2012, failed to provide special transportation from home to school at [redacted] Location of Services and to the ESY locations of services as a necessary related service.

n) Whether the District failed to provide an appropriate LRE in the July, 2013, IEP in that the Parent contends Student needed a more restrictive placement on the option of continuum placements.

o) Whether the District failed to consider Parent's request for a non-public school and, in so doing whether the IEP Team failed to consider an appropriation option on the continuum of placement options.

p) Whether the District failed to develop IEPs from March, 2011, March, 2012, May, 2013, and July, 2013, reasonably calculated to provide Student with an educational benefit in that the the District failed to provide ESY of sufficient intensity to prevent regression.

Additional Alleged Procedural Violations of IDEA in the Parent's Second Complaint

q) Whether the District used pending due process proceedings to deny the Parent's right to request a full reevaluation of Student thereafter.

r) Whether the District had predetermined Student's placement at the July 30, 2013, IEP meeting.

23. The District seeks as relief a declaratory order that its evaluation was comprehensive and appropriate. The Parent requests the following relief: declaratory relief that the District denied Student FAPE; compensatory education; a prospective placement at [redacted]; reimbursement for educational and therapy services paid for by Parent; an appropriately revised IEP; reimbursement for the independent evaluations obtained by Parent; additional assessments to determine the full nature and extent of Student's disabilities (as set forth on page 64 of Parent's closing brief);

24. The Parent subsequently withdrew a number of issues: (i) Issue J as to ESY; Issue K; Issue M; Issue P as to all ESY except for the ESY in the December, 2012, IEP (See Petitioner's comments to Second Order Regarding Substantive Issues Following Pretrial Conference; and Page 14 of Parent Reply in Support of its Second Complaint) (ii) Issue l(viii) is withdrawn (Tr. 2558); (iii) issues l(i) and l(iii) were rendered moot by the stay put orders entered in this case (Tr. 2558).

25. The undersigned also dismissed all claims alleged which were not brought under IDEA because the undersigned has no jurisdiction to hear those claims.

III. Findings of Fact

A. Aspects of Student's Disability, Strengths, and Weaknesses

26. Student is a [redacted] who currently attends [redacted] Student is eligible for special education under multiple cognitive and physical disabilities.

27. Student has cerebral palsy (Tr. 277). [redacted] has a cognitive delay (*Id.*). Student has a skin disorder (*Id.*).

28. Student is at or near the first percentile in almost every area of cognitive functioning (Tr. 373). Student has a limited vocabulary, has limited reading ability, cannot sound out words, and Student's memory is seriously impaired (Tr. 373-374). Student's reading, writing, and arithmetic are at beginner levels (Tr. 374). Student can't write or spell [redacted] own name (Tr. 374). Student has trouble writing oblique lines (Tr. 374). Student has limited spatial abilities (Tr. 374-375). Student has attentional problems and needs to be redirected at times in order to stay on task (Tr. 375).

29. Student engages in "twin talk" with [redacted] twin [redacted] which is a language twins develop together which has no meaning to others (Tr. 73-74). Twin talk can result in social isolation for twins who engage in it (Tr. 74-75). However, twin talk does not necessarily lead to social isolation for the twins who engage in twin talk (Tr. 74-75).

30. Student has difficulty with gross motor skills and has balance problems which lead to problems walking and running (Tr. 277-278). Student has a very unsteady gait as a result of [redacted] disability (Tr. 278). Student has problems with [redacted] fine motor skills as well which lead to difficulties in writing (Tr. 278).

31. Student has a skin condition known as lamellar ichthyosis wherein [redacted] skin grows over [redacted] sweat glands causing a danger of overheating, and dry and infected skin (Tr. 395-396). Student's skin condition causes a very strong odor reminiscent of rotting flesh (Tr. 395-396). Student's skin infections can be life threatening (Tr. 396).

32. Student is able to negotiate the halls and classroom at [redacted] as well as move independently throughout most of the school at [redacted] (Tr. 41,283). Student is able to play basketball, play on a playground, run, and shoot baskets at a basketball hoop (Tr. 65-66, 338-339). Student is generally able to navigate crowded playgrounds and hallways (Tr. 66-67). Student is able to navigate around a classroom full of desks, chairs and specialized equipment (Tr. 67). Student is able to walk from [redacted] bus to the class at [redacted] regularly (Tr. 282). Student is able to walk to [redacted] service areas at [redacted] regularly (Tr. 283). Student is able to negotiate multiple hallways across the "sprawling" [redacted] campus (Tr. 284, 389-390).

33. At [redacted], Student is able to interact and learn in class without an aide (Tr. 68).

34. Student's IEP currently does not contain a medical health plan at [redacted] (Tr. 79-80, 249). Student has a health plan outside of the IEP at [redacted] (Tr. 79-80).

35. Student is very sensitive to changes in [redacted] physical environment, and requires preparation activities and time to transition from one school to another (Tr. 335).

B. Student's Attendance at [redacted]

36. Student attended [redacted] ("[redacted]") while she resided in the District in 2011, 2012, and until Fall, 2013.

37. [redacted] physical plant consists of a large one level building which is sprawled out over the [redacted] campus (Tr. 283-284). [redacted] contains places which are carpeted and places which are not carpeted (Tr. 284, 351). [redacted] and [redacted] are different options on the continuum of placements (Tr. 340)- because [redacted] is a special school and the FBI Program at [redacted] consists of special classes within a District school.

C. The Proposed Transfer to [redacted] and Aspects of the FBI Program

38. In the 2012 and 2013 IEPs, the District proposed [redacted] as Student's location of services. In the 2012 and 2013 IEPS, District proposed a program and location of services for Student, the "Functional Based Instructional Program" ("FBI Program") at [redacted] for part of the duration of the IEP (Tr. 42, 48, Dist.stay put Ex. 19, pg. 2).

39. In the FBI Program, JFK LOS staff use scheduling to ensure that Student and [redacted] peers would not be in the hallways at the same time as the general education population (Tr. 381-382). Student and the general education population would not mix much (if at all) in the FBI Program (Tr. 382-283). Students who are part of the FBI Program are

dropped off in a separate location than the general education students (Tr. 230). After the FBI Program students are dropped off by bus, FBI Program students are escorted by teacher's aides to where the students start their day (Tr. 230). FBI Program Students are escorted to the buses by teacher's aides upon dismissal (Tr. 231).

40. The FBI Program has a modified curriculum where students are assessed based upon their unique needs and strengths as opposed to the general curriculum (Tr. 1008, 1010). Services are co-implemented by related service providers and teachers (Tr. 1008).

41. All students in the FBI Program receive: adaptive PE (Tr. 1009); adapted assistive technology in educational learning and programs for multimodal learning (Tr. 1009-1013).

42. All students in the FBI Program are taught in a smaller environment and a smaller group setting (Tr. 1010). The teacher to student ratio is approximately 3:1 (Tr. 1010).

43. Students stay with one teacher as much as possible in the FBI Program (Tr.

44. The District often does not include the universal aspects of the FBI Program in Students' IEPs as separate accommodations (Tr. 1012). However, all students receive the universal services offered by the FBI Program (Tr. 1012).

45. The FBI Program also offers social language as part of the curriculum (Tr. 2245).

46. At hearing, Parent challenged some aspects of the FBI Program. In some cases, Parent categorically denied the appropriateness of the FBI Program. In other circumstances, Parent denied some aspects of the FBI Program based upon alleged admissions of District personnel. Finally, Independent Psychologist, Parent Advocate, and Parent Pediatrician offered opinions as to why the FBI Program was inappropriate for Student. The undersigned rejects Parent's opinions as to the appropriateness of the FBI Program because, as she admitted, she has no expertise in special education (Tr. 2185). The undersigned makes a credibility finding in favor of the District administrators (Assistant Superintendent, Director of Student Services, District PE Instructor, and District FBI Teacher) as to the attributes of the FBI Program. The undersigned bases this credibility finding on the fact that District administrators have a better understanding of every aspect of the FBI Program than any single District employee. The undersigned addresses the specific critiques of the FBI Program by Parent's experts throughout the body of this decision.

47. Based upon the testimony of Assistant Superintendent that the universal services of the FBI Program are provided to every student in the FBI Program, the undersigned makes an inference that the services provided by the FBI Program constitute implied terms of Student's proposed IEP, and thus should be considered in determining whether Student's 2012 and 2013 IEPs provided Student with FAPE.

48. The [redacted] Program Student is in has similar assumptions to the FBI Program (Tr.1008-1014).

D. Findings of Fact Related to the 2012, Evaluation

49. The District has been working on various portions of an evaluation since November, 2012. Student had just been reevaluated in 2011, and the [redacted] team members did not believe a reevaluation was necessary in 2012 (Tr. 810). However, the mediation agreement mandated a reevaluation.

50. The District conducted a psychological assessment, a health assessment, an occupational therapy assessment, a physical therapy assessment, a speech and language assessment, and an educational assessment. Through these various assessments, the District tested academic achievement, functional performance, cognitive functioning, communication status, health, hearing/vision, motor abilities, social/emotional status (SD. Ex. 19).

51. None of the assessments determined Student's needs in regard to transition from one physical location to another (Tr.1113-1114). A transition plan to transfer Student to [redacted] was contained in the mediation agreement, but that transition plan was not carried out (Tr.817-819). Moreover, no admissible evidence was admitted at hearing as to how the mediation agreement was reached, so it is impossible to know if the transition plan in the mediation agreement was calculated to ensure Student received FAPE even in light of the transfer.

52. Parent obtained an independent evaluation on July 1, 2013 (P. Ex. 3104-3121). The independent evaluation comprehensively identifies Student's needs in regard to transitions (*Id.*). The independent evaluation was considered before any transfer was effectuated at a July 30, 2013, IEP meeting.

53. Parent paid $3200.00 for the evaluation (PD Ex. 3104). Parent also paid for an update to the evaluation, but provided no bill for the update.

54. The District did not conduct any transition assessments even though the District will have to prepare a secondary transition plan within the three year reevaluation period (as Student would turn [redacted] and ½ within the three year reevaluation period (Tr. 2229-2230).

55. In light of the above stated findings, The undersigned makes an inference that the initial District evaluation failed to identify Student's needs in relation to transfers from one physical location to another.

56. The undersigned makes an inference that Student suffered no loss of educational benefit from the District's failure to determine Student's needs related to transfers because the independent evaluation was considered by the IEP Team prior to the transfer.

Similarly, Parent's role in providing FAPE was not hindered by the District's failure to assess needs related to transfers because of the independent evaluation.

57. The District conducted an AT assessment and funded a second independent assessment. There was no testimony or evidence that the two assessments, together, failed to identify all of Student's educational needs to the extent appropriate. As discussed below, gaps in the AT action plan are intentional to allow educators to adapt to Student's learning style.

58. The undersigned makes an inference that the District's evaluation determined all of Student's other needs to the extent necessary to provide Student with special education (including language, skin condition and mobility needs).

E. Findings of Fact Related to the March 2011, IEP

59. Student had surgery on March 2, 2011, and again on March 23, 2011 (Tr. 1905, 2115).

60. The parties held an IEP meeting on March 25, 2011 (Tr. 2115)

61. Thereafter, Student spent time at the [redacted] ("[redacted]") (Tr. 1905). Student was discharged from the [redacted] on May 2, 2011, and returned to [redacted] on May 3, 2011 (Tr. 2117-2118).

62. Parent contends that between March and May, 2011, Student failed to receive any educational services for 54 school days (Tr. 1904). However, Parent admits that her recollection is fuzzy as to what happened in mid-2011 (Tr. 2116). The District provided extensive evidence that Student attended [redacted] in March, 2011 (SD Ex. 51, 52, 89, 91, 94, 95, 116, 117, Tr. 2163, 2328-2335). Moreover, the District provided extensive evidence that Student was provided with tutoring at [redacted] and/or services at [redacted] for most of April and May, 2011. (SD Ex. 86, 113, 114, 115, 116, 117, Tr. 2328-2335). As such, the undersigned makes a credibility finding against the Parent and in favor of the District. Specifically, the undersigned finds that the District did provide services for most of the 54 days at issue. Rather, Student was absent for 18 days over March, April, and May, 2011 (SD. Ex. 117). Moreover, the undersigned makes a credibility finding that Student received tutoring for some of the 18 days Student was absent from school (SD Ex 112, 114).

63. Based upon the above stated credibility finding, the undersigned makes an inference that there is no evidence to show Student suffered the loss of an educational benefit for the 18 days Student was not in school. In support of said inference, the undersigned finds that there was no evidence of lost educational benefit from the small number of days which no educational services were provided; Student was provided tutoring for some of the time [redacted] was absent from school; and there was no evidence Student could have learned on the days services were not provided given [redacted] physical condition.

64. The undersigned makes a further credibility finding that the District provided appropriate transportation to Student based upon the District's documentation (SD Ex. 91), and the fact that Parent admitted her memory was faulty in regard to events which happened more than two years ago (Tr. 2116).

65. Parent first filed a due process complaint regarding these allegations in August, 2013. When directly asked why Parent failed to file a due process request within two years of the services not being provided, Parent stated she had other priorities in her disputes with the District (Tr. 2181-2184). In light of this testimony, the undersigned makes a credibility finding that there was no misrepresentation which caused Parent to not file a timely complaint. The undersigned makes a further credibility finding that no withholding of information by the District caused Parent not to file a timely due process complaint.

F. Findings of Fact Related to IEP Design- 2012 and 2013 IEPs

i. Adverse Effects of Mother's Opposition to [redacted]

66. Parent contends that her opposition to a transfer to [redacted] should have changed the IEP and required the IEP Team to place Student at [redacted].

