

Case Number: 2012-0536

vs. [REDACTED]

Hearing Officer: Harry A. Blackburn

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

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### Impartial Due Process Hearing Decision Cover Page

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District Name  
Superintendent  
Address  
Represented by

[REDACTED]

Phone: [REDACTED]

Parent Name  
Address  
Represented by

[REDACTED]

Phone: [REDACTED]

Date and Timelines

Date of Written Request: 08/02/2012

Date of Pre-hearing Conf: 09/05/2012

Date of Hearing: October 3, 4, 11, 19, and 22, 2012; Hearing Closed with submission of Written Closing Arguments on November 5, 2012 per request of parties.

Date of Decision: November 24, 2012

Summary of Decision

Parents' filed an Amended DPCN on behalf of their kindergarten age (5) child diagnosed with autism and speech and language impairment, on August 2, 2012 challenging an IEP proposed placement from a blended regular education pre-school program at the Student's neighborhood school, into a more restricted kindergarten self-contained, segregated school placement away from the Student's neighborhood school and not with typically developing peers. Hearing Officer found in favor of Parents' allegation that the District denied the Student a FAPE by not properly evaluating and providing properly trained staff and program to address Student's needs and not providing an appropriate educational program in the Least Restrictive Environment.



Conference to obtain legal counsel. The Continuance request included an extension of the 45 day timeline. The Hearing Officer Granted the Continuance request on July 12, 2012. On July 24, 2012 an Appearance was filed on behalf of the Parents' by [REDACTED] Attorney for [REDACTED] Parents' Attorney requested a Continuance to file an Amended Complaint by August 2, 2012. The District agreed and the Hearing Officer granted the request for continuance to August 13, 2012 for Status on the filing of an Amended Complaint on July 26, 2012. Parents', through their attorney, filed an Amended Due Process Complaint on August 2, 2012. The Hearing Officer issued an Amended Complaint Preliminary Scheduling Order on August 3, 2012. The District filed its Response to Parents' Amended DPCN on August 13, 2012. Parents' filed an Emergency Motion For Stay Put on August 10, 2012. A status conference telephone call was held on August 13, 2012 and the Hearing Officer issued a Continuance and Scheduling Order allowing the parties to file their respective pleadings in favor and in response to Parents' Emergency Motion. A status conference call was held on August 17, 2012 and the Hearing Officer granted the Parents' Emergency Motion for Stay Put, ordering the Student to remain at the blended pre-school program with all current supports at [REDACTED], followed by a written Interim Order on August 20, 2012. At the same status conference on August 17, 2012, the parties mutually agreed to hold a Pre-Hearing Conference on September 5, 2012 which was followed up by the issuance of the Hearing Officer's Continuance Order granting the request for continuance and extension of the 45 day time line. On September 4, 2012, the Hearing Officer issued a Pre-Hearing Conference Notice with attachments. A Pre-Hearing Conference was held on September 5, 2012 and the Hearing Officer issued a Pre-Hearing Conference Report ("Order") on September 25, 2012. Hearing dates and location were agreed upon and the hearing was held on October 3, 4, 11, 19, and 22, 2012 at [REDACTED] in [REDACTED] IL. The parties mutually requested, in writing,

a postponement of closing the hearing until filing of written closing arguments on November 5, 2012, to be simultaneously filed by the close of business. Both parties filed their respective written arguments by the close of business on November 5, 2012 and the Hearing was officially closed.

The Hearing Officer's Decision and Order was originally due to be issued on or before Thursday, November 15, 2012. The Hearing Officer held a conference call with the parties on Tuesday, November 13, 2012 to explain his health situation and provided them with a date certain when to expect the written Decision. Due to his ill health, the Hearing Officer explained that the Decision would be delayed until Friday, November 23, 2012. On November 23, 2012, the Hearing Officer sent the parties an e-mail late in the evening informing them that a final draft was completed, but it would not issue until the following morning, Saturday, November 24, 2012, to give time to the Hearing Officer to proof read and prepare the document for proper formatting to mail and to upload into the Illinois State Board of Education Special Data System.

## **II. ISSUES**

Whether [REDACTED] violated the Student's right to FAPE by:

1. failing to provide the Student with an appropriate educational placement from August 2, 2010, to August 16, 2011;
2. failing to develop appropriate, measurable annual goals that address the Student's academic, functional and communication needs from August 2, 2010, to the present;
3. failing to implement IEP goals, including collection data to measure the Student's progress, from August 2, 2010, to the present;
4. failing to provide an appropriate ABA program, including consultation from a qualified behavioral analyst, from August 2, 2010, to August 16, 2011;
5. failing to appropriately evaluate the Student to determine an appropriate educational placement from August 2, 2010, to the present;

6. failing to Provide appropriate augmentative communication devices, including Proloquo2Go, from August 2, 2010, to the present;
7. failing to develop an appropriate behavior intervention plan from August 2, 2010, to the present;
8. failing to provide appropriate accommodation and modifications to address the Student's sensory integration needs, including an appropriate pressure vest from August 2, 2010, to the present;
9. failing to convene an IEP meeting with the required IEP team members on April 20, 2012;
10. failing to provide an appropriate education in the least restrictive environment during the 2012–2013 school year;
11. failing to provide an appropriate ABA program, including the necessary staff training and consultation, from June 4, 2012, through June 28, 2012, and for the 2012–2013 school year; and
12. failing to allow meaningful parental participation in the IEP process from April 29, 2012, to the present;
13. failing to provide appropriate occupational therapy from August 16, 2011 to the present.

### **III. Relief Sought By Parents:**

1. provide the Student with an appropriate educational placement in the general education kindergarten at [REDACTED] with necessary pull-out special education, as well as accommodations, modifications, supplementary aids and related services;
2. develop an appropriate daily ABA program, which employs Discrete Trial Format using errorless learning and includes consultation from a behavioral analyst qualified to design, oversee and evaluate an ABA program;
3. conduct the Verbal Behavior Milestone Assessment and Placement Program;
4. conduct an augmentative communication evaluation;
5. convene an IEP meeting with the required IEP team members to do the following:
  - a. develop appropriate, measurable annual goals that address the Student's academic, functional and communication needs, including a goal for structured peer interaction;
  - b. provide weekly data reports detailing the Student's progress on her measurable IEP goals;

- c. implement the recommendations of the augmentative communication evaluation and provide the recommended devices;
  - d. conduct a functional behavior assessment and develop and appropriate behavioral intervention plan for the Student;
  - e. provide sensory integration accommodations, including an appropriate pressure vest; and
  - f. provide a visual schedule to structure the school day, visual rule cards, and visual systems, including a Visual Time Timer;
6. provide reimbursement for the independent educational evaluation that Parents' obtained from [REDACTED]
  7. provide reimbursement for the 2011 [REDACTED] including transportation to and from the program; and,
  8. provide appropriate compensatory education in each of the Student's deficit areas for the amount of time the Hearing Officer finds that the District denied the Student a FAPE.

#### IV. FINDINGS OF FACT

1. The Student is a five-year old girl with Autism who first became eligible for special education and related services on October 2, 2009, when she was nearly three years old. *PD-15*. At that meeting, the Student's Individualized Education Program ("IEP") team found her eligible for the [REDACTED] Early Childhood Special Education ("ECSE") program under the disability category of Multiple Disabilities. *PD-28*. Through a play-based assessment, she was found to have moderate to severe delays in adaptive behavior, communication skills, general knowledge, gross motor skills and sensory integration. *PD-18-19*.
2. The Student's intellectual functioning was not formally assessed. However, the school psychologist testified at Hearing, that the Student appeared to be functioning within the low range based on clinical observations and developmental expectations. Her general knowledge skills were estimated to fall between the 6 to 8 month range with scattered skills through the 12 month range. (SD, 31; PD 1)

3. The school social worker evaluated the Student's adaptive behavior using the Scale of Independent Behavior-Revised edition, which was completed by both Parents. The Student was in the .1 percentile rank for broad independence, social/communication, personal living skills, and community living skills. She was in the .2 percentile rank for her motor skills. (SD 32, PD 2,3)
4. The physical therapist found that the Student had adequate gross motor skills to participate in classroom and school activities, but would need individual assistance for safety of herself and others. (PD 5)
5. The occupational therapist recommended educational occupational therapy services to assist teaching staff in developing sensory strategies to promote involvement in school tasks and purposeful use of objects. (PD 4)
6. The Student's speech and language skills were in the 6 to 12 month range. She made some utterances that had consonant and vowel combinations. (PD 6, p 19).
7. Pursuant to the District's October 2, 2009 IEP, the District placed the Student at [REDACTED] [REDACTED] in a self-contained [REDACTED] outside of her home district. PD-28.
8. The Student's mother obtained an independent educational evaluation ("IEE") from [REDACTED] [REDACTED] during the summer of 2010, led by [REDACTED] [REDACTED] a psychologist who specializes in educational planning for students with autism. *Transcript*, at 1457:14-22. The evaluation definitively diagnosed the Student with Autism and found several deficits in need of direct instruction. PD-844.
9. The IEE revealed that the Student needed to receive instruction using Discrete Trial Format, a form of Applied Behavioral Analysis ("ABA"), in order to learn. PD-846.

10. The Student's mother provided the IEE to the District and requested that the Student's IEP be amended to include the recommendations. *PD-909a*. On August 19, 2010, the Student's IEP team met to consider the IEE. *PD-58*. The IEP team did amend the program modifications section to include Discrete Trial, Picture Exchange Communication System ("PECS") and a sensory diet, and also added training for the Student's aide. *PD-70*.
11. Over the course of the following year, the Student made little or no progress on her goals and objectives. *PD-118-PD-138; PD-141-176; PD-178-187*.
12. On May 25, 2011, the IEP team reconvened to review the Student's eligibility for special education. *PD-188*. Based on updated medical information, the IEP team determined that the Student's primary disability was Autism and her secondary disability was speech and language impairment. *PD-190*.
13. No new assessments were completed by the District, but the District agreed to place the Student in the blended preschool program at [REDACTED] *PD-204*.
14. During the summer of 2011, the mother enrolled the Student in a two week, one-on-one behavioral based intervention program at the [REDACTED] *Transcript*, at 1559:18-24. During the two week program, the Student made progress to develop functional behavior and communication skills. *Transcript*, at 1446:11. Her therapist administered the Behavioral Language Assessment ("BLA"), which provided baseline data to determine where her ABA program should begin. *PD-879-881*. The results put the Student at an early learner level, meaning she lacked language skills and most other basic learner skills. *PD-876*. However, over the course of the two-week program, she began to communicate her needs and socially interact. *PD-877-878*. Based on her progress with the program, her

- ABA therapist recommended that the Student receive 25-30 hours of ABA instruction each week. *PD-878*.
15. The Student's mother requested that the District provide her with 25 hours of ABA, as recommended by [REDACTED] *PD-939*.
  16. On August 16, 2011, the Student's IEP team met to consider the mother's request and agreed to provide seven hours of individualized, ABA therapy each week with four hours of consultation from [REDACTED] each month in order to implement this program. *PD-216*. In addition, the IEP team agreed to have trained, the Student's teachers, related service providers and aide in ABA and PECS. *PD-237*. The IEP team also agreed that the Student would continue to receive direct occupational therapy. *PD-236*.
  17. The District told the Student's mother that she would have to seek outside occupational therapy sources to provide the required minutes in the Student's IEP because the [REDACTED] did not hire sufficient occupational therapists. *PD-236*. Over the course of the school year, the Student did not receive in-school consultation from an occupational therapist and no occupational therapist attended IEP meetings. *Transcript*, at 460:17.
  18. The Student began the school year in August 2011 at Eastland in the Blended Preschool Program. *PD-231*. The Student's schedule was as follows: on Monday through Thursday, the Student would begin her school day with one-hour of ABA instruction. *PD-245-246*. Each day, the Student would also spend more than an hour participating in centers and gross motor time with typically-developing preschool students. *Transcript*, at 474:15-17. On Fridays, the Student received ABA instruction. *Transcript*, at 475:6-7.
  19. The Student made significant progress while in the District's blended preschool program. *Transcript*, at 58:9.

20. On September 26, 2011, the IEP team reconvened to review the progress the Student had made over the first month of school. *PD-254*. In approximately one month's time, the Student had finished Phase One of PECS and had mastered some of the discrete trial components. *PD-259*.
21. On April 20, 2012, the Student's IEP team conducted her triennial reevaluation and met to discuss her placement. *PD-380*. The IEP team made the decision to move her to a [REDACTED] Life Skills Program for kindergarten, where she would have only 20 minutes of participation with same-aged, typically developing students each week. *PD-397*. No occupational therapist was present at the IEP meeting. *PD-380*. The IEP team also discontinued consultation with [REDACTED] for ABA training.
22. The Student's mother initially agreed with the placement change, when she learned more about the District's responsibility to provide instruction in the least restrictive environment, she requested an IEP meeting to discuss her concerns about the Student's new IEP placement. *PD- 956-957*.
23. The District denied the Student's mother's request for the IEP meeting stating that all issues, including placement, had been discussed and resolved. *PD-958*.
24. The Student has continued to attend [REDACTED] in the Blended Preschool Program as her stay-put placement.

**V. Burden of Proof**

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

district to present evidence at hearing that it has properly identified and evaluated the nature and severity of the student's suspected or identified disabilities including eligibility for special education and related services. 105 ILCS 5/14-8.02a(g-55). *Kerry M. v. Manhattan*, 106 LRP 58547 (N.D. Ill. 2006).

## **VI. DISCUSSION AND CONCLUSIONS OF LAW**

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

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

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

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

Based upon the testimony and documentary evidence produced at the Hearing, the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are follows.

1. **Whether [REDACTED] failed to provide the Student with an appropriate educational placement from August 2, 2010, to August 16, 2011; and Whether [REDACTED] failed to provide an appropriate ABA program, including consultation from a qualified behavioral analyst, from August 2, 2010 to August 16, 2011?**<sup>2</sup>

Parents' Position

- i. *The District failed to provide appropriate and intensive instruction required by the IEP.*

Parents' claim that from August 2, 2010 to August 16, 2011, the District did not provide a methodology that was based on peer-reviewed research for the Student. This, in light of the Student's failure to make progress on her goals and objectives during the 2010-2011 school year, the District did not vary its methodology to select "an educational method most suitable to the child's needs." *Lachman*, 852 F.2d at 296. Although the Student's IEP stated that she was to receive Discrete Trial Training, as recommended by the [REDACTED] IEE, testimony indicates that this was never provided. Furthermore, as the Student continued to not progress in several critical skills, such as matching colors and objects, the District did not vary its methodology in order for her to make progress. In Parents' view, by continuing to allow the Student to fail with these goals quarter after quarter, the District has denied the Student a FAPE.

The Student's IEP team revised her IEP on August 19, 2010, as a result of the IEE that

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<sup>2</sup> Issue 1 encompasses Parents' Issues 1 and 4 as per their Amended Due Process Complaint and the Hearing Officer's Pre-Hearing Conference Report.

the Student's mother obtained from [REDACTED], to include instruction using Discrete Trial. *PD-70*. This instructional methodology had been recommended by the IEE as necessary for the Student to make progress. *PD-846; Transcript*, at 212:10-22. However, the IEP stated that training in this method would be provided solely to the Student's aide. *PD-70*. The Student's, special education teacher, [REDACTED] did not have training in this methodology and did not obtain training after it was written into the IEP. *Transcript*, at 404:4-5. [REDACTED] testified that there was no certified teacher or outside consultant overseeing a Discrete Trial Program. *Transcript*, at 408:5,11. Although the Student's aide attended training on Discrete Trial format, this training was not sufficient for implementing a Discrete Trial Program, as required in the Student's IEP. *Transcript*, at 222:7-13.

During the following school year, when the Student did not receive instruction using the recommended Discrete Trial Program, she continued to not make progress in many of her skills. [REDACTED] testified that there were many objectives on which she collected data where the Student made no progress and regressed in some areas. *Transcript*, at 426:23-444:1. Parents' aver, that despite the lack of progress, [REDACTED] did not request an IEP meeting in order to consider whether to alter the method of instruction that she was using for the Student and she did not request additional support for the Student's instruction. *Transcript*, at 435:17-436:11,440:17-23, 444:5. She continued to record the Student's failure, but did not attempt any new instruction. The Student's mother states that [REDACTED] did not provide her with these detailed data sheets that recorded the Student's failure to make progress on several objectives. *Transcript*, 1401:20.

In spite of [REDACTED] documentation of the Student's failure to make progress, when the IEP team met on May 25, 2011 and the Student's mother requested an intensive ABA program, the District did not agree to alter its methodology. *PD-205*. The IEP states, "the educators emphasized that the Student has made gains and advances via this instruction," referring to PECS, Discrete Trial and TEACCH. *PD-205*. There is no mention in this documentation of the several objectives where the Student had made no progress or very little progress.

Following the May 2011 IEP meeting, the Student's mother enrolled her child in a two week, one-on-one ABA program at [REDACTED] *Transcript*, at 1559:18-24. During the two

week program, the Student made progress to develop functional behavior and communication skills. *Transcript*, at 1446:11. Her ABA therapist, ██████████ administered the Behavioral Language Assessment ("BLA"), which provided baseline data to determine where her ABA program should begin. *PD-879-881*. Importantly, ██████████ assessment found the Student to be at a very similar level to ██████████ evaluation a year earlier. *Compare PD-839-847 with PD-875-881* (explaining that the Student could not make requests, could make only a few sounds, and would follow few instructions). When the Student began receiving ABA, she began making progress immediately. ██████████ testified that she noticed an increase in skills as a result of the Student's attendance in the two-week program. *Transcript*, at 452:20. She also documented her enthusiasm for the Student's new skills retention. *PD-1240* ("She's made so many gains over the summer!"); *PD-1244* ("the Student continues to show off all of her new and emerging skills.").

It was not until the IEP meeting on August 16, 2011 when the District agreed to provide an appropriate ABA program that would be properly overseen by a consultant with the necessary expertise to implement the program. *PD-237*. The Parent concludes that the District denied the Student a FAPE as a result of its failure to select a methodology that allowed the Student to make progress until August 16, 2011.<sup>3</sup>

- ii. *The District did not provide the appropriate staff training to implement the Student's IEP.*

██████████ testimony reflected that she did not have the training to implement the Discrete Trial Program. *Transcript*, at 404:4-5. The Student's aide was provided with training in discrete trial, but this training would not provide her with the necessary expertise to oversee the necessary program for the Student to make progress. *Transcript*, at 222:7-13. Furthermore, none of the Student's teachers, aides, or related services had training regarding the inclusion of students with autism in the general education setting. Parents' conclude, the Student was denied a free appropriate public education, as a result of the inappropriate and lack of staff training to

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<sup>3</sup> Parents' *Brief of Closing Argument*, (p. 19-22).

implement their daughter's IEP.<sup>4</sup>

District's Position

The District states that when the Student was initially found eligible for special education services, the academic, developmental and functional needs stemming from the Student's disabilities were summarized as follows, "the Student needs a predictable, pictured, structured routine with extra attention to physical safety, sensory strategies, speech and language therapy, communication strategies, and extra and repeated opportunities to engage with peers and to increase functional use of objects. The Student needs repeated exposure to pre-readiness skills." (PD 6, p. 19) After identifying her present level of achievement and functional performance, four goals were agreed upon which addressed her functional and pre-readiness skills, including improving functional communication skills, increasing time and attention to developmentally appropriate tasks, increasing purposeful use of objects, and participating in and following school routines. the Student was placed in the [REDACTED] early childhood special education program ("ECSE") in [REDACTED] for the 2009-2010 school year based on her eligibility and her goals. The IEP was implemented on November 10, 2009 and the school year ended on May 24, 2010. The District claims that towards the end of that school year, the Student's mother informed the teacher that she was not interested in ESY for the Student in the summer and she did not want to have an IEP meeting in the Spring 2010. (PD 79, p. 917). On May 24, 2010, [REDACTED] sent a notification of IEP amendment where the OT services were increased from 60 minutes per month consult to 90 minutes per month direct and consult, which was requested by the occupational therapist. (SD, 19, 18; PD 12, p.48, 50) Additionally, the teacher planned to implement PECS in the Fall because the Student had developed appropriate skills to begin. (PD 119, 1040). The District states that there was no consideration of a change of placement prior to the 2010-2011

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<sup>4</sup> Ibid, (p. 22-23)

school year since there was “only an amendment of the IEP.” (District *Closing Argument*, p. 11.)

The team met early the following school year on August 19, 2010, to update the IEP that would end October 2, 2010. The team included both Parents, the LEA Representative, Special Education Teacher, Speech Language Therapist, Social Worker, Occupational Therapist, Psychologist, Nurse, advocates [REDACTED] and [REDACTED] from [REDACTED] and the ECSE program supervisor. The purpose of the conference was IEP only. At that time, the Student’s primary disability was Multiple Disabilities and her secondary disability was Speech or Language Impairment. The student strengths section was amended to add further information from the Student’s mother regarding the Student’s strengths. (PD 14, p. 60) The Student’s Mother also provided recommendations from [REDACTED], and a list of 82 gains she wanted the Student to make over the 2010-2011 school year. (PD 74, p.75-76) The four annual goals and objectives from her initial IEP were not amended and remained the same until her annual review in October 2010. The supplementary aids and services was amended to include discrete trial, PECS, and sensory diet for additional supports needed, and to include training for school personnel in areas such as discrete trial, autism spectrum disorder, and PECS. (PD 14, p. 70) The Student’s occupational therapy was increased from 90 minutes per month to thirty minutes per week. Speech Therapy was increased from sixty minutes per week to ninety minutes per week. (PD 14, p. 69) At that time, the team determined that the ECSE program at [REDACTED] continued to be the placement that would best meet the Student’s needs.

The Student’s mother requested that the annual IEP be held in mid-October instead of by the October 2, 2010 end date. (PD 85; PD 120, p. 1061) The annual IEP was held on October 14, 2010. The Student’s mother, the LEA representative, the special education teacher, the speech pathologist, and the occupational therapist attended. The general education teacher was excused

from the conference. (PD 17, p. 99,101) At that time, the Student's primary disability was still Multiple Disabilities and her secondary disability was Speech/Language. The District summarized how the IEP was amended:

"revising the student's strengths section to reflect her current strengths; the results of recent or other assessment data section was revised to provide detailed information on specific progress and deficits in all developmental areas; the parental concerns section was revised to document the Student's mother's current concerns; her academic, developmental and functional needs stemming from student's disability section was revised to add structured teaching-type presentation; the consideration of special factors section was updated to add a suction cup bowl for self-feeding at school; the autism consideration section was revised to add certain supports for the Student's responses to sensory experiences, to add visual schedules for needs resulting from resistance to environmental change or change in daily routine, and to add information on updated medical and diet needs." (District *Closing Argument*, p. 12)

The Student's goals and objectives were revised: goals 1 and 2 remained in place with revised objectives, goal 3 and its objectives remained in place (formerly goal 4 in 8/2010 IEP), and goals 4-6 were new goals and objectives; the supplementary aids and services section was updated to document that the Student's mother and the Student's individual aide attended a two-day discrete trial training at Little Friends Center for Autism. (PD 17, p. 103) The conference notes documented additional information regarding general IEP notes, Health/Medical information, student information and annual goals.

The District avers that the Student's mother indicated she did not understand the progress reports and the team discussed how to read and understand the reports and how percentages and data are collected and reported. Additionally, the District claims the Student's mother also asked about behavioral goals, and the team explained that the Student exhibited behaviors at her developmental level and that behavior was not a concern at that point. The team explained the procedures if behaviors do impede her learning or the learning of others. (PD 17, p. 116, 104) The IEP team continued placement at the [REDACTED] ECSE housed in [REDACTED] to best meet the Student's needs identified through her IEP beginning October 18, 2010 to October 4, 2011. (PD 17, p. 99, 114)

The Student's mother requested an eligibility meeting in the Spring 2011 based on new medical information. (PD 91; Tr. 10/11/12 p. 741-742, 881; Tr. 10/19/2012, p. 1025) She also asked that the ESY meeting be held at the same time. (PD 91, 926-927, 1204) The IEP meeting was held on May 25, 2011 to discuss identification of needed assessments, eligibility, IEP, and ESY. The Student's Parents, the LEA representative, the special education teacher, the [REDACTED] Administrator, social worker, psychologist, the student's aunt, and [REDACTED] an advocate from NICIL attended the meeting. (PD 24, p.188) The speech and language pathologist, general education teacher, and occupational therapist were excused from the meeting. (PD 24, p.207) Additionally, the Student's mother waived the 10 day notice. (PD 24, 209) Based on the medical information provided, the team changed the primary disability to autism and the secondary disability remained the same. (Tr. 10/11/12, p. 743)

Additionally, due to the Student's mother's request for consideration of change in placement and because of the discussion that evolved at the meeting about the Student's gains and greater awareness of her surroundings, a change of placement to the blended preschool housed at [REDACTED] was made for the 2011-2012 school year. (Tr. 10/4/2012, p.449-450) The IEP meeting became an annual review with the plan to meet to fine tune the IEP and possibly amend the IEP during the week of August 15, 2011 prior to the school year. (PD 24, 204) The team recommended ESY for the summer of 2011, and the goals and plan for ESY were developed. The occupational therapist's service summary and extended school year recommendation was provided in writing since she was excused from the meeting. (PD 87)

The District concludes that there is no evidence that it failed to comply with the procedures set forth in the IDEA or that the IEP failed to enable the Student to receive an educational benefit in the least restrictive environment from August 2, 2010 to August 16, 2011. The District further

states that that the documentary and testimonial evidence shows that the IEP was reasonably calculated to confer an educational benefit and that her IEP goals drove the placement decision for the 2010-2011 school year and the summer 2011 ESY. It was not unreasonable to place the Student at the [REDACTED] ECSE program in [REDACTED] during August 2, 20120 to August 16, 2011. Nor was it unreasonable to continue with the ESY program in June 2011 until her new placement began at the blended preschool program in August 2011. Deference should be given to the trained educators in this placement decision.<sup>5</sup>

#### Hearing Officer Conclusion

The Parents' position rests on the IDEA's premise that every child is entitled to a FAPE, which is defined, in part, as education provided in conformity with the child's IEP. *20 U.S.C. § 1401(9)(d)*. The IEP sets forth all special education and related services to be provided to the student and educational goals for the student each year. *20 U.S.C. § 1414(d)*. From this, a student's educational placement must be provided in accordance with the student's IEP and include all of the instruction and services contained within that document. *See James*, 642 F. Supp. 2d at 833. Failure to provide the instruction and services listed on the IEP constitutes a denial of a student's right to a FAPE. Parents' aver that while their child was a student at [REDACTED] she consistently failed to make meaningful progress. As a result, the Student has been denied a FAPE.

In support of the above stated argument, Parents' concede that although IDEA does not mandate that schools utilize a specific methodology with students, the IDEA states that the "IEP must include a statement of special education, related services and supplementary aides and services *based on peer-reviewed research to the extent practicable.*" 20 USC §1414(d)(1)(A)(I)(IV) (emphasis added). Parents' point out that the Seventh Circuit has noted that, "[t]he primary responsibility for formulating the education to be accorded a handicapped child, *and for choosing the educational method most suitable to the child's needs*, was left by the Act to state and local educational agencies in cooperation with the parents or guardians of the child." *Lachman v. ISBE*, 852 F.2d 290, 296 (7th Cir. 1988). Questions regarding educational

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<sup>5</sup> District Closing Argument (p. 10-14)

methodology must be based on "the child's individual characteristics, including demonstrated response to particular types of educational programs" *Deal v. Hamilton Cty. Bd. Of Educ.*, 392 F.3d 840 (6th Cir. 2004).

Parents' further aver that, while it is the local and state official's task to select *which* methodology, *some* type of methodology must be used with a student, and it must be the methodology that is "most suitable" to that student's needs. *See Lachman*, 852 F.2d at 296.

The IDEA requires that each IEP include "a statement of the *program modifications or supports for school personnel* that will be provided for the child...to be involved in and make progress in the general education...and to be educated and participate with other children with disabilities and nondisabled children." 20 U.S.C. 14(d)(1)(A)(i)(IV)(emphasis added). This requirement includes training staff in the components of the student's IEP and the use of accommodations and modifications for the student to participate in the regular education classroom. Furthermore, the IDEA's implementing regulations mandate that "each teacher and provider...is informed of his or her specific responsibilities related to implementing the child's IEP; and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." 34 C.F.R. 300.323(d)(2). Failure to provide appropriate training for teachers and providers is a denial of the student's right to FAPE. *See Evergreen Park School District 124*, 106 LRP 64583 (ISBE August 2006) (issuing order for staff training in Down's Syndrome due to staff failure to know strategies for students with Down's Syndrome); *Damian J v. School Dist. of Philadelphia*, 49 IDELR 161 (E.D. Pa. 2008) (the district's failure to assign a qualified teacher with training in IEP implementation to the student's emotional support class amounted to a denial of FAPE).

This Hearing Officer finds that the Parents have met their burden on this issue and the District has failed to provide the Student with an appropriate educational placement from August 2, 2010 to August 16, 2011. The Parents' were able to show that little to no educational benefit commensurate with *Rowley* was derived by the Student from the IEP in place and could not expect to be implemented properly given the lack of sufficiently trained staff to implement Direct Trial Techniques. While District staff may have been well intentioned, they were not qualified to

properly administer and implement the IEP they themselves developed. The District was unable to demonstrate, with sufficient and reliable certainty, its ability to properly assess what was needed to address this Student's multiple needs and equally important, to provide the trained staff in Discreet Trial, to implement the goals and services it believed were necessary to implement the IEP it developed.

The origins of the factors in determining an IEP's appropriateness that the courts have cited in reviewing the adequacy of an IEP, and of a parentally proposed program, can be found in IDEA itself, and more significantly in the Rowley test. First, the IEP process must be truly individual in its assessment of the child's needs and in the design of the program and services to meet those needs. Second, the people who will be responsible for explaining and for implementing the services must have the training and qualifications to do so. And perhaps most important, the program must have the prospect for benefiting the child educationally, most significantly as judged by the child's experience.

Treating each child with a disability as an individual for purposes of evaluation and educational planning is a cornerstone concept of IDEA, and part of what dramatically distinguishes it from the group approach to public educational planning that most students experience.<sup>6</sup> Where the school district fails to offer a program that addresses clearly identified needs, its IEP has been found inappropriate.<sup>7</sup> Qualified and knowledgeable school personnel are

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<sup>6</sup> 20 U.S.C. § 1414 (2000). *Rowley* also referenced the need for "individually designed" services and "personalized instruction." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201, 203 (1982).

<sup>7</sup> A recent, significant case re-characterized what the district court had viewed as a methodology dispute over ABA and TEACCH, and invoked the "due weight" owed to the administrative hearing decision to reinstate a hearing officer's determination that the school district's IEP using the TEACCH program was inappropriate. *County Sch. Bd. of Henrico County v. Z.P.*, No. 03-2338, 2005 WL 327026 (Feb. 11, 2005), *rev'g* 258 F. Supp. 2d 701 (E.D. Va. 2003). The hearing officer had found that the autistic child's individual needs were so severe that the proposed class size would not allow "the amount of direct, one-on-one instruction that would be necessary to keep him focused and to stop him from engaging in self-stimulatory behavior," and would therefore offer him no educational benefit. *Id.* at \*6. The appellate court disclaimed that the dispute was one over methodology, in light of the administrative findings that

another important factor.<sup>8</sup> For example, a district court upheld a hearing officer's finding that an IEP was inadequate, and ordered reimbursement of the parents' home-based DTT program where the school produced no witnesses with training in autism.<sup>9</sup> Finally, whether an educational benefit has been achieved is the last factor.