67. First, the undersigned finds that the District would not necessarily have been aware of the intensity of Parent's opposition to [redacted] given Parent's behavior in 2011 and 2012. While Parent was never enthusiastic about [redacted] in 2011 and 2012, she did not make clear to the IEP Team the depth of her opposition. Rather, Parent was noncommittal in her dealings with the District. As Parent admitted in District Exhibit 84, she attempted to appease the District in 2012 (Tr. 2120). Parent also agree to visit [redacted] and was directed to ask pertinent questions (SD. Ex. 84, Tr. 507). Parent acted impressed when she visited [redacted] in 2012 (Tr. 2307). Later in 2012, Parent signed a mediation agreement where she agreed to the eventual transfer of Student to [redacted] (S.D. Ex.11).

68. School District Exhibits 76-79 and 84 strongly suggest intense Parental opposition to the transfer. However, said exhibits (when coupled with Parent's behavior) also demonstrate that Parent's actions were much more equivocal when dealing with the District and IEP Team.

69. In light of the snapshot rule, the undersigned holds that the District and IEP Team did not need to consider adverse effects of Parent's opposition to the transfer in 2012. Parent's opposition was too equivocal for the District to need to consider whether Parent's opposition would poison Student's education at [redacted].

70. Moreover, Parent presented no evidence Parent's opposition to [redacted] would actually harm Student's educational experience. When Student visited [redacted] in 2013, Student appeared to be relaxed and able to participate at [redacted] (Tr.2220-2222).

There is no direct evidence in the record that Student would actually be hindered by Parent's opposition to [redacted] other than Parent's unsubstantiated assertions. The undersigned therefore makes a factual inference that the IEP Team did not need to consider the adverse effects of Parent's opposition to [redacted] based on a lack of any evidence that Parent's opposition caused a deprivation of educational benefit to Student.

ii. Need for a Transportation Plan Within School- May, 2012, December, 2012, July, 2013, IEPs

71. Parent raised a concern at all of the IEP meetings that Student would not be safe in the hallways of [redacted].

72. Later, on July 1, 2013, Independent Psychologist issued a report (P Ex. 3105-3121). Independent Psychologist amended her report on December 13, 2013 (P. Ex. 4292-4296). Independent Psychologist also raised a concern that Student could safely navigate the halls of [redacted] (P Ex. 4293).

73. If Student were in the halls of [redacted] without an aide while the general population was using the halls, this could be dangerous for Student (Tr. 379-380). However, [redacted] staff use scheduling to ensure that Student and [redacted] peers would not be in the hallways at the same time as the general education population (Tr. 381-382). Student and the general education population would not mix much (if at all) in the FBI Program (Tr. 382-283). Students who are part of the FBI Program are dropped off in a separate location than the general education students (Tr. 230). After the FBI Program students are dropped off by bus, FBI Program students are escorted by teacher's aides to where the students start their day (Tr. 230). FBI Program Students are escorted to the buses by teacher's aides upon dismissal (Tr. 231).

74. For the most part, Parent did not challenge the specific aspects of the FBI Program. Rather, Parent either categorically denied the existence or effectiveness of the safety features of the FBI Program or Parent would rely on some stray comment by a District person to demonstrate the alleged dangers of the FBI Program. To the extent that Parent disputes the safety procedures in place in the FBI Program, the undersigned makes a credibility finding that such safety procedures are part of the FBI Program based upon the testimony of District personnel.

75. Parent and Independent Psychologist also contend that Student needs a transportation plan because travel distances are too long at [redacted] for Student to walk to. The undersigned rejects this contention and makes an inference that Student can travel around [redacted] to the extent necessary to reach [redacted] classes and services at [redacted] Student is able to walk from [redacted] bus to [redacted], walk to [redacted] services at the "sprawling" [redacted] campus; and is able to play adaptive basketball (Tr. 764-765). The layouts of [redacted] and [redacted] were admitted into evidence, and Student walks further to her related services at [redacted] and other educational services at [redacted] than she would to services at [redacted] (SD. Ex 32, Tr. 1733, 1736, 2355-2359). In general, Student would walk less than 500 feet to get to any educational service (*Id.*). Moreover, the undersigned

makes a credibility finding that Student can walk between a ¼ mile and ½ mile based upon the testimony of [redacted] PE Instructor and [redacted] Physical Therapist (Tr. 778-779, 1975, 1994-1995). The undersigned makes a credibility finding against Parent because the [redacted] personnel were observing Student at [redacted] on a regular basis and Parent allowed (and is even seeking) extracurricular activities where Student must walk for relatively long distances.

76. The undersigned makes a further inference that Student does not need a transportation plan within school because of safety issues. The undersigned makes an inference that Student's gait and balance issues do not require more than the precautions within the FBI Program based upon Student's success at [redacted] Student goes on field trips to stores, museums, and factories (Tr. 1785-1786). Student is able to walk through the [redacted] campus with adults close by (Tr. 2368). [redacted] has a number of students with emotional disabilities who run through the halls, throw tantrums, and otherwise could run into Student (Tr. 968-969). In light of Student's experience in navigating the hazards of the [redacted] campus, the undersigned finds that a transportation plan is not necessary (as long as the built-in precautions of the FBI Program are in place).

77. The undersigned further makes an inference that the precautions of the FBI Program are implied terms of Student's IEP, and the lack of a transportation safety plan is not necessary given that: (1) Student would receive the accommodations necessary to attend school; and (2) safety concerns were discussed extensively at the IEP meetings, and Parent was informed

In light of these uncontested facts regarding Student's abilities, the undersigned therefore makes an inference that Student would be able to walk the halls at [redacted] and a credibility finding against the opinion of Independent Psychologist in this regard. The undersigned makes a further credibility finding and rejects Independent Psychologist's contention that carpeting is an essential part of Student's placement as both [redacted] and [redacted] have carpeted and noncarpeted area. By all accounts Student is able to negotiate the carpeted and noncarpeted areas of [redacted].

iii. Academic, Functional and Independent Living Skills (including a Transition Plan)

78. Parent (supported by Independent Psychologist's Report) contends that Student's academic goals should be shaped around "procedural learning." (PD Ex. 3105-3120). According to Independent Psychologist, both the methods to teach Student and [redacted] goals are misaligned due to the District overestimating Student's abilities. According to Independent Psychologist, Student should be taught using procedural learning, which is a method of teaching children with extremely low cognitive abilities. According to Independent Psychologist, teaching academic subjects is pointless. Independent Psychologist bases [redacted] argument, in part, on the fact that Student's IQ is consistently dropping.

79. Independent Psychologist's opinion of Student's cognitive potential is contradicted by District assessments, the assessments of [redacted] educators, and one of Parent's other experts [redacted] (Tr.1963-1964). The consensus among Student's educators and District administrators is that Student is making progress on [redacted] academic goals; that Student can continue to gain an educational benefit from Student's current goals and the teaching methodology currently being used; and that Student can learn to read at a second or third grade level (Tr.1767-1782, 2250, 2338-2342).

80. Student's [redacted] Teacher testified that Student was continuing to make progress on [redacted] academic IEP Goals in 2012 (Tr.1767-1782). Student is currently learning reading primarily through sight word memorization (Tr. 1768-1769). [redacted] Teacher testified that many of Independent Psychologist's goals have already been mastered with Student, and would be repetitive (Tr. 1794).

81. As to the 2012 IEPs, the undersigned rejects the opinion of Independent Psychologist based upon the testimony of Student's [redacted] Teacher demonstrating that the current methodology for teaching Student is effective. The District was able to provide Student with an educational benefit in 2012 using its preferred methodology. The undersigned further notes that Independent Psychologist's report was unavailable in 2012, and the undersigned must judge the District by what it knew or could have known at the time the IEPs were formulated.

82. As to the 2013 IEP, the undersigned again rejects Independent Psychologist's opinion regarding methodology and goals because the IEP Team had a right to rely on [redacted] Teacher's firsthand accounts of Student's learning and Student's past success in determining a methodology to teach Student.

83. The undersigned further finds that even if procedural learning and Independent Psychologist's proposed goals are a reasonable methodology for teaching Student, the IEP Team's current approach is equally reasonable given that Student is making progress and obtaining an educational benefit. The undersigned finds that the IEP Team considered all of the factors regarding formulating Student's goals (with the exception set out below).

84. For the 2012 IEPs, Student would not turn [redacted] and ½ while those IEPs were scheduled to be in effect. Parent Advocate provided an opinion that Student should have had a transition plan regardless. Parent Advocate did not provide any reasoning for departing from the statutory scheme. The undersigned rejects the need for a transition plan prior to Student's [redacted] birthday based on the fact that the programs at [redacted] and the FBI Program contain a great deal of functional learning embedded in the curriculum.

85. The 2013 IEP does not have a transition plan. Student will turn [redacted] and ½ during the life of that IEP. The IEP Team chose to hold off on preparing a transition plan until the assistive technology assessment was available.

86. Parent presented no direct evidence as to how Student was harmed by the slight delay in enactment of a transition plan. However, to the extent Student needed developmental and functional goals to address [redacted] needs, the IEP had to contain such goals as addressed below.

iv. Appropriate Goals and objectives

87. Parent sought a series of functional goals for Student be added to Student's IEP at the July, 2013, IEP meeting (PD 4122), and the proposed goals of the Independent Psychologist. (SD. Ex.59).

88. The IEP Team considered all of Parent's proposed goals at the 2013 IEP meeting. The proposed goals: (1) were already tasks measured within one of Student's current goals; (2) measured tasks which Student had already mastered; or (3) attempted to measure matters which were already embedded within the curriculum; or (Tr. 2251, 2376-2378, 2429, 2651).

89. Parent provided no direct evidence rebutting any of the IEP Team's above stated reasons for rejecting Parent's proposed goals. The District presented a great deal of evidence that the IEP Team considered the proposed goals at the 2013 meeting and decided the ultimate goals were adequate. In light of the deliberative process the IEP Team undertook and the fact that I have rejected Independent Psychologist's opinion as to Student's cognitive ability; and Student's previous success in achieving under similar goals, the undersigned finds that the IEP Team acted reasonably in adopting the 2013 IEP goals.

90. The Parent presented no direct evidence that the IEP Team should have considered Independent Psychologist and Parent's proposed goals in 2012. Because the undersigned rejected Independent Psychologist's opinion as to Student's cognitive potential, and the fact that Student made progress in 2012, the undersigned makes an inference the IEP Team's goals in 2012 were reasonably designed to provide Student with a substantial educational benefit. In making this inference, the undersigned takes into account what the IEP Team knew at the time the goals were formulated. Specifically, the IEP Team did not have Independent Psychologist's report.

91. The undersigned makes an inference that the IEP Team made a reasonable decision in rejecting goals related to tasks Student had already mastered in 2013. The undersigned makes an inference that the IEP Team was reasonable in not creating redundant goals. The undersigned bases these inferences on the fact that redundant goals or goals regarding skills Student had mastered are unlikely to provide an educational benefit to Student.

92. Moreover, the undersigned makes an inference that, due to the implied terms of the IEP (through the FBI Program curriculum and the Elim curriculum), the undersigned finds that Student lost no educational benefit as a result of Student's IEP not having goals

related to matters which were already embedded in the curriculum. Student is being provided services to address [redacted] educational needs.

93. However, by not even considering whether Student needed goals related to matters embedded in the curriculum, the undersigned makes an inference that the IEP Team is hindering Parent's role in the provision of FAPE for Student. Goals are supposed to address all areas of need and formulated by the IEP Team (including Parent). The District's categorical removal of all matters embedded within the curriculum from deliberation by the IEP Team violates the law. Specifically, the District is unilaterally removing large aspects of Student's educational experience which should be decided by the IEP Team (including Parent). The District's action also hindered Parent's ability to measure Student's progress by monitoring Student's progress in completing goals. This is especially important because Student isn't in the general curriculum and goals are one of the few ways to objectively measure progress.

v. Health Plan and Planning for Student's Safety

94. Student had a health plan at [redacted], the District nurse updated the health plan prior to the IEP meeting, and the IEP Team repeatedly discussed Student's health issues at the December, 2012 IEP meeting (Tr. 435-437, 463). The health plan is attached to Student's IEP (Tr. 2246-2247, SD Ex. 59, pp 851-853).

95. Parent's objections to the health care plan are located on page 38 of her closing argument. Said objections are all related to the failure to provide aquatic therapy (risk of contractures and surgery, according to Parent, is increased by the lack of aquatic therapy). Because I rejected this argument in the section on physical therapy, the undersigned rejects Parent's contention that the health care plan is inadequate. The undersigned further makes an inference that the precautions made by the IEP Team were reasonable in preparing the health care plan.

vi. Physical Therapy (including aquatic therapy) and Individual Occupational Therapy

96. Parent provided a prescription from Student's orthopedic surgeon (dated July 29, 2013) that Student requires 1-2 hours of aquatic therapy per week (PD. Ex. 4032-4033). Student's orthopedic surgeon did not testify at hearing. The prescription did not indicate whether the need for physical therapy had an educational purpose or a medical purpose. However, the prescription did indicate that physical therapy was necessary to prevent contractures- which would be an educational purpose (protection of the child's functional movement by prevention of contractures and deformities is an educational purpose).

97. The 2012 IEPs provided for 30 minutes of physical therapy per week (SD. Ex. 14, pg. 204). The July, 2013, IEP provided for 50 minutes of direct physical therapy and 20 minutes of consult every week (Tr. 2447).

98. The prescription was based on an assumption that the District was discontinuing Student's current physical therapy treatments (PD Ex. 4032).