When it comes to judging the appropriateness of an educational program, the best evidence is success. Conversely, even a procedurally perfect plan that accurately describes the child and proposes a carefully conceived array of services, if it has been tried and found wanting, will be a hard sell to a hearing officer or court. In theory, the appropriateness of an IEP is to be judged as of the time it is proposed, rather than in hindsight.<sup>10</sup> But given the length of time a case takes to rise through the administrative and judicial review process, there may be several years of IEPs at issue by the time a decision is due.<sup>11</sup> The facts bear out the lack of success the Student experienced by the District's failure to implement the IEP utilizing appropriately trained staff.

2. **Whether [REDACTED] failed to develop appropriate, measurable annual goals that address the Student's academic, functional and communication needs from August 2, 2010 to the present?**<sup>12</sup>

Parents' Position

- i. *The Student's present levels of performance for her goals are not appropriate statements of her levels of performance for the goals.*

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the school district program was inappropriate. *Id.* at \*8. Instead, the court chastised the district court for rejecting the administrative hearing officer's findings without a legitimate basis to discount or disregard them. *Id.* See also Choutka, *supra* note 167, at 100; Etscheidt, *supra* note 167, at 53-61; Yell & Drasgow, *supra* note 86, at 213.

<sup>8</sup> *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004).

<sup>9</sup> *T.H.*, 55 F. Supp. 2d at 838 n.9; see also *G. ex rel R.G. v. Ft. Bragg Dependent Schs.*, 343 F.3d 295, 301 (4th Cir. 2003) (noting as a significant issue that the IEP did not provide for the participation of a Lovaas-certified consultant).

<sup>10</sup> As one court put it: [A]n [IEP] is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993)).

<sup>11</sup> For example, in *Bd. of Educ. of County of Kanawha v. Michael M.*, 95 F. Supp. 2d 600, 602-04 (S.D.W. Va. 2000), the child was diagnosed with autism at age three and was eight at the time of the district court decision, which finally determined his challenge to IEPs from 1996 through 1999 for failing to include a supplemental home-based Lovaas program

<sup>12</sup> Parents' Issue 7 from Amended DPCN, Whether [REDACTED] failed to develop an appropriate behavior intervention plan from August 2, 2010, to the present, is addressed within

From the Student's initial entry to special education, the Student's IEP has lacked measurable annual goals. Her goals include words such as "increase" as points of measurement. For example, the Student's August 19, 2010 IEP sets a goal that "the Student will increase time and attention to developmentally appropriate tasks and activities." *PD-65* The Parents claim that this broad goal is not measurable as Parents' claim that there is no point for how much she will increase her attention and there is no clarification as to which tasks are developmentally appropriate. Furthermore, there is no baseline for her attention from which to measure whether she has increased. The present level of performance for that goal simply states, "the Student has difficulty maintaining attention to tasks." *PD-65*. Similarly, the Parents' aver that the Student's remaining goals with vague statements about the Student being able to "increase" some skill are flawed.

When the Student's goals do reference actual measurable criteria, there is no specific statement regarding her present level of performance based on that criteria. For example, the Student's October 14, 2010 IEP sets a goal that, "the Student will improve functional communication skills by at least 9 months as measured by informal checklists." <sup>13</sup> *PD-106*. Although this provides measurable criteria for this goal, there is no statement about the Student's current performance on the informal checklist. This present level states, "the Student's speech and language skills are improving. She is much more aware of her environment. She is interested in more of the daily activities in the classroom. The Student is able to use her match schedule. She is more verbal and has used a few words at school." *PD-106*. There is no reference to her level in months on the informal checklist that will presumably be used to measure the Student's progress. The Parents' conclude that it is not measurable.

Parents' acknowledge that the Student's goals do contain objectives that could be measurable if there were present levels of performance to provide a baseline for her performance. Continuing with the same goal for functional communication, there is an objective that "the Student imitate sounds and words at least 2 times a day at school" in 85% of the days. *PD-106*. However, there is no statement of the Student's present level for imitating sounds and words. Similarly, the Student has an objective, "given a field of 2 objects, the

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<sup>13</sup> Parents' point out that in three years of attending school, this has always been the Student's annual goal for speech and language.

Student will point to or give the object when shown a picture" in 80% of the trials. PD-106. Also, there is no statement about the Student's current level of performance with this objective and without accurate present levels of performance. Parents' state that the IEP goals cannot be measurable.

- ii. *The Student's IEPs did not contain appropriate goals to address the Student's behavioral difficulties or develop a behavior intervention plan.*

Parents' claim, none of the Student's IEPs has ever contained a behavior intervention plan or specific, measurable goals to instruct her to develop skills to self-regulate her behavior and attend to large group activities. [REDACTED] the Student's aide during the 2011-2012 school year and [REDACTED] the social worker who evaluated the Student, testified that a functional analysis was never conducted of the Student's behavior. *Transcript*, at 555:19, 1054:17-1055:18. [REDACTED] testified that she did not conduct a functional analysis because the Student's behavior was developmentally appropriate and not in need of intervention, despite her behavior not being age-appropriate. *Transcript*, at 1054:17-1055:18. Parents' conclude that the Student is in danger of being sent to a segregated school setting for reasons including their daughter not having appropriate behavioral skills. Therefore, Parents' believe, the District has denied her a FAPE by not providing her with these goals and a BIP.

#### District's Position<sup>14</sup>

The District, in its closing argument,<sup>15</sup> highlights that the Student's "goals were developed in her initial IEP on October 2, 2009 and implemented on November 10, 2009. The IEP was amended on May 10, 2010 to increase the Occupational Therapy ("OT") minutes only." Prior to the start of the 2010-11 school year on August 23, 2010, an IEP conference was held to update minutes for related services to consider the list of goals from recommendations from [REDACTED]. The annual goals *remained the same from the initial IEP*. [emphasis added]. The District alleges that the Parents' violation claim falls outside the 2 year statute of limitations period and therefore

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<sup>14</sup> The Hearing Officer overruled a 2 year statute of limitation objection raised by the District when the Parents' attorney asked questions of a witness regarding the initial eligibility IEP of Student allowing questions to be asked for "historical" purposes only. The District admits, however, in its argument that the initial IEP annual goals remained the same for the school year in which the time period being raised by the Parent is properly within the 2 year statute of limitation period.

<sup>15</sup> *Parent Brief of Closing Argument, p. 14 et al.*

they are barred from being raised since they did not raise the issue when they “knew or should have known” of the alleged action, the allegation of a failure to develop measurable annual goals from the IEP developed on October 2, 2009 is improper. In the alternative, the District provides arguments in favor of their conclusion that the annual goals as written are appropriate.

*a. August 2, 2010 to October 17, 2010 IEP Goals*

“Goal 1 states the Student’s present level of academic achievement and functional performance as follows: the Student’s speech and language skills are in the 6 to 12 month range as shown during the play-based assessment. The Student explored toys in the room. She had some eye contact and did play with a toy for a very short period of time. (PD 6, p. 22) There is no question that the present level was appropriate based on the evaluations. Therefore, the communication goal of “The Student will improve functional communication skills by at least 9 months as measured by informal checklists” was developed. The goal is measurable since it is to increase functional communication by at least 9 months. The speech and language pathologist testified that she measured for an increase in functional communication using the Rosetti Infant- Toddler scale. (Tr. 10/4/2012 , p. 585) The short term instructional objectives/benchmarks included: The Student will participate in vocal play to increase vocalization/word production 90% of the time. The procedure was to measure through data charting and observation documents. The next instructional objective/benchmark was: The Student will look toward the speaker when her name is called/when a direction is given 85% of the time. The procedure was to measure through data charting and observation documents. The third instructional objective/benchmark was: The Student will use an object/picture schedule to transition from activity to activity throughout the day 95% of the time. The procedure was to measure through data charting and observation documents. The fourth instructional objective/benchmark was: The Student will make choices from 2 or 3 objects when asked 80% of the time. The procedure was to measure through data charting and observation documents. The fifth instructional objective/benchmark was: The Student will use words/pictures/objects/ a communication device to communicate and/or to participate in classroom activities 70% of the time. The procedure was to measure through data charting and observation documents. Each of these objectives are smaller, manageable learning tasks to master on the way to achieving growth in functional communication skills. Each has objective criteria (90% of the time; 80% of the time) and a procedure to measure progress. The objectives were scheduled to be measured quarterly. The speech and language pathologist further testified that she developed the goal and objectives to increase The Student’s functional communication skills as she was nonverbal when she entered the preschool program. (Tr. 10/4/2012, p. 582-587)

For Goal 2, the present level of academic achievement and functional performance was: The Student has difficulty maintaining attention to tasks. She is severely delayed in pre-readiness skills and needs to improve attention to tasks to increase ability to learn new tasks. The Student's evaluations support this statement of present level. The annual goal to address this pre-readiness and functional area was: The Student will increase time and attention to developmentally appropriate tasks and activities. The short term instructional objective/benchmark included: Given a predictable, pictured, structured routine with a low student: staff ratio, shortened verbal directives, repeated and extra practice, structured teaching-type presentation, and sensory strategies, The Student will engage in presented tasks 50% of the time. The procedure was to measure through checklist and observation documents. The second instructional objective/benchmark was: Given a predictable, pictured, structured routine with a low student: staff ratio, shortened verbal directives, repeated and extra practice, structured teaching-type presentation, and sensory strategies, The Student will stay within a designated area for 5 minutes without refusal, running, or protest 2 out of 4 attempts. The procedure was to measure through observation documents. The third instructional objective/benchmark was: Given a predictable, pictured, structured routine with a low student: staff ratio, shortened verbal directives, repeated and extra practice, structured teaching-type presentation, and sensory strategies, The Student will point to 5 body parts upon request (eyes, nose, mouth, ears, belly) 2 out of 4 attempts. The procedure was to measure through a checklist. Each of these objectives are smaller and manageable learning tasks of the annual goal to increase time and attention to tasks and activities. They include objective criteria (50% of time, 2 out of 4 attempts), the evaluation procedure, and the schedule for how often the objectives will be measured (quarterly). The District does recognize that the annual goal itself may not provide a means for measuring how much progress the Student is making, and would be considered a technical violation. However, the annual goal is appropriate for the Student's needs and the short term objectives contain discrete, measurable components of the annual goal.

For Goal 3, the present level of academic achievement and functional performance was: the Student has difficulty using objects purposefully and often mouths toys to explore and interact with them. The annual goal to address this deficit area was: the Student will increase purposeful use of objects. The first instructional objective/benchmark was: Given a predictable, pictured, structured routine with a low student: staff ratio, shortened verbal directives, repeated and extra practice, structured teaching-type presentation, and sensory strategies, the Student will give one object upon request 2 of 4 requests. The procedure to measure was by data charting. The second instructional objective/benchmark was: Given a predictable, pictured, structured routine with a low student: staff ratio, shortened verbal directives, repeated and extra practice, structured teaching-type presentation, and sensory strategies, the Student will make a choice between 2 objects presented 75% of the time. The procedure to measure was by observation documents. The third instructional objective/benchmark was: Given

a predictable, pictured, structured routine with a low student: staff ratio, shortened verbal directives, repeated and extra practice, structured teaching-type presentation, and sensory strategies, the Student will imitate the use of single use objects (for example pull lever, move ball, stack block) 50% of the time. The procedure to measure this goal was through observation documents. Each of these objectives are smaller and manageable tasks of the annual goal to increase purposeful use of objects. Each includes objective criteria (75% of the time; 2 of 4 requests), the evaluation procedure, and the schedule for how often the objectives will be measured (quarterly).

Goal 4 of the initial IEP states the present level of academic achievement and functional performance as: the Student has difficulty maintaining focus and participating in routines. The annual goal to address this area was: the Student will participate in and follow school routines. This describes the skill that the Student will demonstrate and the extent to which it will be demonstrated. The first objective/benchmark was: Given a predictable, pictured, structured routine with a low student: staff ratio, shortened verbal directives, repeated and extra practice, structured teaching-type presentation, and sensory strategies, the Student will go to a designated area upon request with minimal physical assistance 50% of her daily transitions. The procedure to measure was through observation documents. The second instructional objective/benchmark was: Given a predictable, pictured, structured routine with a low student: staff ratio, shortened verbal directives, repeated and extra practice, structured teaching-type presentation, and sensory strategies, the Student will move objects/pictures on her individual schedule with no physical assistance 50% of attempts. The procedure to measure was through observation documents. Each of these objectives are smaller and manageable tasks of the annual goal to participate in and follow school routines. Each includes objective criteria (50% of transitions; 50% of attempts), the evaluation procedure, and the schedule for how often the objectives will be measured (quarterly). (District's *Closing Argument*)

The District avers that even if the Hearing Officer finds that the claim for failing to develop appropriate, measureable annual goals from August 2, 2010 to October 18, 2010 is not outside the statute of limitations, the goals developed in the initial IEP addressed the Student's needs as assessed through the evaluations, and were appropriate and measureable.

b. October 18, 2010-October 14, 2011

At the Student's annual review in October 2010, her goals and objectives were reviewed and revised. In Goal 1, her present level of academic achievement and functional performance was: the Student's speech and language skills are improving. She is much more aware of her environment. She is interested in more of the daily activities in the classroom. The Student is able to use her

match schedule is more verbal and has used a few words at school. Her annual goal to address this deficit area was: the Student will improve functional communication skills by at least 9 months as measured by informal checklists. While the goal is stated the same as the previous IEP, the speech and language pathologist explained that the Student was to improve by an additional 9 months as the team was still trying to have the Student perform skills at home and school that were more functional related to following directions, increasing safety, and similar type situations. (Tr. 10/4/2012, p. 592-593) All of the instructional objectives/benchmarks were changed from the previous IEP. The four instructional objectives contain objective criteria (80% of the time, 85% of the time), the evaluation procedure (data charting, observation documents), and a schedule to measure the progress for each objective (quarterly). (PD 17, p. 106) Each objective is a smaller and manageable task of the annual goal to improve functional communication skills by at least 9 months based on the Student's stated present level.

Goal 2 states the Student's present level of academic achievement and functional performance, showing that she has made improvements of time and attention to tasks, providing an example of tasks she has mastered, and noting the benefits of structured teaching for the Student. While the annual goal remains the same as the previous IEP, it does provide that structured teaching will be used to teach the Student new skills. The District does recognize that the annual goal itself does not provide a means for measuring how much progress the Student is making, and would be considered a technical violation. However, the annual goal is appropriate for the Student's present level, and the short-term objectives contain discrete measureable components of the annual goal. While the instructional objective to point to 5 body parts remains in the new IEP, the other two instructional objectives were revised. Each contains objective criteria, an evaluation procedure, and a schedule. (PD 17, p.107)

Goal 3 is a continuation of Goal 4 from the initial IEP. The present level of academic achievement and functional performance was updated to show that she had difficulty with managing her routines independently. The annual goal was revised to state: the Student will become more independent with participation in school routines. The duration of this goal is for the year the IEP is in effect. The goal describes the skill that the Student will demonstrate over the next year and the extent to which it will be demonstrated. The instructional objectives/benchmarks remained the same as the previous IEP. (PD 17, p. 108) However, as set forth earlier an IEP is not inappropriate simply because it does not change significantly on an annual basis or because a student does not meet her goals. The continuation of this goal, mastery of which will improve her functional ability to participate in the educational process, did not deprive the Student of educational benefits.