99. Parent Pediatrician testified that Student needed the physical therapy prescribed by the orthopedic surgeon and testified as to the benefit of aquatic therapy. Parent Pediatrician's opinion was based on the opinion of the orthopedic surgeon (Tr. 1527, 1542-1543). Parent Pediatrician admitted she was simply reiterating the second hand opinion of another doctor (*Id.*). Parent Pediatrician did not actually speak to the orthopedic surgeon, but rather spoke to a nurse who spoke to the orthopedic surgeon (Tr. 1527). Parent Pediatrician had not actually treated Student for two years (Tr. 1535, 1539). The opinion provided at the hearing was based upon double hearsay (the Parent Pediatrician learned the opinion from a nurse who learned the opinion from the orthopedic surgeon) (Tr. 1527).

100. Parent Pediatrician also assumed that [redacted] was unable to provide Student with services (Tr. 1538).

101. Parent Pediatrician further admitted that aquatic therapy was not the only reasonable methodology for providing Student with physical therapy (Tr. 1543). Parent Pediatrician admitted that routine physical therapy would be a reasonable way to provide physical therapy to Student (Tr. 1543).

102. Independent Psychologist testified that time in water would be helpful to Student but admitted that Student did not know if time in water was necessary for Student (Tr. 1345-1346).

103. Student has been receiving only routine, land based physical therapy in the amount of 30 minutes per week at [redacted] for years (Tr.1840). There was no evidence of any adverse effects on Student from only receiving conventional physical therapy at [redacted] in the amounts set out in the 2011 and 2012 IEPs (Student was at [redacted] until August, 2013) (Tr. 1831-1836). Rather, it appeared Student was making progress on [redacted] physical therapy goals (*Id.*). As such, the undersigned makes an inference that the District had no basis to believe that physical therapy was inadequate in the 2012 IEPs (especially since the prescription for aquatic therapy was only provided in July, 2013).

104. District personnel testified Student only needs the physical therapy in amounts set forth in the 2012 and 2013 IEPs to receive FAPE (Tr. 2449). District personnel also testified that aquatic therapy was not educationally necessary for Student (Tr. 2446). According to District personnel, 50 minutes of direct physical therapy is all that is necessary for Student to reach [redacted] goals (Tr. 2449). Moreover, the land-based physical therapy to be provided at [redacted] is an evidence based method of providing Student with physical therapy (Tr. 2448).

105. District personnel requested to speak to Student's doctors to determine if more physical therapy was necessary for educational purposes, but Parent refused to allow District personnel to speak to Student's physicians (Tr. 2426-2427).

105. The undersigned makes a credibility finding that the District can provide related services at [redacted] (including physical therapy and occupational therapy based upon the uncontradicted testimony of District service providers (Tr. 59, 132-137, 181-186, 194-199, 297-301). The undersigned further finds that there is no reason to believe the District will refuse to provide related services to Student at [redacted]

106. The undersigned therefore rejects the opinions of Student's Orthopedic Surgeon and Parent Pediatrician because: (1) the opinion was based upon an erroneous assumption- that physical therapy was going to be discontinued as a result of the transfer; (2) Parent Pediatrician did not actually have an opinion in support of Parent's contentions and only relayed another doctor's opinions; (3) Student has been receiving routine physical therapy at [redacted] for years with no apparent ill effects; (4) the opinions were based on the erroneous belief that [redacted] is not an appropriate location of services. For the reasons set forth in other places of this order, I find that [redacted] is an appropriate location of services; and (5) Parent Pediatrician admitted that routine physical therapy was a reasonable way to provide physical therapy to Student. The undersigned also notes that Parent did not allow further discussion with Student's doctors thus limiting what District personnel could have known in determining how much physical therapy is educationally appropriate for Student.

107. In light of the above finding, the undersigned makes an inference that the physical therapy offered by the District at [redacted] constituted a reasonable methodology, and that the minutes in the July, 2013, were adequate to allow Student to benefit from special education.

108. At the hearing, Parent presented no evidence that the IEPs were deficient because of a lack of individual occupational therapy or physical therapy sessions. Parent presented no evidence that the District would not provide "embedded" physical therapy or occupational therapy sessions. More importantly, the Parent provided no evidence that more occupational therapy or different occupational therapy was necessary for Student to receive FAPE.

vii. Assistive Technology

109. The District had an AT assessment completed, and then agreed to fund [redacted] assessment and report (Tr. 2606, 2608). The District had an AT assessment completed in addition to the independent AT Assessment.

110. The independent assistive technology expert testified that the IEP Team should have known to adopt a series of appropriate assistive technology to allow Student to reach her potential in reading. According to independent assistive technology expert, the IEP Team inexplicably chose not to do so. The undersigned rejects independent assistive technology expert's claim for the following reasons.

111. First, [redacted] Teacher testified at length that Student couldn't understand phonics at

the level Assistive Technology Expert believed possible (Tr. 1768-1769). Taking the snapshot rule into account, the IEP Team had a right to rely on the firsthand accounts of [redacted] Teacher as to Student's reading ability.

112. The District AT expert prepared an AT plan (Tr. 1623-1624, PD Ex 3124). The AT plan was never implemented because Student never moved into the District.(Tr.1623).

112.. The undersigned finds the District acted reasonably in funding a separate AT assessment in order to determine whether additional AT would be useful for Student.

viii. Social-Emotional Services including Social Learning

113. Parent provided no evidence (other than her unsubstantiated assertions[1] , See Tr. 2017) that Student needed different social-emotional services than that provided at [redacted] in 2012. Parent provided no evidence that the social-emotional services which would have been provided at [redacted] in the 2012 or 2013 IEPs were inappropriate. The IEP provides for 30 minutes of social work services per week (SD Ex. 47, pg. 651).

114. The District provides social learning through its FBI Program and social-emotional goals also address social learning (Tr. 2245, 2513-2515).

115. In light of the lack of any evidence other than Parent's assertions and the District testimony as to the the social-emotional services provided, the undersigned finds that the social-emotional services are reasonably designed to allow Student to benefit from special education and to receive FAPE.

ix. Adaptive Physical Education and Adaptive Equipment

116. Parent contends the District does not offer true adaptive physical education in light of Parent's observations and an alleged admission by the [redacted] principal. The District Director of Special Services and P.E Instructor testified that appropriate adaptive P.E. is offered at [redacted] and that numerous types of adaptive P.E. equipment are available for Student to use (Tr. 2382-2389, 2249). The undersigned makes a credibility finding in favor of District personnel based upon their long experience with the FBI Program.

117. Moreover, the undersigned makes a credibility finding that the P.E. instructor at [redacted] is properly trained in light of the uncontradicted testimony of the P.E. instructor (Tr. 2381-2382).

x. Need for Greater ESY

[1] Although Independent Psychologist's report contained some discussion of appropriate social-emotional services for Student, Indpedendent Psychologist offered no direct critique of the propose FBI Program social services as testified to by District Social Worker. Moreover, Indpendent Psychologist never testified that social-emotional services currently being provided are unreasonable.

118. Parent provided no evidence that the District knew or had any reason to know in December, 2012, that Student would need full time ESY in order not to regress during the summer (as opposed to the part-time ESY proposed by the District in the December, 2012, IEP). At the time the District formulated the IEP, [redacted] used ESY to advance Student's learning as opposed to using ESY simply to prevent regression (Tr. 2405).

119. The undersigned therefore makes an inference that half-day ESY was reasonably calculated to prevent regression (based on the fact that full day [redacted] ESY had previously been more than necessary to prevent regression). The undersigned notes that I judge the District's actions under the snapshot rule- what the District reasonably knew or could have known in December, 2012.

xi. Parent Training

120. At hearing, Parent testified that she needed training, but did not point to any actual training which needed to occur for Student to access special education (Tr. 2016). For example, Parent failed to point to any program or piece of assistive technology which she needed training on in order for Student to received FAPE (Tr. 2016). Parent also desired training to participate more fully in the IEP process (Tr. 2017).

121. In light of the lack of any evidence of specific training needed to provide Student FAPE or to benefit for special education, the undersigned makes an inference that Parent training is not necessary as a related service.

xii. Transitional Needs Related to Transfer

122. The May and December, 2012, IEPs did not contain a transition plan to transition Student from [redacted] to [redacted]. The mediation agreement contained a series of steps to transition Student from [redacted] to [redacted], but those steps were, for the most part, never carried out. However, the transfer was never effectuated until Fall, 2013 (and then, Parent pulled Student out of school). As such, the undersigned finds that Student suffered no loss of educational benefit from not having a transition plan related to Student's transfer from [redacted] to [redacted].

123. Moreover, Independent Psychologist's report highlighted Student's needs in relation to transitions (PD Ex.3104-3121). The IEP Team held a July, 2013, IEP meeting in part to consider Independent Psychologist's report and considered Student's transition issues related to the transfer at length (Tr.2402-2402).

124. The IEP Team accepted input from [redacted] staff and [redacted] staff. The IEP Team adopted a modified social story and a series of steps for Student to acclimate [redacted] to [redacted] (Tr.2402-2404). The IEP Team also discussed and prepared a plan to monitor Student for approximately six months as Student became acclimated to [redacted] (Tr.2247). The IEP Team also determined that Student would be at [redacted] for at least two school years (Tr. 2401).

125. While Independent Psychologist's report is very thorough (and led to insights on how to transition Student to a new location of services), the undersigned rejects some of the assumptions and findings. First and foremost, the undersigned rejects the length of time it will take to transition Student to a new location of services. Student was able to adapt to three new teachers in one year (Tr.2440). Student has been receptive in [redacted] visits to [redacted] (Tr.2393). Moreover, the undersigned found that Independent Psychologist's underestimates Student's cognitive ability (for the reasons set forth above). The undersigned further finds that, in light of the above stated factual findings, that Student has greater emotional resilience than Parent contends. For these reasons, the undersigned finds that Student is able to tolerate transitions to a greater extent that Independent Psychologist opined. The undersigned similarly rejects the claim of some [redacted] personnel that Student would take up to three years to acclimate to [redacted] for the reasons set forth in this paragraph.

126. The undersigned makes an inference that the transition plans made for Student in July, 2013 were reasonable and that the transition plans constituted reasonable methods for Student to obtain FAPE despite the transfer to [redacted] The undersigned bases this inference on the testimony of District personnel, the rejection of parts of Independent Psychologist's report;

127. In light of Independent Psychologist's report and the proceedings in the July, 2013, IEP meeting (all of which occurred while the stay put order kept Student at [redacted], as well as my stay put orders which kept Student at [redacted] for most of 2013; the undersigned makes an inference that Student lost no educational benefit from the fact that there was no transition plan in the 2012 IEPs and that Parent's role in provision of FAPE to Student was not hindered by the lack of transition plans to transfer Student from [redacted] to [redacted]

xiii. Extracurricular Programs

128. Parent presented no direct evidence of any particular extracurricular program Student needs to have FAPE. In any regard, the undersigned makes a credibility finding that there are similar extracurricular programs for Student at [redacted] (with the exception of swimming) (Tr. 61-62, 70-71). The undersigned bases this credibility finding on the knowledge District personnel have with their own programs. The undersigned finds that the lack of swimming is not a denial of FAPE for this child based upon [redacted] IEP and the IEP meetings which determined that aquatic therapy was not a necessity to provide FAPE.

xiv. Least Restrictive Environment

129. [redacted] is closer to Student's home than [redacted] It is the closest school to Student which can accommodate [redacted] disabilities. [redacted] is also a less restrictive option on the continuum of placement options because it is a segregated class within school where nondisabled children attend school while [redacted] is a special school.

130. The IEP Team determined in July, 2013, that Student's IEP could be implemented at JFK LOS. The IEP Team further determined that a transfer to [redacted]

C. Findings of Fact Related to [redacted] and [redacted] and the Appropriateness of the Proposed Location of Services

i. Initial Credibility Finding

131. The undersigned makes a preliminary credibility finding against Parent in regard to portions of Parent's affidavit which was made part of the record when the stay put exhibits were admitted into evidence. Specifically, Parent submitted an affidavit setting out numerous alleged deficiencies in the FBI Program (Stay Put District Ex. #3, Parent Affidavit, #15). While the affidavit claims that the statements are made upon personal knowledge, there was no foundation laid in the affidavit for how Parent obtained such detailed knowledge regarding the FBI Program from a few visits. As such, the undersigned makes a credibility finding against Parent regarding the claimed deficiencies of the FBI Program and in favor of the District personnel who have more extensive knowledge of the FBI Program. Moreover, Paragraph 15 of the Affidavit contains numerous opinions which would require expert knowledge, and no foundation was laid qualifying Parent as an expert. As such, the undersigned rejects Parent's opinions based upon the lack of foundation as to Parent's expertise. Alternatively, Parent claims in her affidavit that the opinions in Paragraph 15 came from unnamed medical and educational experts. However, to the extent Parent's experts did not testify, the undersigned rejects Parent's opinions in her affidavit regarding the suitability of the FBI Program for Student. This credibility finding does not apply to matters which Parent testified to at hearing, and Parent's testimony shall be addressed in separate credibility findings.

ii. Similarities Between [redacted] and [redacted]

132. The parties agree that Student has been able to receive FAPE at [redacted] Therefore, to the extent the FBI Program at [redacted] is similar to [redacted] Program, the undersigned makes an inference that such similarities show the FBI Program at [redacted] would be appropriate for Student as well.

133. Both [redacted] and the FBI Program are designed to serve the same disability population (Tr. 58-59). Student's prospective classmates at [redacted] would have the following impairments: cognitive impairments, learning disabilities, behavioral and emotional disabilities, speech and language impairments, and physical impairments (Tr. 59, Tr. 273, 282). Student's current classmates at [redacted] have similar impairments (*Id.*) The composition of the [redacted] student body in the FBI Program and Student's classmates at [redacted] is nearly identical in terms of the needs and abilities of both student bodies[2] (Tr. 68-70).

[2] Independent Psychologist claimed that the FBI Program did not serve students with similar ambulatory issues as Student. However, because Independent Psychologist admitted that she did not have a full understanding of the Student body in the FBI Program, the undersigned rejects this claim as speculation.

134. The classrooms for Student are relatively similar at [redacted] and [redacted] (except that the [redacted] classroom appears slightly smaller because of different furniture) (Tr. 68-70, 346-347).

135. Both [redacted] and [redacted] are air conditioned (Tr. 99-100, 177).

136. [redacted] is a special school where Student spends no time with nondisabled peers, although Student does spend time with volunteers from a local high school, Marist High School, while at [redacted] (Tr. 62). [redacted] is located in a middle school where Student's interaction with [redacted] ondisabled peers would be minimal, at least initially after the transfer (Tr. 63). At [redacted] Student could engage in "Real World Club" where FBI Program students and general ed curriculum students interact (Tr. 77-78).

137. [redacted] ses several sight word based reading programs (including Edmark) to educate children with needs like those of Student (Tr. 97). [redacted] also uses research based math programs for students who have special needs in math (Tr. 98-99).

138. The school days during the regular school year are similar at [redacted] and [redacted] with the school day at [redacted] slightly longer than the school day at [redacted] (Tr. 60-61).

139. [redacted] can provide the same extracurricular activities as [redacted] with the exception that [redacted] has a swimming pool while [redacted] does not (Tr. 61-62, 70-71). Student uses the swimming pool twice a month (Tr. 337). [redacted] offers community outings which Student could participate in if Student was properly prepared for the outings (Tr. 417).

140. Both [redacted] and [redacted] have basketball nets which can be raised and lowered, recreation bars, and adaptive PE equipment (Tr. 79, 337-339). The District has also agreed to obtain additional PE equipment to the extent Student needs such equipment to receive FAPE (Tr. 250-251). [redacted] has adaptive PE which Student can participate in (Tr. 258-259).

iii. Additional Credibility Findings and Inferences Related to the Appropriateness of the [redacted] (Parent's Experts) Regarding [redacted]

141. Parent contends Student would not be safe at [redacted], and Student would lose [redacted] ndependence at [redacted] due to the large size of the school, and the composition of the student body. The undersigned rejects these opinions for the following reasons.

142. Parent contends Student could not ambulate at [redacted]. Student can walk between a quarter and a half mile. [redacted] was on adaptive cross-country at [redacted] (Tr. 1994-1995). [redacted] would have to walk much shorter distances to get to [redacted] services at [redacted] (Tr. 2355-2357). Moreover, Student has the ability to learn [redacted] way around a new building (Tr. 729). The undersigned makes a credibility finding and an inference against Independent Psychologist regarding Student's physical ability to walk the halls at [redacted]

LOS. Student is able to walk from her bus to [redacted] walk to her services at the "sprawling" [redacted] campus; is on adaptive cross-country, and is able to play adaptive basketball. In light of Student's abilities, the undersigned therefore makes an inference that Student would be able to walk the halls at [redacted] and a credibility finding against the opinion of Independent Psychologist and Parent in this regard. The undersigned makes a further credibility finding and rejects Independent Psychologist's contention that carpeting is an essential part of Student's placement as both [redacted] and [redacted] have carpeted and noncarpeted area. By all accounts Student is able to negotiate the carpeted and noncarpeted areas of [redacted]

143. Parent also had an access auditor tour [redacted] Access Auditor found approximately 60 instances of violations of Illinois law and the Americans with Disability Act (as amended) (Tr.2053). Neither Access Auditor nor any other witness testified that any of these alleged violations would hinder Student in any way (Tr. 2062). Therefore, in light of the lack of this crucial fact, the undersigned rejects the opinions of Access Auditor as it relates to whether the District can provide FAPE to Student a[redacted]

144 In specific support of her opinions, Independent Psychologist stressed that [redacted] was completely accessible to Student including: an accessible library; an accessible physical therapy room and equipment; and an accessible occupational therapy room (Tr. 412-413).

145. Independent Psychologist also opined that Student could not be accommodated with a wheelchair at [redacted] because use of a wheel chair would be psychologically disabling for Student (Tr. 386). However, outside of school, Student regularly uses a wheelchair when she has to travel for long distances (Tr. 479-480). Moreover, because of her walking ability, Student would rarely have to use a wheelchair at [redacted]

146 The undersigned makes a credibility finding and an inference against Independent Psychologist (and to the extent necessary, against Access Auditor) as to the appropriateness of [redacted]. First, much of [redacted] is accessible to Student as testified to by District personnel. There is adaptive PE equipment at [redacted] There is an area outside for Student to play. There is no evidence that the alleged violations of the ADA and the Illinois Accessibility Code would affect Student Moreover, Independent Psychologist's opinion is unpersuasive because: (1) the District can arrange Student's schedule to give her access to the hallways when most of the general education population isn't using the halls; and (2) the District can use paraprofessionals or other District staff to ensure Student's safety in the halls and to make most of [redacted] accessible to Student. The undersigned rejects accessibility claims under IDEA for the reasons set forth in this paragraph.

147. The District has two classes available if it should appear necessary to separate Student from her twin sister (Tr. 2259).

148. The undersigned also rejects Independent Psychologist's claim that the very presence of middle school children at [redacted] somehow makes [redacted] inappropriate or amounts to a change in placement. First, Student would have the same opportunity to interact with disabled peers at [redacted] as at [redacted] Moreover, Student already interacts with slightly older nondisabled children at [redacted] (the [redacted] volunteers). Finally, Student will have minimal contact with the nondisabled peers at [redacted]. For these reasons, the undersigned makes a credibility finding against Independent Psychologist's contention that the presence of middle school children makes [redacted] inappropriate. Similarly, the undersigned makes an inference against Independent Psychologist and therefore finds that the presence of nondisabled children does not make [redacted] inappropriate (because of the District's ability to accommodate Student through scheduling and increased supervision).

149. The undersigned also rejects Independent Psychologist's contention that nondisabled middle school children are somehow more dangerous than the disabled children at [redacted] Student was going to school with children who are classified as emotionally disturbed. Such children can be quite volatile. Yet, [redacted] was able to accommodate Student. Likewise, [redacted] will be able to accommodate Student with appropriate supervision and scheduling.

150. The undersigned also rejects Independent Psychologist's contention that [redacted] allows Student more independence than Student would have at [redacted]. Student is constantly supervised at [redacted] even when she is walking the halls (Tr.2368). The undersigned makes a credibility finding against any contention that Student is more independent at [redacted] as [redacted] staff must supervise Student to protect her from [redacted]'s disabled population (which contains many children with emotional disabilities). The undersigned further makes an inference that any placement and location of services is going to have hazards for this Student. However, [redacted] was able to accommodate Student and [redacted] can accommodate Student.

151. The undersigned also makes an inference that noise in the lunchroom will not make [redacted] inappropriate. Student has been able to eat lunch at [redacted] which is also quite noisy (Tr. 2664-2665).

152. Finally, the undersigned makes an inference that Student's skin condition does not render [redacted] inappropriate. Student's skin condition (and the social effects of the skin condition) will be an issue at any location of services. Other children's reactions are going to have to be dealt with in any location of services. Moreover, [redacted] mimics a small school environment in the [redacted] Program because interaction with nondisabled children is minimal.

153. In light of the credibility findings and inferences set forth above, the undersigned makes an inference that [redacted] is an appropriate location of services for Student. The composition of the student body at [redacted] and layout of [redacted] would not prevent implementation of Student's IEP or otherwise lead to a loss of educational benefit.

iv Personnel at [redacted]

154. The proposed classroom at [redacted] is taught by a certified special ed teacher (Tr. 87-88).

155. [redacted] can provide occupational therapy, physical therapy, and speech and language services taught by licensed professionals (Tr. 59, 132-137, 181-186, 194-199, 297-301).

156. The [redacted] Program has a social worker to provide social-emotional related services, while [redacted] uses counselors (Tr. 59-60). The District provided uncontradicted evidence showing that a social worker could provide Student with appropriate social-emotional services (Tr. 177-180).

157. Student's projected classroom at [redacted] had a teacher and three paraprofessionals for nine students (Tr. 89). The [redacted] Program generally has a student-teacher ratio of approximately 2:1-3:1 (Tr.2612). The staff had been trained by a school nurse how to implement Student's health plan (Tr. 466).

158. Student has been able to obtain an educational benefit from similar service providers at [redacted]

159. Independent Psychologist opined in her report that Student needs related service providers on staff at all times at [redacted]. The undersigned rejects this opinion and makes an inference that [redacted] has properly trained personnel to implement Student's IEP. First, there is no evidence Independent Psychologist has any expertise in staffing a public school. Second, there are no facts in the record to suggest staff would be unavailable to implement Student's IEP.

v. Adaptive PE at JFK LOS

160. As discussed above, the undersigned found that adaptive PE is available at [redacted]

vi. Student's Tolerance for Tranfers

161. Student Advocate provided an opinion that Elim was "the most appropriate" placement for Student as opposed to [redacted] (Tr. 1712). Student Advocate did not testify that Elim was the only appropriate location of services for Student. The undersigned rejects the opinion of Student Advocate that [redacted] is an inappropriate location of services for Student because the undersigned finds that Student can be transitioned to [redacted] (as discussed above in the section on transitional needs related to the transfer).

D. Findings of Fact on Procedural Violations

i. Initial Finding on all Procedural Violations

162. Parent has made numerous claims of procedural violations of IDEA prior to the filing of multiple due process complaints and after the litigation began. Parent has always been able to prevent the District from acting through filing of due process complaints. When the District filed a motion to dismiss Parent's complaint, the undersigned gave Parent a continuance to find an attorney. Parent did retain two attorneys who litigated on Parent's behalf zealously and thoroughly. There was a two day stay put hearing coupled with a ten day due process hearing. There is also companion litigation in the Federal District Court for the Northern District of Illinois. There was never a claim that Parent was prejudiced in any way due to lack of information. Due to the length of the hearing, the thoroughness of Parent's attorneys, and the fact that most of Student's special education was regulated by the undersigned by the stay put injunction; the undersigned makes an inference that any deficiency of notices, deficiency of provision of Student records, and deficiency in response; caused no loss of educational benefit to Student and did not hamper Parent's role in the provision of FAPE for Student.

ii. Prior Written Notice and Predetermination Issues

163. Parent claims that she did not receive full copies of the 2012 IEPS in a timely manner. Parent admits she eventually received the IEPs (Tr. 2700-2702). Parent was able to file for due process within ten days and obtain the protection of the stay put on multiple occasions.

164. Parent also claims that in all IEP meetings in 2012 and 2013, the District predetermined the placement. Parent and her Advocate consistently argued to the fact that the District did not yield on any aspect of Student's IEP. However, the District did extensively consider Parent's expert's reports; did allow Parent to accompany her children to school every day if Student was to attend [redacted] and did agree to eliminate all field trips from Student's curriculum at Parent's request. The District did modify the IEP to some of the Parent's requests. The undersigned makes a credibility finding that the District did not predetermine placement, but did insist on unilateral authority on location of services apart from determining whether [redacted] would be appropriate for Student.

165. The May, 2012, IEP was never implemented as to the transfer from [redacted] to [redacted] Implementation of that aspect of the IEP was halted by the filing of two due process complaints, a mediation agreement and two stay put orders.

166. The District members of the IEP Team in December, 2012, assumed that the location of services would be [redacted] due to the mediation agreement (Tr. 1558). The transfer did not occur until the July 30, 2013 IEP meeting due to a stay put order I entered after hearing.

167. In July, 2013, the IEP Team considered whether [redacted] and the [redacted] Program could provide Student with FAPE (through an extensive discussion of Independent Psychologist's report) (Tr. 2367-2376, 2399-2404, 2413-2420).

iii. Use of Pending Due Process Proceedings to Deny Services

168. The District did refuse to evaluate Student in light of a pending due process request. However, the child was never transferred from [redacted] as a result of the mediation agreement and the evaluation was eventually completed after the mediation. Parent presented no direct evidence that the delay in the evaluation caused a loss of educational benefit to Student or interfered with Parent's role in the provision of FAPE for Student.

iv. Failure to Use Evaluation Process Appropriately

169. Parent contends the District failed to provide criteria for an independent evaluation. However, the District had no independent evaluation criteria (District closing brief, procedural issues).

v. Violation of Stay put

170. Parent presented no evidence that the District violated my stay put orders. The undersigned reaffirms my stay put orders and incorporates the factual findings of those stay put orders into this decision.

vi. Response to Due Process Complaint

171. The responses to the various complaints were not filed within 10 days of the filings of the complaint. Parent provided no evidence that her litigation strategy was affected in any way by the tardy responses or that the tardy response caused the loss of an educational benefit for Student.

vii. Provision of Records

172. As of July 1, 2013, Parent was given an opportunity to present a list of records Parent believes are missing. No list was presented. Parent presented no list of any missing records at hearing. Parent presented no evidence that her litigation efforts were hampered in any way by not having records. Parent presented no direct evidence of any loss of educational benefit or any way her role in provision of FAPE was hampered by lack of records. Parent filed timely due process complaints and her interests have been protected by the stay put injunction thereafter.

E. Remedies

173. Parent is currently homeschooling Student. Parent provided no evidence that Student is being provided with FAPE in the homeschooling placement (Tr. 2185-2187).

IV. Conclusions of Law

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

174. 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.*

175. 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 filing party to prove his/her/its case. The parties must prove their cases by a preponderance of the evidence. 5 ILCS 100/10-15.