Goals 4 through 5 were new goals added to the Student's IEP. Each one of the goals identifies the present level of academic achievement and functional

performance. Each one of the annual goals indicates what the Student is expected to be able to do by the end of the year in which the IEP is in effect. Each one describes the skill the Student will demonstrate and the extent to which it will be demonstrated. There are instructional objectives that break down the skill necessary to achieve the annual goal into discrete steps. Each one includes evaluative criteria, evaluation procedures, and a schedule. (PD 17, p. 109-111). While the state investigator found an annual goal in the Student's April 2012 IEP for toileting, which is similar to Goal 5 in this IEP was not measurable, the District argues that Goal 5 does describe the skill that the Student will demonstrate (use toilet) and the extent to which it will be demonstrated (at school). (District's *Closing Argument*)

In summary the District concludes that, annual goals in the Student's IEP for October 18, 2010 to October 14, 2011 addressed the Student's academic, functional and communication needs, and were appropriate and measurable. Any technical violations for a portion of the annual goals did not arise to the level of a denial of FAPE. The objectives for every goal were appropriate and overall the annual goals and objectives conferred an educational benefit for the Student.

c. May 26, 2011 to May 25, 2012 IEP

The District states that the May 26, 2011 IEP meeting was convened to make a determination of the Student's eligibility based on new medical information. The meeting was also scheduled to discuss ESY. Based on the discussion that evolved during the meeting regarding the IEP team's change of the Student's primary disability from multiple disabilities to Autism, her IEP meeting became an annual review and her placement was changed to the blended preschool program at [REDACTED] in [REDACTED] IL. (The Student's home school). The team planned to have another meeting and fine tune the IEP prior to the Student's first day of school. (PD 24, p. 204) [REDACTED] testified as to the progress that the Student made that led to the decision to place the Student in the blended preschool, to include increase of attention to task and better body awareness. (Tr. 10/4/2012, p. 449-450) The Student's annual goals and objectives remained the same and the Student was to maintain Goals 1-4 during the 2011 ESY program. (PD 24, p. 193-198)

*d. August 18, 2011 to August 15, 2012 IEP*

The District states that the IEP team meet prior to the start of the Student's placement in the blended preschool program. The Student's toileting annual goal remained the same with a revision to one of the objectives. (PD 28, p. 224) The Student's Goal 2 remained the same as her previous IEP Goal 6, with the same objectives. (PD 28, p. 225) The Student's Goal 3 and objectives remained the same as her previous Goal 1. (PD 28, p. 226) The Student's Goal 4 remained the same as her previous Goal 2 and there was a revision to one of the objectives, but otherwise they remained the same. (PD 28, p. 227) The Student's Goal 5 and its objectives remained the same as her previous Goal 3. (PD 28, p.228) The Student's Goal 6 remained the same as her previous Goal 4, and all but one of the objectives remained in place. (PD 28, p. 229) The reason the goals were not further revised was explained in the conference notes section. the Parent had provided a report from the [REDACTED] ABA summer program which referenced skill levels achieved in that program which were advanced from what had been seen during the school year. Based on this information, the education team decided to review the Student's skill level once she returned to the classroom and to discuss new goals/measures with the parents two weeks after school started. (PD 28, p. 236) Based on this explanation for the continuation of the Student's goals at the beginning of the school year, the District avers that the IEP was designed to assess the Student's present levels in the classroom and to provide her with an educational benefit.

*e. September 27, 2011 through August 15, 2012 IEP*

The District states that the IEP team met again on September 26, 2011 as planned to revise her IEP as needed based on a review of the Student's skill levels since there was a report of progress in the clinical ABA program over the summer.

The Student's toileting annual goal was revised to state that she would participate in a toileting routine with a revision to one of the objectives. (PD 34, p. 262)

Goal 2 was a continuation of her annual goal to improve her functional communication skills by at least nine months. The present level was revised and showed that the Student was working on phase 2 of PECS. One of the instructional objectives remained the same, but updated to include communicating wants and needs through phase 3 of PECS. Two new instructional objectives were developed. These new objectives contained evaluative criteria, evaluation procedure, and a schedule. (PD 34, p. 263) Thus, Goal 2 was a measurable annual goal designed to provide an educational benefit.

Goal 3 was a continuation of the annual goal to increase time and attention to task. While the goal may not provide a means for measuring the Student's progress, each of the instructional objectives provided a discrete measurable means to progress toward the annual goal. Only one objective remained the same and four new objectives were created. Each objective contained evaluative criteria, evaluation procedure and a schedule to measure progress. (PD 34, p. 264)

The District concludes that to the extent that the annual goal may be technically deficient, overall, the goal and objectives provided an educational benefit.

Goals 4 through 6 were new annual goals for this IEP. Each goal provides the Student's present level of academic achievement and her functional performance. Each annual goal states what the Student is expected to do by the end of the year in which the IEP is in effect, and describes the skill and the extent to which the skill will be demonstrated. Each objective provides a discrete and measurable means for the Student to progress to her annual goal. (PD 34, p. 265-267) These annual goals addressed the Student's academic, functional, and communication needs, and provided an educational benefit. The District concludes that these goals and objectives were appropriate.

*f. April 20, 2012 – April 19, 2013 IEP*

Hearing Officer Conclusion

Eg3The annual goals from the April 20, 2012 IEP (PD 46, p. 387-393) were reviewed by an Illinois State Board of Education ("ISBE") investigator. The investigator determined that Goals 1,

3, and 7 were not measurable. (PD 138) Goals 2, 4, 5, and 6 were measurable. In accordance with the State findings, an IEP was held on August 23, 2012 where these goals were revised. (PD 55) The District admits that while there may have been a technical violation based on the State's findings, it does not rise to the level of the denial of FAPE. At every meeting, consideration was given to the Student's present levels, her mother was always present and active at IEP meetings, and the goals and objectives were appropriately directed to the Student's functional and educational needs. the Student received an educational benefit from her annual goals.

The District concludes that if an IEP is reasonably calculated to allow some educational benefit, hearing officers and courts should look no further. *See Heather S.*, 125 F.3d at 1057. The District alleges that the Student's IEP team drafted measurable goals as required by IDEA. The IEP team also drafted objectives that were specific and measurable and contained criteria for measuring progress and the Student's mother was an active participant. *See O'Toole v. Olathe District Sch. USD No. 233*, 144 F.3d 692, 705 (10<sup>th</sup> Cir. 1998) (noting that there is no legal authority requiring a level of specificity in the statement of annual goals and that objectives are sufficient when they contain either explicit or implicit criteria for evaluating the general progress toward achieving goals).

The IDEA states that an IEP must be "updated annually." 20 U.S.C. §1414(d)(1)(A)(I)(viii). However, the statute also indicates that the IEP should be revised only "as appropriate." 20 U.S.C. § 1414(d)(4)(A)(ii). Because the latter portion of the statute is the more specific provision regarding IEP revisions, its language controls. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1981). Thus, while the IEP must be reviewed annually, it only needs to be revised when appropriate. An IEP is not inappropriate simply because it does not change significantly on an annual basis. *Carlisle Area Sch. v. Bess P. ex rel. Scott P.*, 62 F.3d

620, 533-34 (3<sup>rd</sup> Cir. 1995). Nor is an IEP inappropriate because the student does not meet any of the IEP goals. *Id.* at 530. The appropriateness of an IEP is determined by whether or not it is "sufficient to confer some educational benefit." *Rowley*, 458 U.S. at 200. "Although a violation of the IDEA, a failure to include measurable goals, like other procedural defects, does not amount to a denial of a FAPE unless it also significantly impedes the parents' opportunity to participate in decision making regarding the provision of a FAPE, impedes the student's right to a FAPE, or causes a deprivation of educational benefits to the student." *Stanley C ex. rel. M.C.*

*v. M.S.D. of Southwest Allen Cnty. Schs.*, 628 F. Supp. 2d 902, 961 (N.D. Ind. 2008) (citations omitted).

Parents' aver the Student's annual goals were not measurable because they did not have appropriate present levels of performance and they did not provide for criteria for assessment. Present levels of performance are essential for appropriate goals as they establish a baseline for measuring the student's progress throughout the year. *See James*, 642 F. Supp. 2d at 817-18; *see also Bakersfield City Sch. Dist.*, 51 IDELR 142 (SEA CA 2008); *see also Clovis Unified Sch. Dist.*, 109 LRP 69459. In *James*, the district court determined that short term objectives were "specific and capable of measurement" because they contained accurate present levels of performance. 642 F. Supp. 2d at 818. Similar to the IEPs reviewed in *James*, the Student's annual goals were broad statements with more specific short-term objectives. Unlike the IEPs in *James*, the objectives in the Student's IEPs did not include present levels of performance in order to make those objectives measurable. As a result, the Student's IEPs were not tailored to her unique needs and denied her a FAPE. *See Jacari J*, 690 F. Supp. 2 at 702.

The IDEA requires an IEP team "in the case of a child whose behavior impedes his or her learning or that of others, [to] consider when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address the behavior." 20 U.S.C.

1414(d)(3)(B)(i). The failure to provide a student with proper behavioral interventions and proper supporting services has been found to be a denial of a student's right to a free appropriate public education. *Neosho R. V Sch. Dist. v. Clark*, 315 F.3d 1022, 1030 (8th Cir. 2003). An IEP that does not address disability-related actions of misbehavior and disruption in the classroom is not "reasonably calculated to enable the child to receive educational benefits." *Alex R. v. Forrestville Valley Community Unit Sch. Dist. No. 221*, 375 F.3d 603, 613 (7th Cir. 2004).

In addition, Parents' aver that a behavior intervention plan ("BIP") has been found to be a crucial element of an appropriate educational program for students with autism. *See TH*, 55 F.Supp.2d 830; *see also Chicago Public Schools*, 104 LRP 18296 (ISBE 2003) (stating that an IEP without a BIP was fatally defective for a student with autism in need of intensive, consistent behavioral interventions). Although the IDEA only *requires* the creation of a BIP when a student faces a disciplinary change in placement, the Department of Education stated in its *Analysis of Comments and Changes to 2006 IDEA Part B Regulations* that "as a matter of practice, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement. In fact, the Act "emphasizes a proactive approach to behaviors that interfere with learning" by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child's IEP, "the use of positive behavioral interventions, and other strategies to address the behavior." (See section 614(d)(3)(B)(i) of the Act). This provision should "ensure that children who need behavior intervention plans to succeed in school receive them." 71 Fed. Reg. 46721 (August 14, 2006) (emphasis added).

Parents' add that, the Seventh Circuit has found that when behavior begins to impede a student's learning, the IDEA obliges an IEP team "at least to consider whether to implement a behavior intervention plan." *Alex R.*, 375 F.3d at 613. In *Alex R.*, the court found that the district satisfied its procedural requirement under the IDEA by creating a BIP for Alex. It is clear that where a student's behavior would necessitate a change in placement, as the IEP stated

that it did during the Student's April 20, 2012 IEP meeting, the IDEA would oblige an IEP team to consider creating a BIP. *PD-399* (stating "the Student would become overstimulated and frustrated when expected to sit and attend during regular education classes").

"An IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Indep. Sch. Dist. No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996) (quotation omitted)

The IDEA "does not require that a school either maximize a student's potential or provide the best possible education at public expense." *Clynes*, 119 F.3d at 612. A school district fulfills its legal duty when, as here, it "provides individualized education and services sufficient to provide disabled children with 'some educational benefit.'" *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999) (quoting *Rowley*, 458 U.S. at 200). The District claims it met this obligation.

This Hearing Officer is of the opinion that the Parents' have met their burden of proof on this issue. The evidence shows that while some of Student's annual goals were appropriate, as pointed out in the District's arguments, however, the Parents' respective goal examples demonstrated they did not address the Student's present levels of performance and were not appropriate statements of her levels of performance for the goals. The Student's annual goals were "broad statements with more specific short-term objectives and did not include present levels of performance in order to make those objectives measurable.

It is also important to note the District's non-recognition of the Student's behaviors that impede her learning and therefore require the development and implementation of a behavior intervention plan (BIP) based upon conducting a Functional Behavior Analysis (FBA). The District did not believe the Student's behaviors rose to the level of considering developing a BIP even though the Student's IEP team believed the Student's placement should change to a more restrictive setting at the [REDACTED] self-contained program. *PD-399*. None of

the Student's IEPs contain a BIP or measurable goals in instruct her to develop skills to self-regulate her behavior and attend to large group activities even though she has been observed by staff as "becoming overstimulated and frustrated when expected to sit and attend regular education classes." *Ibid-399* In light of the above, the Hearing Officer finds a denial of FAPE.

**3. Whether [REDACTED] failed to implement IEP goals, including collecting data to measure the Student's progress, from August 2, 2010 to the present?**

Parents' Position

Parents' aver that the Student's IEP team did not collect data to measure her progress on her IEP goals and, as a result, she was denied a free appropriate public education. The Student's September 26, 2011 IEP, her annual review where goals were revised for the 2011-2012 school year, required that her progress on her goals be measured using data charting, observation documents, and checklists. PD-262-267. [REDACTED] testified in great

length about that data that she collected about the Student's failure to make meaningful progress on her short-term objectives during the 2010-2011 school year. *Transcript*, at 426:23-444:1. However, she did not produce similar data sheets during the 2011-2012 school year.

[REDACTED] and [REDACTED] the Student's aide during the current school year have tracked the Student's progress in ABA. PD-476-709; PD-1731-1744. In addition, [REDACTED] has tracked the Student's progress in toileting skills. PD-751-806. However, no data has been collected regarding the Student's progress in her remaining five annual goals from her IEP. Parents' highlight that no data sheets and checklists have been produced.

Furthermore, Parents' aver that the Student's annual progress reports lack percentages or quantitative statements regarding the Student's progress. PD-362-370. For example, for the short-term objective, "the Student will cut a 5" square in half," the Student's goal is to be able to do this in 3 out of 4 attempts. PD-365. Her Report for Period 4 states, "In Progress" and the Narrative reports, "the Student continues to be more interested in the scissors themselves. She is making some progress." PD-365. The Progress Report does not state whether the Student can cut a 5" square in half in 1 out of 4 attempts or whether this is a task that she has not done at all. Other reports produced at hearing demonstrated similar flaws, which is inconsistent with the

requirements of the Student's IEP. As a result of the District's failure to measure the Student's progress, Parents' claim, the District has denied the Student a FAPE.

#### District's Position

In support of its position that it implemented the Student's IEP goals in accordance with the law, including data collection from August 2, 2012 to the present, the District avers that Parents' claims are not "particularly specific." It characterizes Parents' claim in this area as Parents' belief that a lack of staff training, inappropriate program oversight, and failure to track progress are failures in implementation over the 2010-2011 school year. The District references that it has already set forth the training of the IEP team in its *Closing Argument* submitted to the Hearing Officer, and concludes that it is evident that the staff working with the Student was highly qualified and properly supervised. (District *Closing Argument*, Section II.E.)

The District points to documentary and testimonial evidence of what it believes substantiates the implementation of the Student's IEP goals.

During the 2010-2011 school year, the teacher kept track of daily progress towards goals and summarized the information on quarterly progress reports. (PD 16, p. 86-98; PD 19, p. 118- 138; PD 22, p. 141-176; PD 22; PD 23, p. 178-187) the Student's toileting goal, goal #5 was tracked daily in the toilet training packet. (PD 64, p. 751-778) ██████████ testified how she implemented the Student's IEP goals throughout the school year, which included the use of PECS. (Tr. 10/4/2012, 396 -402, 411-423) ██████████ also consulted with the occupational therapist to\* discuss strategies in working with the Student on the goals. (Tr. 10/4/2012, p. 440-441). During the 2011-2012 school year, the teacher continued to track the Student's daily progress towards her goals and summarized the information on quarterly reports (PD 35, p. 275-279; PD 43, p.362-370; PD 44, PD 48, SD 33, SD 35; PD 56-63; PD 64, p. 779-806; PD 52; Tr. 10/4/2012, p.377-388) SD *Closing Argument*, p. 26).

#### Hearing Officer's Conclusion

Since Rowley, many courts have found an IEP to be inappropriate and, therefore, a denial of FAPE, based solely on process or procedural errors. The 2004 IDEA Amendments, however, address such procedural violations as follows:

A decision made by a hearing officer "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the

procedural inadequacies: 1) impeded the child's right to a FAPE; 2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE to the child; or 3) caused a deprivation of educational benefits. However, nothing shall be construed to preclude a hearing officer from ordering an LEA to comply with the procedural requirements. 34 C.F.R. § 300.513.

An IEP must include statements about "how the child's progress toward meeting the annual goals will be measured." 34 C.F.R. 300.320(a)(3). Failing to measure progress in accordance with the IEP is a violation of FAPE, as it is not providing special education and related services "in conformity with the individualized education program required" by the IDEA. 20 U.S.C. 1401(9)(D).

It is the Hearing Officer's opinion that the Parents' have met their burden of proof on this issue. The Student's IEP team did not collect the relevant data to measure her progress on her IEP goals and, as a result she was denied a FAPE and significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of FAPE to the child.

**4. Whether [REDACTED] #308 failed to appropriately evaluate the Student to determine her appropriate educational placement from August 2, 2010 to the present?<sup>16</sup>**

Parents' Position

*i. The District failed to conduct an appropriate initial evaluation of the Student.*

Parents complain that the District failed to adhere to appropriate evaluation procedures when it conducted its initial evaluation in 2009, by failing to individualize the evaluation to the Student's needs. Parents' note that although the evaluation was conducted outside the 2 year statute of limitation period, it was the evaluation relied upon when the complaint arose on August 2, 2012. Testimony of [REDACTED] school psychologist, confirmed that he assessed the Student using a play-based assessment, which is the method he uses for his initial assessments "all the time." *Transcript*, at 719:13. [REDACTED] testified that he uses the Brigance Early Childhood Developmental Inventory to guide the play-based assessment.

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<sup>16</sup> This issue is Issue 5 in Parents' Amended DPCN in light of Issues 1 and 4 being combined.

*Transcript*, at 719:22. However, Parents' claim that there is no reference to this assessment tool in his Psycho-Educational Testing Report or the subsequent eligibility IEP that was developed on October 2, 2009. PD-1-3; PD-15-30.

██████████ Social Worker, testified that whenever there is a referral for an initial evaluation, she conducts a Social Developmental Study and conducts adaptive testing using the Scales of Independent Behavior- Revised. *Transcript*, at 985:6-8. Parents' allege that the District did not individualize its assessment to the Student's needs.

Parents' allege that the District's initial evaluation of the Student was not appropriate because it did not include specific assessments to determine the effects of her disability of autism. Despite her severe communication delays, the Student was not specifically assessed by the speech pathologist, ██████████ in order to determine her level of functioning. Although ██████████ attended the play-based assessment, she did not prepare a report. The only report about the Student's communication is contained in the eligibility notes in the October 2, 2009 IEP which state, "the Student's speech and language skills *seemed* to fall in the 6 to 12 month range." PD-16 (emphasis added). ██████████ claimed that she used the "Rossetti Scale" to determine this age range, but there is no record that this language scale was used. *Transcript*, at 584:7. Similarly, there was no separate assessment done to determine the Student's level of occupational therapy delays, nor a report prepared by an occupational therapist. PD-16-17. Parents' claim that an initial assessment was not individualized to her needs as required by the law.

Parents' also claim that the evaluators who conducted the Student's initial assessment did not have the knowledge and skills necessary to assess her as a student with autism. Although the Student did have a medical diagnosis of autism, no assessments had been done by the District to determine its "affect" on her educationally [emphasis added]. PD-1.

██████████ a psychologist with more than fifteen years of experience evaluating students with autism, testified that the "gold standard assessment tools" for identifying needs for a student with autism include the Autism Diagnostic Interview ("ADI") and the Autism Diagnostic Observation Schedule ("ADOS"). *Transcript*, at 169:9-12. Although these assessments are standard assessments for students with autism, ██████████ testified that he is not trained to administer assessment tools specific for students on the autism spectrum. *Transcript*, at 730:5-22. ██████████ explained that no one at ██████████ had received that

training or was qualified to administer the ADOS or ADI, but he has requested to be trained in these assessment tools. He stated that he wanted to receive training in the ADOS and ADI because he "would like to be able to assist in evaluating and determine eligibility for that, not leaving it to outside evaluators." *Transcript*, at 789:17-20. He further explained that he is concerned about "students falling through the cracks and being placed into different eligibility categories." *Transcript*, at 789:13-15. Parents' conclude that this is what occurred when the Student was evaluated and found eligible under the category of Multiple Disabilities. The Parents' conclude that the District did not have the knowledge and skills to conduct an appropriate evaluation of the Student.

- ii. *The independent educational evaluation appropriately evaluated the Student to make recommendations regarding her educational placement.*

Parents' claim that as a result of the District's inability to appropriately assess the Student, her mother sought an independent educational evaluation ("IEE") from [REDACTED] in order to learn more about how her child's diagnosis of autism was affecting her learning. [REDACTED] testified regarding her experience evaluating students with autism through her specialty clinic at the [REDACTED], where she evaluates nearly one hundred students each year. *Transcript*, at 161:20-21. In her first evaluation of the Student in the Summer of 2010, she assessed her using the ADOS, ADI, Mullen Scales of Early Learning, and a behavioral observation. She was able to definitely diagnose the Student as a student with autism, based on these assessments. PD-844. The Student was also assessed by a speech therapist using the Functional Communicate Profile- Revised. PD-848. The Student was also assessed by an occupational therapist using the Peabody Developmental Motor Scales-2, the Sensory Profile Caregiver Questionnaire, a parent interview and a record review. PD-857. Each of these evaluators developed recommendations for the Student's educational program.

When the Student's mother provided the District with a copy of the 2010 IEE report from [REDACTED] did not review the results of the assessments in order to assist the team with its consideration of the report stating that he had never seen the evaluation. *Transcript*, at 1267:22. Although recommendations from the IEE were discussed and some were incorporated into the August 19, 2010 IEP, Parents' claim that it is unclear whether the IEP team understood the results of the assessment without [REDACTED] assistance with their

interpretation.

iii. *The District failed to conduct an appropriate reevaluation of the Student.*

Parents' allege that the District failed to complete appropriate, direct assessments of the Student in order to determine all of her special education and related service needs. As a result, it was unable to appropriately develop her IEP and provide her with a FAPE.

The District conducted a triennial reevaluation of the Student and determined her eligibility on April 20, 2012. This reevaluation consisted of an administration of the Developmental Profile-Third Edition ("DP-3") by ██████████ the Scales of Independent Behavior- Revised ("SIB-R") by ██████████ and the Receptive and Expressive One-Word Picture Vocabulary Tests by ██████████ PD-381-385. The DP-3 and SIB-R are both interview-based assessments where the Student's mother and teacher were reporters. ██████████

██████████ testified that he did not conduct any "direct" assessments of the Student to determine her academic, cognitive or developmental abilities. Based on this single assessment, which did not involve direct assessment of the Student, ██████████ concluded that the Student exhibited "moderate to severe level of intellectual disability." PD-359.

██████████ disagreed with this finding and testified regarding the inconsistencies that she noted in the District's April 20, 2012 reevaluation. First, she was surprised that ██████████ did not directly test the Student because she is "easily testable" based on her ability to transition and attend to tasks. *Transcript*, at 228:10. Dr. Brouillard testified that the interview results that ██████████ obtained, where the Student's standard score for Communication was less than 50, was discrepant from the direct assessment results that ██████████ obtained from the One-Word Picture Vocabulary Assessment where the Student scored a 62. She observed that the scores from the ██████████ interview were significantly lower than the scores on the assessments that involved direct assessment of the Student. *Transcript*, at 231:24.

██████████ found that the Student performed much higher than ██████████ DP-3 assessment results when she conducted the Differential Ability Scales, a direct, standardized assessment, with the Student in June 2012. *Transcript*, at 232:21-233:1. As a result, ██████████ did not believe that the District's assessment, which did not involve direct testing of the Student, produced a valid measure of her performance because it was "dramatically lower

than the other data." *Transcript*, at 234:13-14.

██████████ and ██████████ testified that these inconsistencies in data were not discussed at the reevaluation meeting. *Transcript*, at 758:4-5, 1041-20. ██████████ did not believe that he could compare his results with ██████████ SIB-R assessment because he did not have access to standard score data. *Transcript*, at 760:23-24. However, ██████████ report did include standard scores. In fact, ██████████ testified that the scores on similar subtests of the SIB-R were significantly higher than ██████████ scores. *Transcript*, at 1049:13-23. However, the inconsistencies were not discussed. *Transcript*, at 1050:17.

By failing to conduct direct assessments of the Student to determine her academic, cognitive and developmental functioning and then not considering the inconsistencies in the data, Parents' conclude that the District did not conduct an appropriate reevaluation of the Student.

- iv. *The District failed to evaluate the Student by an occupational therapist for the triennial reevaluation and failed to convene the eligibility meeting on April 20, 2012 with the required occupational therapist.*

Despite the Student's delays in fine motor skills and sensory integration, an occupational therapist did not evaluate her as part of her triennial reevaluation. PD-381-384. Moreover, the District did not include an occupational therapist at the eligibility and reevaluation meeting held on April 20, 2012. PD-380. Because the District failed to provide an occupational therapist with the knowledge and skills necessary to assess the Student's occupational therapy needs, Parents' allege the reevaluation was not appropriate.

#### District's Position

The district claims it properly evaluated the Student to determine an appropriate educational placement from August 2, 2010 to the present. The Student's initial evaluations were conducted in 2009. She was reevaluated in the Spring 2012 for her eligibility in light of her transition to kindergarten. The District believes that Parents' allegation that the IEP team did not include any new evaluation in the May 25, 2011 IEP to be a mischaracterization of the facts. The Student's mother requested an eligibility meeting based on new evidence regarding her child's

medical condition which impacted her educational performance. The Student was no longer experiencing active seizures and her physician determined the cortical dysplasia did not impact her academics. The IEP team considered this outside evaluation and made a change to the Student's primary disability. The school psychologist testified that there was no need for additional evaluations at that time. (Tr. 10/11/2012, p. 743) Parents did not request further reevaluation and the school district did not find that the educational needs of the Student warranted a reevaluation at that time. To the extent that Parents allege that the reevaluations were not appropriate, the District claims that the Student was assessed for her functional abilities across all domains since she has global delays. She was evaluated in all her areas of suspected disability. Discretion is given to the evaluator to determine the tests to administer as no specific assessments, either in number or type, are specifically required. *Krista P. v. Manhattan Sch. Dist.*, 255 F. Supp. 2d 873 (N.D. Ill. 2003) Accordingly, the District concludes that the Parents failed to satisfy their burden of proof to show that the district failed to appropriately evaluate the Student.

#### Hearing Officer Conclusion

A school district is responsible for conducting a "full and individual" evaluation of the student. 20 USC 1414(a)(1)(A). Further, it must evaluate the student in all areas related to the suspected disability. 34 CFR 300.304(c)(4). The evaluation must be comprehensive to identify all of the student's special education and related service needs. 30 CFR 300.304(c)(7). The District must use technically sound instruments to assess cognitive, behavioral, or developmental factors. 34 CFR 300.304(b)(3). Illinois law also requires that evaluators have "the knowledge and skills necessary to administer and interpret evaluation data," which "will vary depending upon the nature of the child's symptoms." 23 Ill. Adm. Code 226.110(c)(3)(A). The law requires that, the District reevaluate the student every three years with regard to his need for special education. 34 CFR 300.303. An appropriate evaluation requires "a full

recognition of the disability and assessment of its extent." *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ.*, 21 F. Supp. 2d 862, 876 (N.D. Ill. 1998). The failure to conduct an appropriate evaluation will result in "inconsistent and inadequate programming" and, thus, a denial of a FAPE. *Id.*

It is the opinion of this Hearing Officer that the Parents' have sustained their burden of proof and have shown by a preponderance of the evidence that the District failed to appropriately evaluate the Student in both her initial evaluation in 2009 and her triennial reevaluation in 2012. It failed to utilize specific evaluation tools in its evaluation of the Student based on her specific needs and instead relied upon an evaluation method that it uses for all children. Next, it failed to evaluate the Student to determine her educational concerns related to her disability of autism. The District also failed to conduct direct assessments to determine her appropriate educational placement. All things considered, the District's failure to conduct proper evaluations geared specifically to the student's needs and to utilize properly trained staff in administering those tests, amounts to a denial of FAPE

During a reevaluation, a school district must evaluate the student in all areas related to the suspected disability by individuals who possess "the knowledge and skills necessary to administer and interpret evaluation data." 34 C.F.R 300.304(c)(4); 23 Ill. Adm. Code 226.11 O(c)(3)(A). The Hearing Officer finds that the District failed to utilize an Occupational Therapist at the time the Student was re-evaluated and failed to have an OT at the reevaluation IEP on April 20, 2012. Consequently, a denial of FAPE is established.

The District's legal citations to the relevant law and case law regarding reevaluation are noted. However its failure to follow proper evaluation procedures is actionable in this case under the circumstances proven by the Parents' as a denial of FAPE.

5. Whether the [REDACTED] failed to provide appropriate augmentative communication devices from August 2, 2010 to the present?<sup>17</sup>

Parents' Position

Parents' complain that the IEP team did not consider or conduct an evaluation to determine whether there were augmentative communication devices or software that would improve the Student's functioning in the general education setting. In response to the question, "Does the student require assistive technology and services?" The Student's IEPs have always stated, "Augmentative communication devices as appropriate." PD-40, PD-104, PD-190, PD-221, PD-260, PD-283, PD-305, PD-385. However, the Student's IEPs have not specifically described any communication devices specific to the Student. When asked about whether the Student's needed an augmentative communication evaluation, [REDACTED] testified that he did "not have an opinion on that." Transcript, at 77:19. Parents' highlight's [REDACTED] having no opinion as showing how insignificant to her IEP team the issue has been.

Although witness testimony and many documents indicate that the Student's has made significant progress with PECS, the Student does not have consistent access to this system. [REDACTED] the Student's speech therapist, testified that the Student is developing speech and making progress with PECS during her therapy sessions. Transcript, at 643:8-16. [REDACTED] the Student's one-on-one aide who accompanies her throughout the school day, testified that she does not regularly use PECS with her, except when going to the bathroom. Transcript, at 1230:7. [REDACTED] testified that the Student does not communicate her wants and needs to her. When the Student does use PECS in a manner that is consistent with the research-based methodology, she makes progress. Transcript, at 643:8-16. However, without access to the system, she cannot use it to encourage her communication and, as a result, assist her participation in the general education setting.

The Student has not had access to other augmentative communication devices that may be appropriate. [REDACTED] the Student's speech therapist, testified that she wrote a grant for the Student to obtain Proloquo2go, but that grant was denied. Transcript, at 644:7-646:10. Proloquo2go is augmentative communication software that can transform the

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<sup>17</sup> Formerly Issue 6 in Parents' Amended DPCN.

Student's Ipad into a communication device. The grant was denied because the [REDACTED] [REDACTED] determined that it was a program that would be the District's responsibility to fund. *Transcript*, at 703:4. Parents' argue that the IEP team did not consider whether this software would improve the Student's functioning in school because it did not consider augmentative communication. PD-377-404. Furthermore, no evaluation was conducted to determine whether this software, or other augmentative communication software, would be necessary for the Student. As a result, Parents' conclude that the District failed to provide the Student with a FAPE with appropriate augmentative communication.

#### District's Position

The District maintains that it provided appropriate augmentative communication devices in accordance with the Student's IEP from August 2, 2010 to present. The District argues that the Student's communication needs have consistently been addressed in her IEPs. The need for augmentative communication devices has been included in her IEPs. The Student has participated in the PECS program since 2010. PECS is an augmentative communication tool, and the Student's Parents also sent an iPad to school, which the speech and language pathologist utilized with the Student. (Tr. 10/4/2012, p. 397-99; 627-628) The Student has not yet completed the six phases of PECS, and parents have not produced any evidence that a different augmentative communication system is needed in order to provide an educational benefit for the Student. There is no evidence that Prolo2go was needed or would have provided an educational benefit for the Student. It should be noted that the initial speech evaluation provided by parents in PD 169, which was completed on September 10, 2012, did not recommend further augmentative communication device evaluation. The Little Friends evaluation from June 2010 recommended PECS and no other type of augmentative communication. (PD 67, p.851-856).

#### Hearing Officer Conclusion

A School District "shall... consider whether the child needs assistive technology devices

and services" when drafting a student's IEP. 20 USC § 1414 s. 614(d)(3)(B)(v). The term assistive technology ("AT") includes "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 20 USC § 1401 s.602(1)(A). AT "services" include obtaining, designing, and selecting appropriate augmentative communication devices, and training personnel to provide augmentative communication services. 34 C.F.R. § 300.6.