176. In determining whether the District acted properly 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).

177. In Illinois state administrative proceedings, the rules of evidence apply. 5 ILCS 100/10-40. Thus, hearsay which has been objected to is generally inadmissible. *Sudzus v. Department of Employment Security,* 393 Ill.App.3d 814 (2009).[3] 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).

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

179. 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).

180. 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).

181. 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

[3]This rule is different than federal administrative hearing where 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).

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).

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

183. 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)

184. 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. Similarly, IDEA requires a decision based upon substantive grounds based on whether a child received FAPE. 20 U.S.C.A. 1415(f)(3)(i); *A.G. v. District of Columbia.* 57 IDELR 9, 794 F.Supp.2d 133 (D.D.C. 2011). This federal requirement also imposes upon all administrative hearing officers the obligation to structure the hearing so as to properly make an administrative record. *Id.*

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).

Conclusions of Law Related to the Mediation Agreement and its effect on the Due Process Proceedings

185. Nearly all courts agree that hearing officers may consider settlement agreements to determine whether a child received FAPE. *J.K v. Council Rock School District* 833 F.Supp.2d 236 (E.D. PA. 2011). Moreover, a settlement agreement can represent a waiver of Parent's rights under IDEA and/or to past failure to provide FAPE. *Id. See also, Linda P. v. State of Hawaii Department of Education,* 46 IDELR 73 (D.Hi. 2006). In such circumstances, hearing officers may have the equitable authority to deny relief to the parties upon considering the settlement agreements as to past violations of FAPE. *Linda P., supra.*

186. Hearing officers have no jurisdiction to enforce mediation agreements as a general rule because IDEA gives authority to enforce mediation agreements to courts, not hearing officers. *See* 34 CFR 300.506(b)(7). However, the undersigned finds that hearing officers have the right to consider and construe mediation agreements to the extent that such agreements are inextricably intertwined with the core functions of a hearing officer, i.e. any issue related the identification, evaluation, placement, or provision of FAPE to a child. *Springfield Local School District Board of Education v. Jeffrey B.*, 55 IDELR 158 (N.D. Oh. 2010).

187. Settlement agreements (and mediation agreements) may constitute a waiver and thus an equitable reason to deny equitable relief to Parent and/or Student. *See e.g. Branham v. District of Columbia,* 44 IDELR 149, 427 F.3d 7 (D.C. Cir. 2005) (conduct of the parties is a factor in determining whether a hearing officer should provide equitable relief to parties in due process hearing).

188. In construing a mediation agreement, the discussions of the parties that occurred during the mediation process cannot be used as evidence in any subsequent due process or civil proceeding in any federal court or state court. 34 CFR 300.506(b)(8)[4]. Even if a mediation agreement is procured by illeal means (like fraud), evidence of the illegal

[4] The federal regulation contains no waiver provision allowing parties to jointly waive the bar on admissibility of evidence related to the contents of a mediation session. This is different than the Illinois Uniform Mediation Act which allows parties to waive the confidentiality of a mediation session through an explicit waiver. See 710 ILCS 35/5.

conduct which occurred during a mediation session must be excluded. *The Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034, 1040-1041 (9th Cir. 2011).

189. In determining a claim for duress (or other equitable reason to rescind a contract), the undersigned should consider whether one party has accepted the benefits of a contract for any considerable length of time. *Inland Land Appreciation Fund, L.P. v. County of Kane*, 344 Ill.App.3d 720, 800 N.E.2d 1232, 1239 (2003). Acceptance of the benefit of a contract will ratify the contract thus preventing a party from later arguing the contract is void for various formation defects. *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill.App.3d 84, 707 N.E.2d 609, 616 (1999).

Conclusions of Law Related to the District's Duty to Evaluate

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

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

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

192. The District and the IEP Team is responsible for determining the appropriate assessments to identify the child's needs. 34 CFR 300.301(a), 34 CFR 300.301(c)(2)(ii); 34 CFR 300.305(a)(2). Although the District and IEP Team must consider a parent's input in determining which assessments are necessary, there is no regulation suggesting a district or IEP Team can abdicate responsibility to determine appropriate assessments necessary to determine a disabled child's needs and the services necessary to provide a child with FAPE. *Id.*

193. When a child has needs arising out of his/her disability related to transitions, the District must conduct appropriate transition assessments necessary to determine the student's needs related to transitioning to a new educational environment. *Dracut School Committee v. P.A. and S.A.* 55 IDELR 66, 735 F.Supp.2d 35 (D. Mass. 2010).

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

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

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

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

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

198. Although the School District must evaluate properly and according to the OSEP regulations, hearing officers are entitled to make a finding against the District only if the procedural inadequacies impeded the Student's right to a free appropriate public education or denied the student some educational benefit. 20 U.S.C.A. 1415(f)(E)(ii)(I-III); *Taylor v. District of Columbia,* 770 F.Supp.2d 105 (D.D.C. 2011); *Dracut School Committee v. P.A. and S.A.* 55 IDELR 66, 735 F.Supp.2d 35 (D. Mass. 2010). *Dracut School Committee v. P.A. and S.A.* 55 IDELR 66, 735 F.Supp.2d 35 (D. Mass. 2010); *Capistrano Unified School District,* 108 LRP 40490 at 29 (Cal. State Educational Agency, 2008).

199. If a Parent disagrees with the District's evaluation, then the Parent may request an independent evaluation at District expense. 34 CFR 300.502(b)(1). If the District believes its evaluation complied with the law, the District is entitled to file a due process complaint to show that the District evaluation is appropriate. 34 CFR 300.502(b)(2)(i). If the District evaluation is appropriate, the District is not obligated to pay for an independent educational evaluation ("IEE"). *Id.* Otherwise, the District must pay for an independent evaluation of an evaluator of the Parent's choosing.

Conclusions of Law Related to IEP Design

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

201. As such, in determining whether an IEP is reasonably calculated to provide FAPE, the undersigned must defer to the District as to disputes among appropriate methodologies to educate the student. *Lachman v. Illinois State Board of Education,* 852 F.2d 290, 297 (7th Cir. 1988); *See also White v. Ascension Parish School Board,* 343 F.3d 373 (5th Cir. 2003); *G.D. v. Westmoreland School District,* 930 F.2d 942 (1st Cir. 1991). The District is entitled to choose among reasonable methodologies to provide a student FAPE, and the parent does not have the right to veto the district's reasonable methodological choices. *Id.* The reasonable choice of the school district as to

methodology need not even need to be the best choice available. *G.D., supra.* However, to the extent practicable, a district must use a methodology to provide special education and related services based upon peer reviewed research. 20 U.S.C.A. 1414(d)((1)((A)(i)(IV). Moreover, when a district fails to or cannot articulate a methodology, less deference (or no deference) is appropriate. *TH v. Board of Education of Palatine Community Consolidated School District 15,* 55 F.Supp.2d 830 (N.D.Ill. 1999).

202. Because of this, the concentration must be on the District's proposed placement and services rather than on the placement at the [redacted] which the Parent prefers (See *G.D., supra,* "The hearing officer was correct in focusing primarily on the District's placement, rather than on the alternative that the family prefers.").

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

204. The concept of FAPE is not limited to whether a student is succeeding academically. *Mary P. v. Illinois State Board of Education,* 919 F.Supp. 1173, 1179-1181 (N.D. Ill. 1996). In order to provide a student FAPE, a school has to meet SEA educational standards. 20 U.S.C.A. 1401(9); *Winkelman v. Parma City School District,* 550 U.S. 516 (2007). *See also Rowley v. Board of Education of Hendrick Hudson Central School District, Westchester County,* 458 U.S. 176, 203 (1982) (in order to provide FAPE, the local district must comply with the definitional requirements of FAPE). Thus, the concept of FAPE must be viewed through: state standards and definitions of education, *See L.I. v. Maine School Administrative District No. 55,* 480 F.3d 1, 47 IDELR 121 (1st Cir. 2007) for an extensive discussion on how state standards affect the definition of "educational performance" for purposes of federal law. Thus, when state educational benefits exceed the minimums required by federal law, the state standards are enforceable through IDEA. *CJN v. Minneapolis Public Schools, Special School District No. 1,* 323 F.3d 630 (8th Cir. 2003).

205. Illinois requires all school districts to teach students to manage emotions and behavior for both academic and life success. 405 ILCS 49/5, 15. Students must be taught: social and interaction skills; how to manage emotions and behavior; how to develop self-awareness and self-management skills; how to use social awareness and interpersonal skills to establish and maintain positive relationships; to develop skills to prevent, manage, and resolve conflicts in constructive ways; to consider ethical, safety, and societal factors in making decisions. *Id.* The standards specifically require school district to teach social and emotional skills and protocols for establishing positive peer, family and work relationships (See IHO Ex. #4, Goal #2). The state standards require a school district to teach students to understand why unprovoked acts that hurt others are wrong (See IHO Ex. #4, Goal #3).

206. An Illinois school district must thus address all of a student's unique social-emotional needs like anxiety, aggression, inability to socially interact with peers and family with specific goals and short term objectives/benchmarks. *Sarah D.,* 642 F.Supp.2d 804, 52 IDELR 281 (N.D. Ill. 2009)*; Los Angeles Unified School District,* 39 IDELR 257 (Cal. SEA 2003). A District must have goals which directly address a child's unique needs and behaviors. *Id.*

207. As part of the IEP Team's responsibilities, it must determine the safety and health needs of a child in order to provide accommodations designed to protect the child in his/her educational environment, and design an IEP which protects the safety needs of a child. *Lillbask v. State of Connecticut Department of Education,* 397 F.3d 77, 42 IDELR 230 (2nd Cir. 2005). To fail to protect a disabled child's physical and psychological safety when designing an IEP constitutes a denial of FAPE. *Id.* The physical and psychological safety of the child is also an important factor (mandated by regulation) to be considered in determining the LRE of the disabled child. 34 CFR 300.116(d).

208. An IEP is a continuing program as well as a document, *O'Toole v. Olathe District Schools Unified School District No. 233,* 144 F.3d 692 (10th Cir. 1998), and thus an IEP thus must be revised as appropriate as the IEP Team learns more about the student in order to provide FAPE to the student. *M.M. v. Special School District No. 1,* 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008).

209. In determining whether IEP design is reasonable, a student's progress under the proposed IEP is evidence a hearing officer must consider. *T.H. v. District of Columbia,* 52 IDELR 216, 620 F.Supp.2d 86 (D.D.C. 2009). *Hunter v. District of Columbia,* 51 IDELR 34 (D.D.C. 2008). However, a lack of academic or behavioral progress is not dispositive of whether the IEP has been reasonably designed to provide a student with FAPE. *Lessard v. Wilton Lyndeborough Cooperative School District,* 518 F.3d 18, 29 (1st Cir. 2008); *Shroll v. Board of Education of Champaign Community Unit School District No. 4,* 48 IDELR 155 (C.D. Ill. 2007).

210. Another factor in determining whether an IEP is reasonably calculated to provide an educational benefit is whether the IEP addresses the Student's unique needs. *Jaccari J v. Board of Education, Chicago Public School District No.299,* 690 F.Supp.2d 687, 702 (N.D.Ill. 2010). In determining whether the District considered a student's unique needs properly in developing an IEP, general principles of reviewing decision making in administrative law are helpful. Decisions are unreasonable if the IEP Team: has relied on factors Congress has not intended it to consider; has entirely failed to consider an important aspect of the problem; has offered an explanation for its decision counter to the evidence before the IEP Team; or is so implausible that the decision could not be ascribed to a difference in view or the product of IEP Team expertise. *See Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29 (1983) (determining when an agency's decision making is arbitrary and capricious in rulemaking which is roughly analogous to the task hearing officers have to judge the

reasonableness of IEP Teams in making decisions regarding IEP design)[5]. Similarly, when educational professionals depart from well-established practices, there must be a good reason for doing so. *Id.* Fanatical dedication to a practice or theory shown to be ineffective or illegal in a specific case also can demonstrate unreasonableness. *Board of Education of Evanston-Skokie Community Consolidated School District 65 v. Risen,* 61 IDELR 130 (N.D.Ill. 2013)(District inclusionist strategy taken too far rendering District actions unreasonable).

211. Moreover, when a hearing officer determines whether an IEP is reasonably designed to provide a student with FAPE, the hearing officer must judge the district based upon what the district knew or reasonably could have known at the time the IEP was drafted—not solely on whether academic progress occurred. *M.B. v. Hamilton Southeastern Schools,* 668 F.3d 851 (7th Cir. 2011); *Thompson RJ-J School District v. Luke P.,* 540 F.3d 1143 (10th Cir. 2008); *Adams v. State of Oregon,* 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. East Hannover Board of Education,* 993 F.2d 1031, 1041 (3rd Cir. 1993); *Roland M. v. Concord School Committee,* 910 F.2d 983, 992 (1st Cir. 1990).

212. 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). Thus, a district cannot be held responsible when it fails to include services and accommodations which might have been available had parents given consent for district personnel to speak to a student's medical providers. *Richardson v. District of Columbia,* 541 F.Supp.2d 346 (D.D.C. 2008).

213. The IEP must comply with the requirements set forth in 20 U.S.C.A. 1414(d) in order to provide FAPE. 20 U.S.C.A. 1401(9). Section 1414(d) requires measurable goals designed to meet the child's educational needs that result from the student's disability. *SS v. Howard Road Academy,* 585 F.Supp.2d 56 (D.D.C. 2008); *Sarah D. v. Board of Education of Aptakisic-Tripp Community Consolidated School District No. 102,* 642 F.Supp.2d 804, 52 IDELR 281 (N.D. Ill. 2009).

214. Thus, in order to provide substantive FAPE, an IEP must establish goals which respond to all significant facets of a student's disability, both academic and behavioral. . *Alex R., supra, Sarah D., supra.* When a student has a learning disability, the goals must address the student's learning disability. *Pennsbury School District,* 48 IDELR 262 (PA SEA 2007). For the IEP in place when a child turns 14 ½ , an IEP must contain

[5] The guidelines set out by traditional judicial administrative review are useful in this context because they point out cognitive flaws in the reasoning process, and allow a reviewer to determine logical flaws in experts' analysis. See Rachlinski, Jeffrey and Farina, Cynthia, Cognitive Government and Optimal Government Design, Cornell University (2002) excerpted in Schuck, Foundations of Administrative Law, (Foundation Press) 2004, pp. 117-126.

postsecondary goals related to training, education, employment, and appropriate independent living schools. 20 USCA 1414(d)(1)(A)(VIII)(aa)[6].

215. Goals should describe what a child with a disability can reasonably be expected to accomplish within a 12 month period in a special education program. *Letter to Butler,* 213 IDELR 118 (OSERS 1988).

216. Each IEP goal should correspond to some item of instructions or services identified in the IEP. *Burlington School District,* 20 IDELR 1303 (SEA VT 1994).

217. An IEP that lacks meaningful educational goals may be fatally defective. *Susquentia School District v. Raelee S,* 25 IDELR 120 (M.D. Pa. 1996). It is difficult to appropriately address a student's needs without first defining the goals which will provide a reasonable educational benefit. *Conemaugh Township School District,* 23 IDELR 1233 (SEA PA 1996).

218. The goals should be specific enough for the providers and the IEP Team to determine whether a student is making educational progress and should contain evaluative criteria so that an IEP Team can objectively determine whether progress is being made. *In Re Student with a Disability,* 50 IDELR 236 (SEA NY 2008); *Anchorage School District,* 51 IDELR 230 (AK SEA 2008). The goals cannot be so inexact or subjective so as to blur whether a child is making objective educational progress. *Id.* The goals should be specific enough to allow educators to address instructional plans for the student. *Board of Education of Rondout Valley Central School District,* 24 IDELR 203 (SEA NY 1996).

219. In general there is no need for a goal for related services or accommodations (unless the related services are integrated into the provision of Student's instruction at which points goals related to the related service then become necessary). *Letter to Hayden,* 22 IDELR 501 (OSEP 1994); *Letter to Smith,* 23 IDELR 344 (OSEP 1995).

220. Goals should address every area of a disabled child's needs. 120 USCA 1414(d)(1)(A)(II)(aa,bb). Goals both measure a child's progress and insure the IEP is providing an educational benefit to the child; and inform a parent regarding the educational program of the child. 71 Federal Register 46664 (August 14, 2006); *Los Angeles Unified School District,* 110 LRP 34448 (Cal. SEA 2010).

221. Failure to properly set out the components of an IEP is a procedural violation of an IDEA. *Hjortness v. Neenah Joint School District,* 498 F.3d 655 (7th Cir. 2007); *A.I. by Iapalucci v. District of Columbia,* 402 F.Supp.2d 152, 44 IDELR 255 (D.D.C. 2005). Therefore, to the extent a district fails to provide measurable or concrete goals, this is a procedural violation of IDEA. *Rosinsky v. Green Bay Area School District,* 53 IDELR 193, 667 F.Supp.2d 964 (E.D. Wis. 2009). Similarly, failure to include a transition plan

[6] IDEA requires a transition plan when children turn 16. However, Illinois law requires districts to provide transition plans for disabled children when they turn 14 ½. 23 Ill.Admin. Code. 226.230(c). This state standard is thus enforceable through IDEA.

for the IEP when a child turns 14½[7] is a procedural violation of IDEA. *Board of Education of Township High District 211 v. Ross,* 486 F.3d 267 (7th Cir. 2007).

222. A reasonable calculation of an educational benefit is gauged using a student's potential- even though the District is not required to maximize a student's potential in designing an IEP. *Ridgewood Board of Education v. N.E.,* 172 F.3d 238, 247 (3rd Cir. 1999).

223. In determining whether a placement is appropriate, an IEP Team must take into account the adverse effects on the child of a parent's resistance to the proposed placement. *Board of Education of Community Consolidated School District No. 21, Cook County v. Illinois State Board of Education,* 938 F.2d 712, 18 IDELR 43 (7th Cir. 1991).

224. Related services are developmental, corrective, and other supportive services necessary for a student with a disability to benefit from special education. 34 CFR 300.34(a).

225. Related services include transportation under some circumstances. Specifically, the District must provide related services if such services are necessary for the student to benefit from special education. 20 U.S.C. 1414(d)(1)(A)(IV); 34 CFR 300.34(a). Related services includes transportation to and from school, 34 CFR 300.34(c)(16); group and individual counseling with the disabled child and his/her family, 34 CFR 300.34(c)(14)(ii); working in partnership with parents and others on those problems in a child's living situation which affects the child's adjustment in school, 34 CFR 300.34(c)(14)(iii); mobilizing school and community resources to enable the child to learn as effectively as possible in his/her educational program, 34 CFR 300.34(c)(14)(iv); and counseling and training the parent on how to understand and acquire the skills necessary to aid in educating the child, 34 CFR 300.34(c)(8)(i,ii). *Letter to Dagley,* 17 IDELR 1107 (OSEP 1991).

226. Districts only have to provide related services if the services have an educational purpose. *Dale M. v. Board of Education of Bradley-Bourbonais High School District No. 307,* 237 F.3d 813, 817 (7th Cir. 2001). There is no need to provide a requested related service if the purpose of the service is, for the most part, not related to provide the student education. *Id.*

227. Under certain circumstances, a district must provide extended school year services to provide a student FAPE. 34 CFR 300.106. ESY generally is only necessary if the student faces a significant risk of having the gains of a school year jeopardized if the student is not provided with ESY. *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153 (5th Cir. 1986). Regression-recoupment problems triggering the need for ESY occur when: A child suffers an inordinate or

[7] IDEA requires a transition plan when children turn 16. However, Illinois law requires districts to provide transition plans for disabled children when they turn 14 ½. 23 Ill.Admin. Code. 226.230(c). This state standard is thus enforceable through IDEA.

disproportionate degree of regression during the summer break; and it takes an inordinate or unacceptable length of time for the child to recoup the lost skills upon returning to school. *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153 (5th Cir. 1986). Other factors in determining whether ESY is necessary include the degree of impairment, ability of child's parents to maintain a child's level of skills, whether the service extraordinary to the child's condition, and the child's rate of progress, retrospective data such as past regression and rates of recoupment skills; and consideration of a student's emerging skills. *Johnson v. Independent School DistrictNo. 4 of Bixby,* 921 F.2d 1022(10th Cir. 1990); *Cordrey v. Euckert,* 917 F.2d 1460 (6th Cir. 1990).

228. The provision of ESY is the exception, not the rule under the regulatory scheme. *Board of Education of Fayette County, Kentucky v. L.M.,* 478 F.3d 307 (6th Cir.2007). Thus, the parent must demonstrate in a particularized manner relating to the individual child, that an ESY is necessary to avoid regression so severe that the child would not be able to catch up during the following school year. *Id.*

229. A Parent cannot compel an IEP Team to add more than the components specifically set out in statute to an IEP. 20 USCA 1414(d)(1)(A)(ii)(I). However, because an IEP is often unclear and often contains many gaps regarding a child's educational experience, the Seventh Circuit has held that there can be terms implied in an IEP. *John M. v. Board of Education of Evanston Township High School District 202,* 502 F.3d 708, 715 (7th Cir. 2007).

Conclusions of Law Related to Least Restrictive Environment

230. Under IDEA, the School District has an obligation to educate Student to the greatest extent appropriate with his/her 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.*

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

232. 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.*

233. The regulations implementing IDEA generally require that the IEP Team exhibit a preference[8] for a placement at a student's neighborhood school. 34 CFR 300.116(b)(3).

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

235. 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.*

Conclusions of Law Related to Placements and Homebound Instruction

236 Every school district is required to have a continuum of placements available for all disabled students- including students who require homebound instruction. 34 CFR 300.115. When a student is absent for more than two weeks, the IEP Team is supposed to determine whether the student's special education and related services should be modified for a homebound placement. 23 Ill.Admin. Code. 226.300. The District is to continue providing special education and related services unless the IEP Team determines such services should not be provided. *Id.* Five hours per week of instruction is a minimum, not a maximum, under the Illinois Administrative Code. *Id.*

Conclusions of Law Related to Placements and Physical Locations of Services and Their Interaction

[8] 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).

237. In general, a school district has administrative discretion as to the location where children with disabilities will attend school. *Concerned Citizens and Parents for Continuing Education at Malcolm X School (PS 79) v. New York Board of Education,* 629 F.2d 751 (2nd Cir. 1980) *cert denied,* 449 U.S. 1078. Moreover, a school district has discretion to close down any of its schools for any reason and the closing of the school will ordinarily not amount to a change in placement for the students previously attending the school. *Id.* IDEA did not transfer fiscal discretion and budgetary decision making regarding the structure of special education services from local school boards to federal courts and/or due process hearing officers. *Tilton v. Jefferson County Board of Education,* 705 F.2d 800 (6th Cir. 1983). For this reason, the physical location of services of special education is usually a matter of administrative discretion within the purview of the school district administration[9]. *White v. Ascension Parish School Board,* 343 F.3d 343, 39 IDELR 182 (5th Cir. 2003).

238. The regulations implementing IDEA generally require that the IEP Team exhibit a preference for a placement at a student's neighborhood school. 34 CFR 300.116(b)(3). Moreover, as long as a district can provide services to a disabled child, the District has administrative discretion as to how and where to assign its staff. *White v. Ascension Parish School Board,* 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003).

239. IDEA does not define the term placement. *Board of Education of Community High School District No. 218, Cook County v. Illinois State Board of Education,* 103 F.3d 545, 548-549 (7th Cir. 1996). Different courts and OSEP have adopted different meanings for the term over time and in different contexts. *Id.* For purposes of this decision, the most important aspect of placement is whether placement contains an element related to the physical location of services or is solely the program set forth in the IEP.

240. OSEP has taken differing positions on whether placement contains within its definition the physical school in which the disabled student is educated. In 1990 and 1994, OSEP stated that placement had three components: (1) the education program in the student's IEP; (2) the option on the continuum of placements in which the student's IEP can be implemented; and (3) the physical school or facility selected to implement the student's IEP. *Letter to Fisher,* 21 IDELR 992, pg. 4 (7/6/1994); *Letter to Wessels,* 16 IDELR 735, pg 4 (3/9/1990). However, in later interpretations, OSEP has suggested that placement in most circumstances refers only to the option on the continuum of placement options which a disabled student receives. 71 Federal Register 46588, 46687 (8/14/2006). Some courts have also limited the definition of placement to the educational program which a student is receiving. *See, e.g. T.Y New York City School Board,* 584 F.3d 412, 419 (2nd Cir. 2009); *White v. Ascension Parish School Board, supra.*

241. Most courts have held that, as a general rule, only major changes in the educational program of a disabled student constitute changes of placement. *Concerned*

[9] The district's administrative discretion is subject to a preference for the disabled student's neighborhood school which isn't at issue in this case. *See* 34 CFR 300.116(b)(3).

Parents, supra, Tilton, supra, Lunceford v. District of Columbia Board of Education, 745 F.2d 1577 (D.C. Cir. 1984). Variations in the educational program students are offered arising from transfers do not generally constitute changes in placement. *Id.* It does not matter if one location can deliver better services or services beyond those required by the IEP. *Sherri A.D. v. Kirby,* 975 F.2d 193 (5th Cir. 1992).

242. However, many courts have held that when aspects of the physical location interact detrimentally with a student's disability, physical location must be considered part of the placement. *Carrie I. on behalf of Greg I, v. Department of Education, State of Hawaii,* 869 F.Supp.2d 1225(D.Hi. 2012); *Comb v. Benji's Special Educational Academy, Inc.*745 F.Supp.2d 755, 767 (S.D. Tx. 2010); *R.B. v. Mastery Charter School,* 762 F.Supp.2d 745, 763 (E.D. Pa. 2010).

243. The Seventh Circuit has indicated that placement should generally be the educational program unless there is a concern in regard to either: (1) discipline or suspensions are involved; or (2) if the child is placed in an inappropriate school. *Board of Education of Community High School District No. 218, Cook County v. Illinois State Board of Education,* 103 F.3d 545, 548-549 (7th Cir. 1996)[10]. If one of the two above stated concerns are at issue, then placement should include location as a component. *Id.*

244. Under even the most restrictive definition of placement when an aspect of the physical location of services causes a deprivation of educational benefit, this can be a denial of FAPE. *Comb v. Benji's Special Educational Academy, Inc.*745 F.Supp.2d 755, 767 (S.D. Tx. 2010). Specifically, an educational program must take into account a student's unique needs. *McKenzie v. Smith,* 771 F.2d 1527 (D.C. Cir. 1985); *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990); *Holmes v. District of Columbia,* 680 F.Supp. 40 (D.D.C. 1988). A student's disabilities may cause him/her to have difficulty with a physical environment and/or with transitioning with one physical environment to another. In such circumstances, then the educational program must contain accommodations and services to allow the child to receive FAPE to be reasonably designed to provide an educational benefit. *Id. See also A.Y v. Cumberland Valley School District,* 569 F.Supp.2d 496, 510 (M.D. Pa. 2008); *Regional School District No. 9 Board of Education v. Mr. and Mrs. P.*, 51 IDELR 241 (D.Conn. 2009); *James E. and Shirley A. v. Thompson,* 495 F.Supp. 1256 (E.D. Wis. 1980).