In *Kevin T*, several witnesses testified that Kevin should have been evaluated for and given AT to assist him academically. *Kevin T*, 2002 WL 433061, at \*12. The Court held that despite the IDEA's requirement that school districts "shall consider" AT and the testimony by credible witnesses that Kevin requires AT in order to receive a FAPE, the District "did not 'consider' let alone provide Kevin with AT." *Id.* The Court held that the District violated the IDEA in failing to consider or provide Kevin with AT devices. *Id.*

It is the opinion of this Hearing Officer that in the instant case the IEP team did not consider or conduct an evaluation to determine whether there were augmentative communication devices or software that would improve the Student's functioning, similar to the facts in *Kevin T*. Testimony and documentary evidence confirmed that no evaluation was conducted to determine whether this software, or other augmentative communication software, would be necessary for the Student. [REDACTED], the Student's one-on-one aide who accompanies her throughout the school day, testified that she does not regularly use PECS with her, except when going to the bathroom. *Transcript*, at 1230:7. [REDACTED] testified that the Student does not communicate her wants and needs to her. When the Student does use PECS in a manner that is consistent with the research-based methodology, she makes progress. *Transcript*, at 643:8-16. However, without access to the system, she cannot use it to encourage her communication and, as a result, assist her participation in the general education setting. The Parents' have sustained their burden of proof that the District's failed to provide appropriate augmentative devices to meet the Student's educational needs.

**6. Whether the [REDACTED] failed to provide appropriate accommodations and modifications to address the Student's sensory integration needs from August 2, 2010 to the present?**<sup>18</sup>

Parents' Position

Parents' allege that their child has significant sensory integration concerns that the District failed to appropriately address. Specifically, the Student has difficulty attending to task, which [REDACTED] the Student's current provider of occupational therapy services, identified as an issue of self-regulation that can be addressed through proprioceptive, or deep pressure, accommodations. *Transcript*, at 319:20- 320:3. A review of the Student's records indicates that providing deep pressure accommodations have been successful at increasing the Student's attention. For example, during the summer of 2011, when the Student received ABA therapy at [REDACTED] the therapist used a deep pressure vest to sustain her attention. *PD-875*. The District had been using a Bear Hug vest, which had not been successful for the Student at sustaining her attention. *PD-237*. As a result, the Student's mother requested that the District provide a different proprioceptive accommodation. *PD-237*. The District denied this request and stated that the educational team would review the Student's need for calming pressure during the school year. *PD-237*.

Although the Student's difficulty attending to tasks continued to be a documented concern for the educational team, Parents' aver the District did not determine to provide a different proprioceptive accommodation, as requested by the Student's mother. The result is that the Student did not learn to self-regulate and fulfill her need for deep pressure input. Accordingly, when [REDACTED] began working with the Student during this current school year, the Student's attention to tasks continued to be a problem. *Transcript*, at

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<sup>18</sup> Formerly Issue 8 in Parents' Amended DPCN.

319:20-320:3. During her testimony, [REDACTED] offered examples of accommodations that could be provided to the Student to meet her proprioceptive needs so that she could develop the skills to self-regulate. However, these were not provided to the Student previously and were not recorded as necessary supports in her IEP.

- i. *The Student has not had the benefit of appropriate visual accommodations and modifications.*

Parents' aver that there are several appropriate accommodations and modifications that should have been provided to encourage the Student's general education participation in the 2011-2012 school year. [REDACTED] a psychologist who specializes in educational planning for students with autism, testified regarding her recommendations for accommodations and modifications for the Student. [REDACTED] recommended that, because the Student's academic strength lies in visual reasoning, she recommended visual systems, such as a visual schedule and visual time timer, as necessary supports to improve the Student's participation in the general education setting. *Transcript*, at 252:22-256:15. [REDACTED] testified that these systems will build upon an area where the Student is already showing growth and assist with her developing independence in the classroom. *Transcript*, at 253:2-8. Further, the use of visual rule cards will assist with the Student's understanding of appropriate age-level behavioral expectations. *Transcript*, at 254:6-255:10. [REDACTED] concluded that with these reasonable measures, the Student's participation in the general education classroom will be greatly improved.

Parents' claim that although the Student's IEP includes some accommodations and modifications, they were not provided to her on a consistent basis. The Student's September 26, 2011 IEP, which was her annual review, stated that she would be provided a "visual schedule for changes in routine." *PD-261*. [REDACTED] the Student's aide during the 2011-2012 school year, testified that the Student did not have a visual schedule as a regular support during her

school day. *Transcript*, at 557:15. Similarly, ██████████ testified that the Student did not have a visual time timer as a regular support. *Transcript*, at 557:22. ██████████, the Student's aide during the current school year, also testified that the Student does not have a visual schedule. *Transcript*, at 1229:13. Parents' conclude that visual systems were not implemented into the Student's educational program to the extent necessary for them to be a consistent support to aid in her participation in the general education setting. As a result, visual accommodations and modifications have not been implemented with consistency in order to support the Student's participation with typically-developing students.

- ii. *The Student has not had the benefit of appropriate social interaction accommodations and modifications.*

In addition to visual systems, ██████████ strongly recommended that the Student needed to be paired with typically-developing students for structured opportunities for meaningful social interaction. *Transcript*, at 260:19-261:15. She testified that it was not beneficial for the Student to simply be placed in the same room or environment, such as lunch or recess, with typically-developing students. In order to assist with the Student's meaningful interaction with typically-developing students, ██████████ recommended that the Student continue to receive a one-on-one aide for her participation in a general education setting. *Transcript*, at 276:1.

Although the Student received the support of an aide, Parents' claim that she was not given opportunities for meaningful social interaction with typically-developing peers. The Student's September 26, 2011 IEP stated that she would be provided a "1:1 aide to help navigate social situations" and "facilitated play experiences." *PD-261*. However, the Student's IEP did not provide for consultation from a social worker in order to provide strategies for facilitating the Student's social interaction. *PD-269*. Parents' aver that the Student's aide did not have sufficient direction and training regarding encouraging the Student's social interaction. ██████████ explained that she would shadow the Student during the periods when she was participating with typically-developing students, but not provide structured opportunities for her

to interact. *Transcript*, at 560:9-24. [REDACTED] did state that she encouraged the Student's socialization by prompting her to say, "Hi," to other students. *Transcript* 560:24. Importantly, the Student did develop that skill during the year. Consistent with [REDACTED] testimony, [REDACTED] was not aware of structured opportunities for the Student to interact with typically-developing students. *Transcript*, PD-1220:4-19. Both [REDACTED] and [REDACTED] testified that the Student struggled to socially interact with typically-developing students. Parents' believe that their child has the potential for increased socialization, as demonstrated by her experience at [REDACTED] but the District has not provided reasonable measures of social interaction accommodations and modifications.

*iii. The Student has not had the benefit of appropriate fine motor accommodations and modifications.*

Parents' claim that the District has also failed to provide appropriate accommodations and modifications to address the Student's fine motor deficits in order to allow her to participate in the general education setting. The Student has significant fine motor deficits and has not developed a functional grasp for writing instruments. *Transcript*, at 317:21-24. During the 2011-2012 school year, the District did not hire an occupational therapist at [REDACTED] *Transcript*, at 99:18, 694:22. Instead, parents were instructed to obtain private occupational therapy to provide the direct minutes required by the IEP, which would be reimbursed by [REDACTED] *Transcript*, at 695:9-11. [REDACTED], Executive Director of [REDACTED], testified that he contracted with FHN Rehabilitation to provide occupational therapy to the Student in the amount of thirty minutes per week. *Transcript*, at 698:15-17. However, [REDACTED] also testified that the contract did not provide for FHN Rehabilitation to provide consultation to the Student's teachers, to attend IEP meetings, or to conduct class observations of the Student. *Transcript*, at 699:7-18. In fact, none of these services were provided to the Student during the 2011-2012 school year. According to the testimony of [REDACTED] occupational therapist, these are all regular job responsibilities of a school occupational therapist.

Parents' also note that when the Student has received consultation, accommodations, and modifications to address her occupational therapy needs; she has made progress on skills that are central for her participation in the general education setting. [REDACTED] testified about

the progress that the Student made in her occupational therapy goals, including cutting skills and pre-writing skills, in just one month of receiving school based occupational therapy at [REDACTED] *Transcript*, at 136:2-4. Further, [REDACTED] the Student's current provider of occupational therapy services, testified to the consultation that she had provided to [REDACTED] regarding the use of assistive devices to encourage the Student's development of functional writing skills. *Transcript*, at 322:9, 23. [REDACTED] testified that she has been conducting a trial of assistive devices for the Student's development of grasp skills during this school year. She explained that she has been using the Grotto Grip, which appears to be assisting the Student to promote a functional writing grasp. *Transcript*, at 322:9, 23. She has been consulting with [REDACTED] regarding the trial of these devices. The Parents' highlight the fact that [REDACTED] [REDACTED] received no consultation from an occupational therapist during the 2011-2012 school year. *Transcript*, at 460:7, 17. Parents' conclude, that the Student did not have the benefit of accommodations and modifications to assist with her development of writing skills, which they believe are vitally important for participation in the general education Kindergarten curriculum. Given the Student's demonstrated success when receiving targeted occupational therapy interventions, Parents' conclude that the IEP team needed to consider these reasonable measures to improve the Student's general education participation.

iv. *The Student has not had the benefit of accommodations and modifications to address her dietary needs.*

Parents' aver that the District has not provided the reasonable measure of dietary accommodations and modifications to address her needs related to her allergies to gluten, casein, and peanuts. Because of the Student's dietary needs, she has been restricted in her ability to participate in the general education setting and the District has not taken reasonable measures to ensure that the classroom was safe for her. *Transcript*, at 459:1-2, 560:8 [REDACTED] testified that her main concern related to the Student's participation in the general education setting is her safety due to her allergies. *Transcript*, at 459:23. She has seen the benefits of preventing the Student from accessing these prohibited foods and has ensured that her classroom is safe for the Student. *Transcript*, at 427:13- 428:2. However, the District did not take reasonable measures to ensure that the general education classroom was safe for the Student. *Transcript*, at 459:1-2. [REDACTED] used this as justification for the Student not being

included in the general education setting. *Transcript*, at 479:10-480:4. However, a school district can reasonably make accommodations and modifications to ensure that a student is safe from allergens. Parents' conclude that since the District did not take the reasonable measures necessary to provide accommodations and modifications and the Student must not be placed in a segregated setting without their benefit.

#### District's Position

The District believes that the Student's mother is "not particularly" clear as to how the District failed to provide appropriate accommodation and modifications to address the Student's sensory integration needs except to state no pressure vest was provided. (*District Closing Argument*, p. 30). Every single one of the Student's IEPs addressed her sensory needs and provided for accommodations and modifications. In the 2010-2011 school year a "huggy vest" was provided to the Student and its use was continued for as long as the Student needed it. (Tr. 10/3/2012, p. 104-105) The District concludes that there is no evidence to support the Parents' assertions and therefore they have failed to meet their burden of proof regarding a failure to accommodate for the Student's sensory integration.

#### Hearing Officer Conclusion

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction:

- (i) To address the unique needs of the child that result from the child's disability;  
and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. [34 C.F.R. §300.39(b)(3)]

One of the most powerful types of supports available to children with disabilities are the other kinds of supports or services (other than special education and related services) that a child needs to be educated with nondisabled children to the maximum extent appropriate. Some examples of these additional services and supports, called supplementary aids and services in IDEA, are: adapted equipment—such as a special seat or a cut-out cup for drinking; assistive technology—such as a word processor, special software, or a communication system; training for staff, student, and/or parents; peer tutors; a one-on-one aide; adapted materials—such as books on tape, large print, or highlighted notes; and collaboration/consultation among staff, parents, and/or other professionals. (20 U.S.C. 1401(33))

The IEP team, is the group that decides which supplementary aids and services a child needs to support his or her access to and participation in the school environment. The IEP team must work together to make sure that a child gets the supplementary aids and services that he or she needs to be successful. Team members talk about the child's needs, the curriculum, and school routine, and openly explore all options to make sure the right supports for the specific child are included.

Parents rely on IDEA provisions in support of their position that the Student should remain at [REDACTED] as her LRE placement.

"IDEA requires that the "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." 20 U.S.C. 1412 (a) (5)(A); *see also* 34 C.P.R. § 300.550. Under the Seventh Circuit's inquiry, the school district must take "reasonable measures" to determine whether education in the regular education classroom can be achieved satisfactorily. In *Beth B.*, the court found that the school district satisfied this requirement because it provided aides, communication devices, computerized books, and an individual curriculum and, despite this, Beth's "academic progress was virtually nonexistent and her developmental progress was limited." 282 F.3d at 499. Even with these aids and supports, the court reasoned that Beth was not receiving a "satisfactory education."

*Id.* (Parents' Brief, p. 9-10).

In the Student's case, in contrast to the facts described in *Beth B.*, Parents' aver that the Student has made academic and developmental progress despite the District's decision not to provide the appropriate supplementary aids and supports to assist with her participation in the regular education classroom. The Student did not receive support similar to what Beth received. Although the Student has made progress while at [REDACTED] the District has not satisfied its responsibility to provide "reasonable measures" to encourage the Student's general education participation. *See Ross*, 486 F.3d at 277. Importantly, **the District did not discuss the necessary supports to allow The Student to access the general education setting when she transitioned from the self-contained preschool to the blended preschool for the 2011-2012 school year. PD-204. (Emphasis Added).**

This, Parents' explain, is "inexcusable" given that the Student transitioned from a placement where she had *no* contact with typically developing students to a placement where over *one-third* of her day was spent in an inclusive setting with approximately thirty students.

*Compare PD-113 with PD-200.* Despite this substantial change in program, the Student's IEP team did not have a discussion about the necessary accommodations, modifications and supports for her to participate in the inclusive preschool setting. *Transcript*, at 1556:9, 1568:9. Although the IEP team did discuss accommodations to her obstacle course, it did not engage in any discussion at the May 25, 2011 IEP meeting or August 16, 2011 IEP meeting regarding the Student's participation in the general education preschool. *PD-204; PD-236-238.*

The Hearing Officer finds that the Parents' met their burden of proof. The IEP team did not adequately consider the effect of the Student's placement change from the self-contained preschool program to the inclusive preschool. As a result, it did not provide

reasonable measures to encourage her participation in the general education setting which amounts to a violation of IDEA and its LRE mandate.

**7. Whether the [REDACTED] failed to provide an appropriate education in the least restrictive environment during the 2012-2013 school year?**<sup>19</sup>

Parents' allege that the District violated the IDEA's mandate for education in the least restrictive environment when it changed the Student's placement to the [REDACTED] for the 2012-2013 school year. Parents' aver the proposed [REDACTED], a self-contained program, at [REDACTED] in [REDACTED] Illinois is not the least restrictive environment placement for the Student because she has made academic, communication and functional progress while a student at [REDACTED] her home school located in [REDACTED] Illinois.

Parents' allege that the Student's progress and success during the 2011-2012 school year is well-documented in her educational file and supported by witness testimony. When the Student entered the [REDACTED] at [REDACTED] in August 2011, she was receiving specialized instruction in accordance with goals created during the previous school year. *Compare PD-224-229 with PD- 106-111.* In just one month, when her IEP team met on September 26, 2011, the Student had already "made good progress," including mastering skills such as matching 3D to 2D objects, increased vocal imitations and increased motor imitations. *PD-259.* The Student's special education teacher, [REDACTED] had already begun implementing higher-level tasks for the Student and needed to revise her goals to reflect her progress. *PD-1252.* At the September 26, 2011 IEP meeting, the IEP team drafted new goals to address the Student's communication, academic, functional and social deficits, which would be implemented in an inclusive preschool setting. *PD-253-274.*

Over the course of the next school year, the Student made significant progress in developing new skills and achieving the goals developed for her by the IEP team. During the due process hearing, each of the members of the Student's IEP team testified regarding the

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<sup>19</sup> Formerly Issue 10 in Parents' Amended DPCN.

Student's progress in her deficit areas during the 2011-2012 school year. [REDACTED] the District's superintendent, testified that the IEP team considered the Student's progress to be "significant" during the 2011-2012 school year, based on her developmental level. *Transcript*, at 58:8. [REDACTED] testified that over the 2011-2012 school year, the Student made progress in receptively labeling, labeling body parts, receptive instructions, completing puzzles, matching objects, imitating motor movements, making vocalizations, non-identical matching, and making requests for her wants and needs, or "mands." *Transcript*, at 365:1-377:3. With respect to the Student's ability to make vocalizations, [REDACTED] testified that "there was progress made definitely" and listed many areas of growth in vocalizations for the Student. *Transcript*, at 375:6. With respect to requesting her wants and needs, or "manding," [REDACTED] testified that "as the year increased, so did her manding." *Transcript* at 377:2-3. [REDACTED] testified that she believed that the Student made "great progress." *Transcript*, at 476:6.

[REDACTED] Director of [REDACTED] ECSE program, testified that, as a member of the Student's IEP team, she understood that the Student made progress while she attended Eastland. In reviewing the Student's progress report for the end of the fourth quarter in 2012, [REDACTED] testified that the Student had achieved many of the objectives that the IEP team had drafted for her in the fall and was making progress on other objectives. *Transcript*, at 857:24-862:16. She was meeting goals related to communication, labeling shapes, labeling colors, verbally greeting people, tum-taking with classmates, kicking balls, and catching balls. *Transcript*, at 857:24- 859:7. In less than a full school year, the Student had achieved a third of her objectives and continued to make progress on her remaining objectives. *PD-362-370*.

The Student made similar progress with her related services while participating in an inclusive preschool setting at [REDACTED]. The Parents' highlight the fact that the Student's ability to verbally communicate increased substantially. [REDACTED] the Student's speech therapist, testified that at the end of the 2011-2012 school year, the Student had made "more progress than she had in the past." *Transcript*, at 627:14-15. [REDACTED] described that the Student was naming more pictures and objects during instruction, while playing, and when outside. *Transcript*, at 626:23-627:8. She was also naming more pictures and objects that were outside of her classroom routine. *Transcript*, at 627:7-8. She had mastered Phase Three of PECS, which requires the student to choose a picture from a field of many and bring the picture

to a communication partner to request a need or want, and was working on Phase Four. *Transcript*, at 631:8. Phase Four requires the student to use a sentence strip to form multi-word phrases to communicate requests for needs and wants. [REDACTED] also testified that the Student had made progress following one-step verbal directions during instruction and at other points during the school day. *Transcript*, at 631:19-24. [REDACTED] summarized the Student's progress in 2011-2012 school year by stating that she had made more progress than the previous school year. *Transcript*, at 632:23.

As with the Student's progress with communication, she has also made progress in her occupational therapy skills since she began receiving occupational therapy at [REDACTED] [REDACTED] Occupational Therapist, [REDACTED] who supervises the Student's current direct provider of occupational therapy, testified that in just one month of school with consultation and direct services at [REDACTED], the Student has made progress with her cutting skills and being able to imitate a cross. *Transcript* at 136:2-4. Although, the Student did not receive occupational therapy in the school setting during the 2011-2012 school year she has been receiving occupational therapy in her stay put placement at [REDACTED] and she has made progress to develop necessary fine motor skills for participation in the general educational classroom.

Parents' conclude that the [REDACTED] is the Student's least restrictive environment placement due to the level of progress that the Student made on academic goals, school readiness skills, communication and attention while participating in the blended preschool classroom.

Parents' allege that although the Student has made progress while at [REDACTED] the District has not satisfied its responsibility to provide "reasonable measures" to encourage the Student's general education participation. *See Ross*, 486 F.3d at 277. Specifically, Parents' add, the District did not discuss the necessary supports to allow the Student to access the general education setting when she transitioned from the self-contained preschool to the blended preschool for the 2011-2012 school year. *PD-204*. A fact Parents' describe as "inexcusable" given that the Student transitioned from a placement where she had no contact with typically developing students to a placement where over one-third of her day was spent in an inclusive setting with approximately thirty students. *Compare PD-113 with PD-200*. Despite this substantial change in program, the Student's IEP team did not have a

discussion about the necessary accommodations, modifications and supports for her to participate in the inclusive preschool setting. *Transcript*, at 1556:9, 1568:9. Although the IEP team did discuss accommodations, it did not engage in any discussion at the May 25, 2011 IEP meeting or August 16, 2011 IEP meeting regarding the Student's participation in the general education preschool. *PD-204*; *PD-236-238*. The IEP team did consider the effect of the Student's placement change from the self-contained preschool to the inclusive preschool. As a result, it did not provide reasonable measures to encourage her participation in the general education setting.

Finally, in support of their argument, Parents' aver that the Student's IEP team failed to consider the Student's need for inclusive education in order to maintain her academic and nonacademic skills, and not regress, when it made the decision to place her in the Life Skills Program. The Student's IEP team did not consider the Student's specific needs at its April 20, 2012 IEP meeting when it changed her placement to the segregated [REDACTED]. In the conference notes from the April 20, 2012 IEP meeting, there is no documentation of a discussion regarding the benefits of inclusion for the Student. *PD-402-403*. In the Educational Placement Considerations section of the IEP, there is a statement that the Student "would lack exposure to typically developing peers," but no documentation about any discussion about why inclusion is important for the Student. *PD-398*. The IEP does state that the Student will have access to "same-aged typically developing peers during lunch and at other times." *PD-398*. Based on the IEP, the "other times" would be 20 minutes per week of Library. *PD-397*. Notably, [REDACTED] testified that the IEP team did not discuss the regression that would result to the Student's speech ability and behaviors if she were placed in the [REDACTED]. [REDACTED] *Transcript*, at 496:9-497:2. The IEP team did not consider the need that the Student has for education with children without disabilities.

In contrast, [REDACTED] testified that the Student needs instruction in the general education setting to develop numerous academic and functional skills. [REDACTED] explained that the Student needs typically-developing peer models to develop appropriate social skills and reciprocal communication skills. She testified that the Student needs structured opportunities with students who did not have disabilities in an instructional setting in order to develop meaningful social interactions. *Transcript*, at 260:19-261:15. Specifically, she stated that the

Student cannot just be provided access to typically developing peers at lunch or at recess, but needs to be a part of a classroom. *Transcript*, at 259:4-260:8. The Student needs typically-developing peers for communication role models, typically developing peers for play role models, and typically developing peers for behavior role models. *Transcript*, at 260:9-14, 262:21. During her observation of the Life Skills Program, [REDACTED] did not observe students who could be communication role models or social skills role models for the Student. *Transcript*, at 271 :21, 272:3. Based on the Student's current IEP, she would only receive interaction with same-aged, typically developing students during Library, which is 20 minutes per week. According to [REDACTED], this would not allow for the structured interaction necessary for the Student to make progress.

In their closing argument brief Parents' conclude that under the IDEA, an appropriate education is "one that is likely to produce progress, not regression." *TH v. Bd. of Educ. Of Palatine*, 55 F.Supp.2d 830, 840 (N.D. Ill. 1999). If the Student were placed in the Life Skills classroom, she would experience regression of academic and nonacademic skills. Undoubtedly, education in a segregated setting that leads to regression could never be a free appropriate public education in the least restrictive environment. *Parents' Brief*, p. 15.

#### District's Position

As the end of the 2011-2012 school year approached, the IEP team and the Parents' mother knew that the Student would transition from the preschool program to kindergarten. The District scheduled updated evaluations for the Student in order to provide her IEP team with current information and to assist in the educational placement and educational planning decisions. The IEP team met on April 20, 2012 where it was determined that the Student continued to be eligible for special education services. The team, which included staff from the continuum of placements to be discussed, developed the IEP and agreed to placement at the Life Skills Program at Northside Elementary.

The following members of the IEP team testified at hearing: the Student's mother, [REDACTED]

[REDACTED]

[REDACTED] and [REDACTED] The Parent was formally notified of the conference on April 10, 2012. (SD 4; PD 46, 379) In addition, the Parent and the Student's preschool teacher, [REDACTED] communicated regarding the evaluations and upcoming transition planning prior to the April 20, 2012 eligibility and IEP meeting. (SD 1; PD 121, 1294, 1299-1309). The Parent excused occupational therapist [REDACTED] and [REDACTED] the [REDACTED] ABA consultant from the meeting. (SD 3; PD 46, 378)

Re-Evaluations

[REDACTED], the [REDACTED] Special Education School Psychologist, conducted the initial evaluation for special education in 2009 as well as the re-evaluation in the Spring 2012. The evaluation consisted of a review of the prior medical information and the Student's prior history as well as an updated evaluation using a developmental profile. (Tr, 10/11/2012, 747; SD 29, PD 42)

[REDACTED] testified that a direct assessment of 5-year-old the Student was not appropriate because of the unique testing circumstances of children under 8 years of age. He explained that children's growth rate is significantly faster at that time frame than any other time frame in an individual's life, so any direct measure of intelligence or performance provides a snapshot of where that student is at that certain time and is not accurate. Standard scores from individually administered standardized assessments prior to age 8 can have widely varying outcomes. (Tr. 10/11/2012, p. 748)

[REDACTED] conducted a Developmental Profile, Third Edition (DP-3), comprehensive, standardized rating system utilized to assess child development from birth through age twelve. The DP-3 is comprised of five broad scales measuring development across the domains of physical, adaptive behavior, social-emotional, cognitive and communication. It is administered as a interview of the student's parents and/or other caregiver/teacher. (Tr. 10/11/2012, p. 729) The DP-3 is a recognized and acceptable tool in the field of psychology. (Tr. 10/11/12, p. 767) [REDACTED]

██████████ conducted the DP-3 interview with the Parent and teacher, ██████████. The school psychologist found that the Student continued to demonstrate significant global delays in all areas. The Student's standard scores were below 50 on the physical scale, the social-emotional scale, and the cognitive scale based on the information provided by the Parent and ██████████. The Student's standard score was below 50 on the adaptive behavior score based on information provided by ██████████ and a standard score of 56 on the adaptive behavior score based on information provided by the Parent. Her standard score was below 50 on the communication scale based on information provided by ██████████ and a standard score of 55 on the communication scale based on the information provided by the Parent. Even though her standard score was slightly higher on the communication scale and the adaptive behavior scale based on the information provided by the Parent, the Student still scored at a level equal to or better than <0.1 percent of the same-aged peers nationally on every scale. (SD 29; PD 42, p. 357) Her rating on the developmental assessment was consistent with prior evaluative data and his observations of developmental levels. (SD 29; PD 42, p. 361)

In addition to conducting the Student's psycho-educational evaluations, ██████████ has observed the Student in the classroom on an average of one day per week during her three years in the preschool program and provided consultation to her teacher. (Tr. 10/11/12, p. 735, 740, 746, 768) Due to her global delays, the Student is not demonstrating any splinter skills at the current time. (Tr. 10/11/12, p. 777)

██████████ shared the results of his evaluation during the eligibility portion of the April 20, 2012 IEP meeting. (Tr. 10/11/12, p. 756). The Student's eligibility is not at issue in this due process proceeding. With regards to placement, in ██████████'s opinion, the Student would benefit from functional life skills instruction and functional academic instruction. (Tr. 10/11/12, p.

776, 786) [REDACTED] believes that the Student can best meet her goals in a Life Skills instructional program. He believes that general education with supports would not be the least restrictive for the Student because she would need one-to-one instruction for the core academics, which will result in a significant length of time where she will not be with her typically developing peers. (Tr. 10/11/12, p. 776, 785)

[REDACTED] Special Education Cooperative social worker, conducted a re-evaluation in the Spring 2012. She conducted the Scale of Independent Behavior- Revised and updated the Social Developmental Study. (SD, 30; PD 40; Tr. 10/19/12 1030-1032) The Scale of Independent Behavior-Revised (SIB-R) measures the overall adaptive behavior based on four areas of adaptive functioning: motor skills, social skills, personal living skills, and community living skills. The Parent provided the information for the Scale. The Student had a standard score of 69 on her motor skills; a standard score of 41 on her social communication skills; a standard score of 37 on her personal living skills; and a standard score of 61 for community living skills. (PD 40, p. 336; Tr 10/19/12, 1034-1035). The Student's percentile rank was 0.1 percent in social/communication skills and personal living skills. Her percentile rank was 0.4 percent in community living skills, and 2 percent in her motor skills. (PD 40, p. 336) [REDACTED] also conducted an assessment of problem behaviors with the SIB-R because the Parent reported there were problem behaviors. The results showed that the Student was normal in all areas of the general maladaptive index, which includes assessment of internalized, asocial, and externalized behavior. (Tr. 10/19/12, p. 1035-1036.) [REDACTED] testified that the behaviors exhibited by the Student are normal for the developmental level that she is currently at. (Tr. 10/19/12, p. 1036) The Student's support score was 50, showing she requires frequent support. (PD 40, p. 335-336) [REDACTED] [REDACTED] also observed the Student at the preschool program on several occasions, and based on her

observation found that the Student still required guided play and a lot of assistance from her individual aide. (PD 40, p. 338).

In [REDACTED] opinion, the Student has not made enough progress or growth to perform in a general education classroom. (Tr. 10/19/12, p. 1066) Between the first evaluation in 2009 and the re-evaluation in 2012, the Student showed an age equivalent growth of about 1 ½ years. Her overall broad independence standard score increased from 35 to 47, but her percentile rank of .1 in overall broad independence did not vary between 2009 and 2012. (Tr. 10/19/2012, p. 1068- 1069) Specifically, [REDACTED] opinion that the [REDACTED] is the most appropriate placement because it has intensive programming, a smaller staff to student ration, and development of adaptive skills would be focused upon. Moreover, [REDACTED] believes that the Student would be overstimulated in a general education class room. Moreover, due to the frequency of how often the Student would need to be removed from a general education classroom for either the resource room or an adaptive behavior intervention environment, the general education placement could actually be more restrictive than the Life Skills placement. (Tr. 10/19/12, p. 1071-1072)

[REDACTED] is a speech and language pathologist for [REDACTED] Special Education Cooperative. (Tr. 10/4/12, p. 571-572) [REDACTED] conducted the initial speech evaluation as a part of the play-based assessment. (Tr. 10/4/12, p. 577-578). For the April 20, 2012 IEP, [REDACTED] conducted a Receptive One-Word Picture Vocabulary Test and the Expressive One- Word Picture Vocabulary test. the Student's standard scores were 62 and <55, respectively. (SD, 2; PD 46, p. 383) The average range for standard scores is 85 to 115. The Student was often able to name objects but was not

able to use many verbs to tell what she is doing or what is happening. She was better able to follow simple directions. The Student did have errors of speech sound production, which makes it difficult to understand her at times. She is able to imitate most sounds and produces sounds in words much better with a model. The speech pathologist found that the Student's speech and language skills were well below her age level, but that she had made progress over the 2011-2012 school year. (SD 2; PD 46, p. 383) [REDACTED] testified that in her opinion, the Student does not have the ability to follow directions of a regular classroom; she would not understand some of the directions; she cannot sit for the period of time; her pre- academic skills are not sufficient to perform at a rate expected in the kindergarten program; and she does not have the social interaction to interact in the classroom. Because of these areas of need [REDACTED] does not believe that the Student would succeed in a general education classroom with supports in place. (Tr. 10/4/12, p. 639)

Placement decision at 4/20/2012 IEP team meeting

The District avers that it is the responsibility of the IEP team to decide what constitutes the LRE for a student. The placement decision must be consistent with a student's IEP. 23 Ill. Admin Code §226.240(a) and (b). The placement decision of trained educators is given deference by courts. *Heather S.*, 125 F.3d at 1057.