Conclusions of Law Related to Locations of Services

245. Most courts have held that a district generally has discretion to choose a location of services to provide special education to a child. *White v. Ascension Parish School Board,* 343 F.3d 373 (5th Cir. 2003); *Concerned Citizens and Parents for Continuing Education at Malcolm X School (PS 79) v. New York Board of Education,* 629 F.2d 751

[10] One district court has interpreted the Seventh Circuit's holding regarding placement more narrowly than the undersigned does, while one district court has interpreted the Seventh Circuit's interpretation of the law as the undersigned does. Compare and Contrast *Madison Metropolitan School District v. P.R.,* 598 F.Supp.2d 938 (W.D.Wis. 2009), with *Brad K v. Chicago Public School District 299,* 787 F.Supp.2d 734 (N.D. Ill. 2011).

(2nd Cir. 1980) *cert denied,* 449 U.S. 1078; *Brad K v. Chicago Public School District 299,* 787 F.Supp.2d 734 (N.D. Ill. 2011). However, a location which cannot implement large portions of the child's IEP amounts to a change of placement, a material failure of implementation of the IEP, and denial of FAPE. *Lunceford v. District of Columbia Board of Education,* 745 F.2d 1577 (D.C. Cir. 1984); *Brad K, supra; Savoy v. District of Columbia,* 844 F.Supp.2d 23 (D.D.C. 2012).

246. Moreover, when there are aspects of the physical location of services affect the provision of FAPE for the student and/or prevent the disabled student from receiving FAPE, this is a violation of IDEA for which a hearing officer can grant relief- whether or not the defects in the physical location of services are forbidden by the four corners of the IEP. *See Charlie F. v. Board of Education of Skokie School District 68,* 98 F.3d 989 (7th Cir. 1996) (malicious behavior by classroom teacher in a physical location can be a violation of FAPE); *Shore v. Regional High School Board of Education v. P.S.* 41 IDELR 234, 381 F.3d 194 (3rd Cir. 2004)(bullying by fellow students in a physical violation is a violation of FAPE which a hearing officer has jurisdiction to remedy); *See also A.K. v. Alexandria City School Board,* 484 F.3d 672 (4th Cir. 2007) (when physical location can cause a deprivation or dilution of educational benefit, an inappropriate physical location constitutes a denial of FAPE and inappropriate placement for which a hearing officer can provide a remedy); *Madison Metropolitan School District v. P.R.,* 598 F.Supp.2d 938 (W.D.Wis. 2009) (same); *Eley v. District of Columbia,* 59 IDELR 189 (D.D.C. 2012)(same); *TK v. New York City Department of Education,* 779 F.Supp.2d 289 (E.D.N.Y. 2011) (culture of bullying in a physical school is a violation of FAPE and IDEA for which a hearing officer can provide a remedy); *McKenzie v. Smith,* 771 F.2d 1527 (D.C. Cir. 1985) (changes of location to a student who may be harmed by a transfer from one physical location to another can be a denial of FAPE which a hearing officer can remedy); *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990) (same); *Holmes v. District of Columbia,* 680 F.Supp. 40 (D.D.C. 1988) (same); *Z.W. v. Smith,* 210 Fed.Appx. 282 (4th Cir. 2006). (district changes of physical location of services mid-year or in the final year of high school can be a denial of FAPE).

247. Some courts have gone so far as to create presumptions as to when a change in location of services constitutes a denial of FAPE. Specifically, if: (1) a district changes a location for a student mid-year; (2) a district changes a location in the last year of high school; or (3) a student would be harmed by a change in location—then a parent/student can require the district to keep a student in a specific location. *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990); *Holmes v. District of Columbia,* 680 F.Supp. 40 (D.D.C. 1988); *Z.W. v. Smith,* 210 Fed.Appx. 282 (4th Cir. 2006). In such cases, a hearing officer has discretion to find the proposed location of services inappropriate based upon the harm of the transfer. *Id.*

248. IDEA requires an IEP to contain a location of services as part of Student's placement. *See* 20 USCA 1414(d)(1)(A)(i)(VII). The Department of Education has interpreted that section of the law to mean not the physical location of services, but rather a more general statement of where a student will be placed (i.e. a resource room, a self-contained classroom etc.), *Brad K, supra.* However, that interpretation alone does not

preclude a claim for denial of FAPE based on the inappropriateness of the physical location of services. Nor does the interpretation mean that a disabled student or parent of a disabled student cannot challenge a physical location to the extent the physical location can/will cause harm or the dilution of educational benefit to a child. *Batterton v. Francis,* 432 U.S. 416 (1977); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Metropolitan School District of Wayne Township v. Davila* 969 F.2d 485 (7th Cir. 1992) (agency interpretations of statutes when not promulgated by legislative rule entitled to deference based on an agency's expertise and reasoning, but not binding on reviewing courts. A court can reject an agency interpretation of a statute when not promulgated by legislative rule). Impartial hearing officers have commensurate authority with courts in due process proceedings, *Cocores v. Portsmouth,* 779 F.Supp. 203 (D.N.H.), *S-1 v. Spangler,* 650 F.Supp. 1427 (M.D.N.C. 1986). Thus impartial hearing officers are able to reject erroneous agency interpretations of statutes when such interpretations are unreasonable.

249. Therefore, to the extent the Department of Education is interpreting IDEA to preclude a claim of denial of FAPE for failure to provide an appropriate physical location of services (whether or not the complained-of defects in the physical location of services are forbidden by the four corners of the IEP), the undersigned rejects that interpretation as unreasonable- based upon the cases set out above. The court in *Brad K,* did not hold that a claim for the inappropriateness of a physical location of services is barred under IDEA, and only set forth dicta to that effect. Therefore, the holding in *Brad K* is not binding precedent as to this issue either. Therefore, the undersigned holds that an inappropriate physical location of services can be a denial of FAPE whether or not the defects in the proposed physical location of services are contained within the four corners of the text of the IEP.

250. Also, IDEA requires the District educate a disabled child in an appropriate school in order to provide FAPE. 20 USCA 1401(9)(C). The undersigned further holds that a location of services which dilutes the educational benefit envisioned by the IEP is not an appropriate school within the meaning of IDEA.

251. A District must provide physical education to disabled students. 34 CFR 300.39(b)(3). A District's location of services must be able to provide adaptive physical education to disabled students who require adaptive PE to receive special education. 34 CFR 300.39(b)(2)(ii)..

252. A District must have qualified personnel and/or must properly train personnel at a location of services which a disabled student is assigned to. *Alex R. v. Forrestville Community Unit School District No. 221,* 375 F.3d 603, 41 IDELR 146 (7th Cir. 2004).

Conclusions of Law Related to Implementation of the IEPs

253. Even if a district has not changed a student's placement through deficiencies in the location of services, less severe inadequacies in the location of service can violate IDEA under a failure to properly implement claim. *Savoy v. District of Columbia,* 58 IDELR 129 (D.D.C. 2012).

254. Material violations of a student's IEP will be a denial of FAPE and a violation of IDEA for which a parent and student can obtain redress in a due process hearing. *Savoy v. District of Columbia,* 58 IDELR 129 (D.D.C. 2012); *See also Sumter County School District 17 v. Heffernan,* 642 F.3d 478 (4th Cir. 2011); *Van Duyn v. Baker School District 5J,* 502 F.3d 811, 822 (9th Cir. 2007); *Neosho R-V School District v. Clark,* 315 F.3d 1022, 1027, nt. 3 (8th Cir. 2003); *Houston Independent School District v. Bobby R,* 200 F.3d 341, 349 (5th Cir. 2000).

255. In determining whether there has been a material violation of the IEP, ". . .the focus is on the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld." *L.J. v. School Board of Broward County,* 58 IDELR 220 (S.D.Fl. 2012), relying on and citing with approval, *Wilson v. District of Columbia,* 770 F.Supp.2d 270, 275 (D.D.C. 2011).

256. A district must comply with the terms of the IEP to deliver FAPE *Board of Education of the City of Chicago v. Illinois State Board of Education,* 55 IDELR 133, 741 F.Supp.2d 920 (N.D. Ill. 2010). Therefore, ". . .The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail in an implementation failure claim, although the child's educational progress, or lack of if, may be probative of whether there has been more than a minor shortfall in the services provided." *L.J. v. School Board of Broward County, Supra, See also, Board of Education of the City of Chicago, supra.* The reason for this rule is to prevent a district from drafting an elegant IEP and then ignoring it until the parents can prove an educational harm. *Board of Education of the City of Chicago, supra.*

257. The District must implement the IEP as written, and cannot change the written requirements of the IEP without an amendment of the IEP by the IEP Team. *Independent School District No. 281 v. Minnesota Department of Education,* 48 IDELR 222, 107 LRP 56347 (M.Ct. App. 2007).

258. In considering whether an IEP is being implemented properly, the snapshot rule should not apply where a school district has discretion to change tactics and methodologies to provide a student with an educational benefit. *O'Toole v. Olathe District Schools Unified School District No. 233,* 144 F.3d 692 (10 Cir. 1998). An IEP is a program consisting of both the written IEP document and the subsequent implementation of that document. *Id.* The implementation of the IEP document is an on-going, dynamic activity, which must be evaluated as such. *Id.* Thus school districts cannot implement and IEP document in a way which is clearly failing. *Id.*

259. However, just as the undersigned is required to defer to the District on reasonable methodological choices in creating an IEP, a District must be able to choose among different reasonable methodologies in making the day-to-day decisions on how to deliver the services and provide the accommodations listed in the student's IEP. *Independent School District No. 281, supra; Hiawatha School District No. 426,* 58 IDELR 269, #136 (Ill. SEA. 2012); *Belvidere Community Unit School District No. 100,* 108 LRP 42811 (Ill.

SEA. 2008). A district is entitled to some flexibility in how to implement an IEP. *L.J. v. School Board of Broward County, Supra*

260. Decisions on how and where to provide related services generally do not amount to material violations of an IEP. *Catalan v. District of Columbia,* 478 F.Supp.2d 73 (D.D.C. 2007). See also *Houston Independent School District v. Bobby R.,* 200 F.3d 341, 348-349 (5th Cir. 2000). If there are good reasons for a violation of the technical terms of an IEP in providing accommodations and related services, this is not a material violation of the IEP. *Id.*

Conclusions of Law Related to Procedural Violations of IDEA

261. 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 decision making process regarding the provision of a free appropriate public education. 20 U.S.C.A. 1415(f)(E)(ii)(I-III).

262. Federal special education law requires that a student remain in the same placement during the pendency of a due process hearing request. 20 U.S.C.A. 1415(J).

263. The purpose of the "stay put" provision is to remove the unilateral authority that the districts originally had to exclude disabled students from school. *Kevin T. v. Elmhurst Community School District No. 205,* 34 IDELR 202, (N.D. Ill. 2001).

264. The stay put placement is determined primarily by the language of the IEP. *John M. v. Board of Education of Evanston Township High School District 202,* 502 F.3d 708, 715 (7th Cir. 2007); 34 CFR 300.116(b)(2).

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

266. A district must engage in a collaborative process to develop a student's IEP and selection of placement. 20 U.S.C.A. 1415(f)(E)(ii)(III); 34 CFR 300.116(a)(1); 34 CFR 300.321(a)(1); 34 CFR 300.322; 34 CFR 300.324(a)(ii).. To fail to so include the parents is a violation of IDEA. *Board of Education of Township High School District No. 211 v. Ross,* 486 F.3d 267 (7th Cir. 2007). "Predetermination" of a student's IEP or placement is a procedural violation of IDEA. *Id.*

267. It is an open question as to whether the IEP Team must determine the physical school the student attends through a collaborative process with parents or whether determination of the physical school the student attends is a matter administrative discretion of the school district. Compare and contrast *Letter to Fisher,* 21 IDELR 992,

pg. 4 (7/6/1994); *Letter to Wessels,* 16 IDELR 735, pg 4 (3/9/1990) (the physical school is a fundamental component of placement which the IEP Team must collaboratively decide) with *T.Y New York City School Board, supra* and *White v. Ascension Parish School Board, supra* (placement is the program provided to student while site selection is a matter of administrative discretion for the District). The Seventh Circuit has not yet ruled on whether Parents need to be included in the decision of a physical school the student is to attend.

268. In *Board of Education of Community High School District No. 218, Cook County v. Illinois State Board of Education,* 103 F.3d 545, 548-549 (7th Cir. 1996), the Seventh Circuit stated that when there is an issue whether the physical school is appropriate, the physical location of services should be a component of placement. *Id.* As such, when a student's disability interacts with a physical location of services to cause the deprivation of an educational benefit or harm the student, the undersigned holds that the IEP Team must collaboratively decide the physical school a student attends.

269. A District does not need to consider private schools when a public location of services can implement the child's IEP and otherwise provide the child with FAPE. *Hjortness v. Neenah Joint School District,* 498 F.3d 655 (7th Cir. 2007); *Jenkins v. Squillacote,* 935 F.2d 303 (D.C. Cir. 1991); *N.T. v. District of Columbia,* 839 F.Supp.2d 29 (D.D.C. 2012), *Savoy v. District of Columbia,* 844 F.Supp.2d 23 (D.D.C. 2012

270. In general, prior to taking action to change a placement, the district must send the parents a notice with the requirements set forth in 34 CFR 300.503(b). The notice must contain evaluations, procedures, tests, records and reports used to make the decision to make the placement decision. 34 CFR 300.503(b)(3). The notice must also contain a statement that parents of a child with a disability have a right to procedural safeguards for parents. 34 CFR 300.503(b)(4).

271. Parents are entitled to all student records related to the Student's special education. 34 CFR 300.501, 34 CFR 300.613. Parents are also entitled to responses and explanations regarding a student's educational records. 34 CFR 300.613(b).

272. A District must continue to provide services during the pendency of due process proceedings except for actions which are barred by the stay put injunction. 34 CFR 300.300(d)(3); *M.M. v. School District of Greenville County,* 303 F.3d 523 (4th Cir. 2002); *Amman v. Stow School System,* 982 F.2d 644, ftnt 4 (1st Cir. 1992).

273. Parents are entitled to a response within 10 days of the filing of a due process complaint. 34 CFR 300.508(e).

Conclusions of Law Related to Remedies

274. 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).

275. Compensatory education is an equitable remedy hearing officers can award to parents and students. The purpose of compensatory education is to replace lost educational opportunity. *Board of Education of Oak Park, District 200 v. Illinois State Board of Education,* 79 F.3d 654 (7th Cir. 1996). Compensatory education, if awarded, should compensate Student for the District's failure to provide FAPE. *Petrina W. v. Chicago Public School District 299,* 53 IDELR 299 (N.D. Ill. 2009); *See also Branham v. the Government of the District of Columbia,* 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005); *Reid v. District of Columbia,* 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). In determining whether compensatory education, the award should be based upon the equitable factors present in each case (including the conduct of the parties). *Id.* A hearing officer's decision should set forth a reasoned way in which the compensatory services will make the student whole for loss of FAPE. *Id.*

276. An order for a private service provider to provide compensatory education services is proper if such an award is more likely to compensate a student for a district's failure to provide FAPE. *Draper v. Atlanta Independent School System,* 518 F.3d 1275 (11th Cir. 2008).

277. The undersigned is also entitled to place a student in a private placement/location of services as compensatory education or if the equities of a situation require such a finding when a district failed to provide a student with FAPE. *Branham v. District of Columbia,* 44 IDELR 149, 427 F.3d 7 (D.C. Cir. 2005). See also *Draper v. Atlanta Independent School System,* 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008), if a District cannot or will not provide a Student with FAPE, a hearing officer is able to place Student in a private location of services/private placement. *Id.* However, hearing officers should generally not place a child in a private school prospectively unless: (1) the parent can demonstrate that no public school in the District can provide FAPE to the student in a given case. *N.T. v. District of Columbia,* 839 F.Supp.2d 29 (D.D.C. 2012), *Savoy v. District of Columbia,* 844 F.Supp.2d 23 (D.D.C. 2012); or (2) the district has failed so badly that the hearing officer makes a finding that the district will never actually provide the student with FAPE and the additional services necessary to compensate the student for lost educational opportunity, *Id., see also, Draper v. Atlanta Independent School System,* 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008). Moreover, a hearing officer can place a student in a private placement/private location of services for purposes of compensatory education if the private placement will compensate a child for past denials of FAPE. *Gill v. District of Columbia,* 56 IDELR 129, 770 F.Supp.2d 112 (D.D.C. 2011).

278. In making decisions to award a prospective placement at a private location of services, the undersigned must weigh the equitable factors in each case *Branham, supra.*

279. If a hearing officer finds a denial of FAPE, the hearing officer is entitled to reimburse the parent for tuition at a private placement. 34 CFR 300.148(c). To order

such a reimbursement, the hearing officer must find that the district did not make FAPE available to the student in a timely manner prior to enrollment; and that the private placement is appropriate. *Id.* The private placement need only be reasonably calculated to provide the child with an educational benefit to be appropriate. *Florence County School District Four v. Carter,* 510 U.S. 7 (1993). The private placement does not need to meet state standards to be appropriate. 34 CFR 300.148(c).

280. The hearing officer may reduce or deny the reimbursement if the Parent fails to provide a notice at an IEP meeting or within 10 days of the placement of the intent to use a private placement. 34 CFR 300.148(d). However, reimbursement cannot be denied if the district prevented the parents from providing the notice or the parents had not received their procedural safeguards notice. 34 CFR 300.148(e)(1).

281. Parents must file their due process complaint alleging violations of IDEA within two years of the time the parents knew or should have known of the alleged action which forms the basis of the complaint. 20 U.S.C. 1415(f)(3)(C). The timeline begins to run when the parent knew or should have known about the injury to the child. *Centennial School District v. S.D.*, 58 IDELR 45 (E.D. Penn. 2011), *R.B. v. Department of Education of the City of New York,* 57 IDELR 155 (S.D.N.Y. 2011). *Mittman v. Livingston Township Board of Education,* 55 IDELR 139 (D.N.J. 2010); *Gwinnett County School District v. A.A.,* 54 IDELR 316 (N.D. Ga. 2010).

282. There are exceptions to the statute of limitations. If there are specific misrepresentations by the District or the District withheld information to a Parent which was required to be provided to a parent. 34 CFR 300.511(f). However, the misrepresentations or withholding of information must cause the failure to file a due process request. *D.K. v. Abington School District,* 696 F.3d 233 (3rd Cir. 2012).

V. Application of Law to Fact

A. The March, 2011 IEP

283. As a matter of law, the undersigned finds that there is no need to consider a compensatory education plan because there is no need for an IEP to contain a compensatory education plan. IDEA specifically prohibits a hearing officer from requiring more in an IEP other than that which is contained by statute.

284. The undersigned finds that the claims regarding the March, 2011, IEP (design, implementation, and other claims) are barred by the statute of limitations.

285. The undersigned finds that the District provided appropriate transportation to Student.

286. The undersigned finds that there should have been an IEP meeting to consider whether Student needed a homebound placement (and whether services should have been augmented or changed for Student) because Student missed more than two weeks of

school. However, there was no proof Student lost an educational benefit as a result of the District's failure to hold such an IEP meeting or change Studdent's placement. Moreover, there is no proof that Student's IEP and/or educational services would have changed in any way given that Student was only absent for 18 days. Thus, there is no proof Parent's role in the IEP creation process was hindered as a result of the District's failure to hold the IEP meeting.

287. The undersigned therefore finds that the failure to hold an IEP meeting in March, 2011, is a harmless procedural error.

B. Evaluation Issues

288. The Undersigned finds that the District evaluation was not comprehensive in that it failed to identify Student's needs related to transfer from one location to another. Furthermore, the District failed to conduct any transition assessments even though the transition plan would have to be developed within three years of the reevaluation. The District failed to meet its burden of proof on this issue.

289. The undersigned finds that (with the exception of the lack of transition assessments) the failures in the District evaluation are harmless procedural errors because of the thoroughness of Independent Psychologist's Report which was discussed in an IEP meeting before any transfer of Student. The Independent Psychologist's report prevented an inappropriate placement.

290. The undersigned finds that the lack of transition assessments can be cured by an independent transition assessment and IEP meeting prior to Student turning 14 and a ½.

C. IEP Design Issues- 2012 and July, 2013 IEPs

291. The undersigned, for the most part, denies parent's claims that the 2012 and 2013 IEPs were inappropriate. Furthermore, the undersigned finds: (1) that Parent failed to carry her burden of proof that her opposition to the IEP would have resulted in a denial of FAPE to Student; (2) that the lack of a health plan in the IEP was a harmless procedural error because a health plan existed outside the IEP; (3) that Parent failed to prove related services in the IEP were inappropriate; (4) Parent failed to prove that adaptive equipment and adaptive PE was inadequate; (5) Parent failed to prove a transportation plan within the school is necessary; (6) Parent failed to prove that ESY would have been insufficient; (7) The undersigned finds that a transition plan from [redacted] to [redacted] was necessary, but that it was a harmless procedural error because no transfer occurred, and the July, 2013, IEP corrected this flaw; (8) Parent failed to prove that Student required a secondary transition plan in light of the embedded services in the [redacted] Program and the District's plan to hold an IEP meeting before Student turns 14 and 1/2; (9) Parent failed to prove Student required aquatic therapy; (10) Parent failed to prove physical therapy was inadequate; (11) failed to prove an assistive technology plan was necessary in light of the embedded assistive technology services in the [redacted] Program and [redacted]s program; (12) failed to prove social-emotional services were inadequate; (13) failed to prove parent

training was necessary for Student to benefit from special education; (14) failed to prove that Student needed additional extracurricular programs to receive FAPE.

292. The undersigned finds that the District had no reason to believe that its methodologies in 2012 were inappropriate because Student was making progress in her goals. As such, under the snapshot rule, the District cannot be held liable for not adopting Independent Psychologist's report.

293. The undersigned finds that the District's actions in not adopting Independent Psychologist's proposals wholesale in July, 2013, constitute reasonable exercises of discretion. The undersigned finds the IEP Team considered the report at length, considered all factors related to the provision of FAPE for Student, and the IEP Teams actions constitute an exercise of reasonable judgment. Therefore, in light of Paragraphs 292 and 293, the Parent did not carry her burden of proof on Issue J.

294. The undersigned finds that, for the most part, the IEP goals are appropriate. However, the undersigned finds that by not considering goals for services embedded in the [redacted] curriculum, the District impermissibly interfered with Parent's role in providing FAPE for her child.

295. The undersigned finds that Student lost no educational benefit from not having appropriate goals because the functional and developmental skills were embedded in the curriculum.

296. The undersigned finds that even if the IEPs were inappropriately designed in some ways, the July, 2013, IEP meeting corrected the flaws in the 2012 IEPs before many of the objectionable portions of the 2012 IEPs were implemented.

297. The undersigned finds that the District acted reasonably in choosing [redacted] as it is the least restrictive environment where Student's IEP can be implemented. The undersigned holds that the District properly considered the option on the continuum of placement options and properly exercised a preference for a school closest to Student's home.

D. Location of Services

298. The undersigned finds that [redacted] is an appropriate location of services for Student. The District can implement the IEP at [redacted] and it is not foreseeable that [redacted] will cause a significant deprivation of educational benefit to Student- as long as a transition plan for the transfer is in place. Student's needs are not tied to [redacted]

E. Placement

299. Because the IEP is (largely appropriate); the option on the continuum of placement options is appropriate, and the location of services chosen by the District is

appropriate; the undersigned finds that the placement is largely appropriate- with the exceptions set out above in IEP design issues.

300. The undersigned finds that the transfer does not result in a failure to implement the IEP (even if the placement is appropriate, changes in a location of services can amount to a failure to implement the IEP).

F. Procedural Issues

301. The undersigned finds that whether the District failed to timely file for due process to defend its evaluation is moot. Because I have found the evaluation was not comprehensive.

302. The undersigned finds all issues related to improper notice; timely receipt of IEPs; and tardy responses; are harmless procedural errors which did not interfere with Parent's role in providing her child FAPE.

303. The undersigned finds that the District did not violate the stay put injunction for the reasons set forth in my stay put orders.

304. The undersigned finds there are no evaluation criteria and thus the District did not violate IDEA by failing to turn over evaluation criteria to Parent. The undersigned finds all other evaluation issues to be moot because the stay put orders prevented any transfer and the Parent's independent evaluations will be funded by the District pursuant to this order. Moreover, to the extent there were delays as a result of the District's alleged procedural violations, those delays did not cause the loss of educational benefit of prevent Parent from exercising her role in providing FAPE to Student.

305. Because [redacted] is an appropriate location of services, the undersigned finds that the District had no obligation to include the Parent in collaboratively determining the location of services, and it was not predetermination for the District to insist on unilaterally choosing [redacted] for Student rather than have the IEP Team collaboratively make that choice.

306. The undersigned finds that, because [redacted] is an appropriate location of services, as a matter of law, the IEP Team and District had no obligation to consider [redacted] a private location of services.

307. The undersigned finds that in July, 2013, the IEP Team considered and openly discussed the contents of Student's IEP with Parent; whether [redacted] could implement Student's IEP; and whether the transfer would cause a loss of educational benefit to Student. The undersigned finds that the IEP Team considered Parent's input. The undersigned holds that this is all that is required to avoid a predetermination claim, as determination of a physical location of services is within the administrative discretion of the District. The undersigned finds that the District did not predetermine Student's

placement, and that the Parent mistook the District's rightful insistence on choosing the location of services as stubbornness in determining placement.

308. The undersigned finds that the District allowed Parent meaningful participation in the IEP creation process and that Parent mistook the District's rightful insistence on choosing the location of services as stubbornness in determining placement.

G. Remedies

309. The undersigned finds that compensatory education would be inappropriate because there is no evidence Student suffered loss of an educational benefit.

310. The undersigned finds that a tuition reimbursement order would be inappropriate because there is no evidence the home schooling placement is actually providing Student with FAPE. Similarly, a prospective placement at [redacted] would be inappropriate because the District's public school can provide Student with FAPE.

311. The undersigned finds Parent is entitled to reimbursement for some evaluations and declaratory relief in the form of an IEP meeting to set Student's goals.

VI. Order

312. Within thirty days of this order, the District shall pay for Parent's independent evaluation by Independent Psychologist in the amount of $3,200.00.

313. Within 30 days of this order, Parent shall submit to the District a list of independent transition assessments she wants completed at District expense. The District shall fund the transition assessments as long as the transition assessments do not cost more than $5,000.00.

314. The IEP Team shall meet before Student turns 14 and ½ and prepare a secondary transition plan for Student. The IEP Team shall consider the transition assessments procured by Parent in preparing a transition plan. The independent transition assessments do not prohibit the District from conducting its own transition assessments.

315. Within thirty days of this order, the District shall convene an IEP meeting and determine if Student has any needs for which there is no goal (regardless of whether such needs are met by some embedded service in the FBI curriculum). If any of Student's needs do not have a corresponding goal, the IEP Team shall create a goal to meet Student's needs.

316. Parent's other requests are denied.

317. The District shall provide proof of compliance with this order to the Illinois State Board of Education, Compliance Division, by June 1, 2014.

VII. Right to Request Clarification

318. 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.

VIII. Finality of Decision

319. This decision shall be binding upon all parties.

IX. Right to File Civil Action

320. 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: January 9, 2014

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