The Student was in her last year of a blended preschool program at the time of the placement decision but could not remain in the same program due to her transition from preschool to kindergarten. The Student has remained in the preschool program for her stay-put placement. As a part of her preparation for the April 2012, IEP meeting, [REDACTED] [REDACTED] the Life Skills teacher went to the blended preschool to observe the Student in preparation for the IEP. [REDACTED] observed the Student during one of the school days in the preschool classroom. (Tr. 10/19/12, p. 1137)

The IEP team reviewed the reevaluation results. The team determined her academic, developmental and functional needs stemming from her disabilities as follows: “the Student needs a predictable, pictured, structured routine with extra attention to physical safety, sensory strategies, speech and language therapy, communication strategies, structured teaching-type presentation (including ABA therapy), and extra and repeated opportunities to engage with peers and to increase functional use of objects. The Student needs repeated exposure to pre-readiness skills” (SD 2; PD 46, p. 385) The team found that the Student continued to be eligible for special education services. (SD 2). The team considered special factors and determined that the Student required assistive technology devices and special needs related to communication. Autism factors were also considered. Based upon all of this information, and reviewing her present level of academic achievement and functional performance, the IEP team developed the Student’s goals and objectives. The goals focus on the Student’s functional and pre-readiness/academic needs. The Student was to work on toileting, functional communication skills, increasing time and attention to developmentally appropriate tasks and activities, math pre-readiness, social skills, ABA therapy, and expanding her understanding of motor planning through one and two step motor activities.

The IEP team determined that placement at the [REDACTED] at [REDACTED] [REDACTED] would provide the Student with FAPE in the least restrictive environment for kindergarten in the 2012-2013 school year. As explained by the school psychologist, “The goals drive placement. The current goals, I feel, would be best suited in the Life Skills instructional program as opposed to learning common core math, reading, writing, and language at the [REDACTED] (general education).” (Tr., p.776) The [REDACTED] [REDACTED] provides a smaller student to staff ratio, more opportunity to implement methodologies that best meet the Student’s needs, teachers and teaching assistants are

specially trained in and have experience with working with students with Autism and other cognitive and developmental disabilities, and the Student's curriculum would be developmentally appropriate, and she would have the opportunity to interact with same-aged typically developing peers during lunch and at other times. (SD 2; PD 46, p. 398). The IEP also documented the placement options and placement decision with the team's rationale. (SD 2; PD 46, p. 398-99) These options included general education kindergarten, District Instructional and Kindergarten, and the [REDACTED]

[REDACTED] In the conference notes under Services, the case manager also documented discussion regarding appropriate placement considerations. (SD 2; PD 46, p. 403) At that time, the Parent agreed with the placement decision.

The evidence and testimony from the hearing show that the Student is significantly globally delayed in all areas. She has been receiving a combination of a structured environment in the special education early childhood learning classroom, one on one aides, communication devices, related services, one hour of time each school day with typically developing peers and intensive ABA therapy. The evidence shows that the Student continues to need similar education and support services at a greater level of intensity than what is available at the general education kindergarten classroom with supports in order to receive an educational benefit. Based on the documentary and testimonial evidence, there was an appropriate evaluation and assessment of the Student's disabilities and educational needs by the parent and a group of knowledgeable persons reviewing relevant data and placement option appropriate to her identified needs. The placement decision was made after a determination of the Student's goals and objectives/benchmarks. The placement decision conforms to the law governing LRE; the local school, [REDACTED] that the Student would attend if she were not disabled was given first consideration but her needs required a different location to ensure a FAPE

in the LRE. There is no evidence that the decision was based on administrative convenience or that the decision was based on the Student's need for modifications or supports or services. The IEP includes a statements regarding the effect of the Student's disability on her progress and involvement in general education curriculum, and the IEP states whether the Student will participate in assessments. The District believes that it followed appropriate procedures under the IDEA, and the IEP is designed to enable the Student to receive educational benefits.

Moreover, in order to satisfy the LRE requirement, a district selects the appropriate placement along the continuum of alternatives. "[A] district must mainstream [a student]-that is, provide her an education with her nondisabled peers-to the 'greatest extent appropriate.'" *Beth B.*, 282 F.3d at 498. The analysis is whether the education in the conventional school was satisfactory and, if not, whether reasonable measures would have made it so. *Board of Educ. of Twp. High Sc. Dist. No. 211 v. Ross ex rel. Ross*, 486 F.3d 267, 277 (7<sup>th</sup> Cir. 2009). A student cannot be removed from the regular classroom unless their education there, with the use of supplementary aids and services cannot be achieved satisfactorily. *Beth B.*, 282 F.3d at 498. Here, the evidence supports the IEP team's determination that the Student's education could not be achieved satisfactorily in the regular classroom with the use of supplementary aids and services.

The District alleges that Parents' expert, [REDACTED] provided an opinion supporting the placement in general education with supports that the Parent requests. However, [REDACTED] is not a member of the IEP team, she has not spent any significant length of time with the Student either inside or outside the classroom (Tr. 10/3/2012, p. 287-288), and her opinion is based on observing 20 minutes of instruction in the [REDACTED] (Tr. 10/3/2012, p. 292) and 30 minutes in the general education classroom (Tr. 10/3/2012, p. 281) [REDACTED] also made it clear that she is not a

school psychologist, and her opinion is based on her training as a diagnostic clinician. (Tr. 10/3/2012, p. 160, 226) [REDACTED] opinion is that an alternative placement should be chosen. But the standard is not whether an alternative placement could be designed for the Student. As described above, the IEP team determined an appropriate placement for the Student which will provide a free appropriate public education in the least restrictive environment.

#### Hearing Officer Conclusion

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

a satisfactory education, some factors which the undersigned will use to evaluate the placement in this case are: (1) whether a segregated placement is superior, and if so, whether the services which make the segregated placement superior can be replicated in the classroom, *Board of Education of Township No. 211 v. Michael R.*, 2005 WL 2008919 (N.D. Ill. 2005) citing *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) affirmed 486 F.3d 267 (7th Cir. 2007); (2) whether there are educational benefits to mainstreaming, *Michael R.*, *supra*, citing *Sacramento v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994); (3) whether there are non-academic benefits to mainstreaming, *Id.*; (4) cost to the school district of mainstreaming, *Z.S. v. School District of the Wisconsin Dells*, 295 F.3d at 672; (5) disruptive effects on other students, *Alex R. v. Forrestville Community Unit School District*, *supra*. 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). Relatedly, in determining whether a methodology is reasonable, the Seventh Circuit has held that a school district is entitled to determine what reasonable methodology would be "most appropriate" in educating a student. *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988). However, the Seventh Circuit has not defined whether: (1) "most appropriate" means that the District may adopt a methodology in order for the District to

provide an optimal education for the student (even if this means that the student would have to be placed in a more segregated placement); or rather (2) "most appropriate" means that, if the District's decision to provide more than "the floor of educational opportunity" ("FAPE") to a student would necessarily lead to a more segregated placement, the District's discretion is limited to being able to choose among reasonable options designed to provide a disabled student the floor of educational opportunity required by IDEA (FAPE).

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.*

The placement of a child in a segregated classroom "runs counter to the policy of the IDEA of 'mainstreaming' disabled children to the 'maximum extent appropriate.'" *Casey K. v. St. Anne Community High Sch. Dist. No. 302*, 400 F.3d 508, 512 (7th Cir. 2005). The IDEA mandates that districts "maximize the contact that disabled children have with nondisabled children." *James v. Bd. of Educ. of Aptakistic-Tripp Comm. Consolidated Sch. Dist.*, 642 F. Supp. 2d 804, 833 (N.D. Ill. 2009). Numerous courts have recognized and supported the IDEA's least restrictive environment provision as setting forth a "strong congressional preference" for integrating children with disabilities into regular education classrooms. *See, e.g., id.; see also Oberti v. Bd. Of Educ. Of Clementon Sch. Dist.*, 995 F.2d 1204, 1214 (3d Cir. 1993); *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989); *A. W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 162 (8<sup>th</sup> Cir.1987); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1982).

Due to this strong preference, there are several conditions that an IEP team must consider before changing a child's placement to a segregated setting. The

Seventh Circuit declined to articulate "a formal test for district courts to apply when deciding LRE cases." *Beth B.*, 282 F.3d at 499. However, in *Beth B.*, the court stated that a student "may not be removed from the regular classroom unless [her] education there, with the use of supplementary aids and services, cannot be achieved satisfactorily." *Id.* at 498. In *Board of Educ. of Township High Sch. No. 211 v. Ross*, the court stated that the LRE decision requires two steps: first, "whether the education in the conventional school was satisfactory" and second, "if not, whether reasonable measures would have made it so." 486 F.3d 267, 277 (7th Cir. 2007).

The Hearing Officer finds that the Parents' have met their burden of proof on this issue. The Student's education at [REDACTED] was satisfactory despite her IEP team not providing reasonable measures to improve her education in the regular education classroom. The Student has made progress on her IEP goals while participating in an inclusive preschool program and, consequently, the District violated the IDEA's mandate for education in the least restrictive environment when it changed her placement to the [REDACTED] in its proposed April 2012 IEP.

**8. Whether the [REDACTED] failed to provide an appropriate ABA program, including the necessary staff training and consultation, from June 4, 2012 through June 28, 2012 during ESY and for the 2012-2013 school year?**<sup>20</sup>

Parents' Position

Parents' aver that when the District revised the Student's IEP on April 20, 2012 it failed to include an appropriate ABA program, including necessary staff training and consultation, so that the Student could continue to make progress on her IEP goals. On the Student's April 20, 2012 IEP, the District failed to include staff training that would be necessary to design, implement and monitor the ABA program that the Student has been receiving that has created

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<sup>20</sup> Formerly Issue 11 in Parents' Amended DPCN.

progress. *PD-398*. Additionally, the April 20, 2012 IEP removed consultation from [REDACTED] and did not provide a person who would have the expertise to design and oversee the ABA program that is necessary for the Student. *PD-397*. As a result, Parents' conclude that the Student was denied a FAPE as her IEP was not reasonably calculated to confer her educational benefit. *See Rowley*, 476 U.S. at 176.

Parents' point to the Student's making significant progress with the ABA program that she has received at Eastland since September 2011. Her ABA program, a highly-structured, individualized instructional program, has been overseen by [REDACTED] an autism consultant with 15 years of experience designing and implementing ABA programs. *Transcript*, at 1415:2-1424:13. Although [REDACTED] provided the oversight of the program, the day-to-day implementation of the program was performed by an aide for one hour each day. *Transcript*, at 1463:16. [REDACTED] consulted with the aide and the Student's mother for two hours every other week. *Transcript*, at 1463:24. During that time, [REDACTED] would review the Student's progress, model instructional methods for the aide, troubleshoot regarding any difficulty with the programs, and select the programs that the Student would continue. *Transcript*, at 1464:11-12. During the 2011-2012 school year, the Student received ABA instruction in 11 program areas which were driven by the Student's performance on the Behavioral Language Assessment ("BLA"). *PD-746-750*.

[REDACTED] testified that the Student made progress in all of the areas that she received instruction, as documented by the BLA. *Transcript*, at 1501:22-1509:17. Through ABA instruction, the Student developed the following skills: working well for 10 minutes at a table without disruptive behavior; frequently making requests using 10 or more words, signs or pictures; imitating several fine and gross motor movements upon request; vocalizing frequently with varied intonation and saying a few words; repeating or closely approximating words; matching 5-10 colors, shapes or designs; pointing to at least 100 items; and, verbally interacting with peers with prompts. *PD-900-902*. The Student's significant progress while receiving ABA instruction at Eastland is well-documented. *PD-746-750*.

The Student's IEP team members have also recognized the significant progress

that the Student has made while receiving instruction using ABA. [REDACTED] testified that "there's no denying that" the Student has done well with ABA and that it is a methodology that works for her. *Transcript*, at 294:2-4. [REDACTED] testified that the Student was increasing in her ability to make vocalizations and, during the last school year, the Student had made "more progress than she had in the past." *Transcript*, at 627:14-15. [REDACTED] testified that the Student made progress in many areas with ABA including motor imitation, communicating with words, following directions, and completing puzzles. *Transcript*, at 562: 14-563:2. Each of the witnesses who reviewed data from the Student's ABA program testified that she made progress with the methodology.

Parents' draw comparison with the Student's failure to make *any* progress during the previous school year with several of the same objectives for which she received ABA instruction the following year. *Transcript*, at 426:21-444:1. For example, [REDACTED] testified that the Student was never able to "Point to 5 body parts" during the 2010-2011 school year. *Transcript*, at 442:11; *PD-164*. During the following school year, through ABA instruction, [REDACTED] testified that the Student identified 28 body parts. *Transcript*, at 370:25. This is just one example of many where instruction through ABA transformed the Student's progress.

Based on the Student's success with the ABA program, [REDACTED] recommended that the Student continue receiving that structure for her ABA program for ten hours each week. *Transcript*, at 256:19-20. [REDACTED] testified that the Student's program needed to be supervised by "someone that has been trained specifically in the implementation and design and the assessment of ABA." *Transcript*, at 1521:8-10. This person could continue to provide two hours of consultation biweekly to school personnel who would be implementing the program on a daily basis. [REDACTED] stated that she expected, with the Student's history of progress during the previous school year, that she would continue to make gains in all areas including communication, motor ability, academic, and behavior skills. *Transcript*, at 1520:5-9.

The IEP created on April 20, 2012 removed consultation with [REDACTED] regarding the Student's ABA program. *PD-377-404*. It does not provide any consultation for the classroom teacher in order to design, oversee and direct the ABA

program. Although the IEP states that ABA is embedded throughout the program (PD-40), [REDACTED] the Student's proposed teacher in the [REDACTED] [REDACTED] testified that she has not had training to implement an ABA program similar to what the Student has received and has been successful for the Student. *Transcript*, at 1148:15-16. [REDACTED] testified that she could not implement an ABA program to encourage the Student's speech. *Transcript*, at 1146:20-1147:10. [REDACTED] testified that she is not able to implement the ABLLS or VB-MAPP. *Transcript*, at 1128:4-12. These are necessary assessments to drive an ABA program, as testified by [REDACTED] *Transcript*, at 1426:17-20. Furthermore, there is no evidence that [REDACTED] understands the necessity for data collection. When [REDACTED] provided instruction during Extended School Year to the Student, she was expected to provide the Student's ABA maintenance program. However, she did not complete any data that would be evident from a maintenance program. The Student's mother expressed her concerns about [REDACTED] understanding of methodology when she observed the Student during ESY. Similarly, when [REDACTED] observed the Life Skills Program, she did not observe [REDACTED] providing instruction that was research-based and would be beneficial for the Student. *Transcript*, at 275:3-4.

Parents' are adamant that their child needs a specific one-on-one ABA instructional program for 10 hours each week that is implemented by a trained individual and the ABA program must be overseen with bi-weekly consultation from an individual who has experience designing, overseeing and implementing an ABA program within schools. This individual must also have the training to administer the ABLLS or VB-MAPP. Although the District has previously contracted with Little Friends to perform this function, Parents' point out that there are numerous other providers who can fulfill this role throughout the state. Regardless of who provides the consultation, given the Student's history, this consultant role is essential for the Student to receive a FAPE.

Parents' draw the conclusion that by removing from the Student's IEP consultation from someone who has experience designing, overseeing and directing an ABA program, the IEP team has not created an IEP that is reasonably calculated to confer educational benefit on the Student. Parents' believe the IEP team has created

an IEP that, on one hand, is too restrictive due to the level of segregation and, in turn, provides for an inferior instructional method that does not have evidence to support its use with the Student. When determining to place the Student in a segregated classroom at the Life Skills Program, the IEP team did not create an IEP that would provide her with an appropriate education.

#### District's Position

The Student's IEP did not provide for an outside ABA consultation for the 2012 ESY maintenance of the Student's skills. The IEP provided that the Student would have an individual aide, instructional special education with integrated speech and language, and occupational therapy. (PD 46, p. 400) The ABA maintenance program was implemented in accordance with the program set up by [REDACTED] during 2012 ESY. (PD 49) Moreover, [REDACTED] is trained in structured teaching and discrete trial, and planned to use appropriate methods with the Student in the Life Skill program. (PD 46, p. 403) Additionally, it was agreed that the Student would receive 5 hours of ABA therapy per week. (PD 46, p. 403) There is no evidence that the District failed to provide appropriate education, to include ABA therapy, staff training and consultation during 2012 ESY and in the proposed placement. The District concludes that Parents' have failed to meet their burden to prove this allegation and fails to prove that the Student was denied FAPE.

#### Hearing Officer Conclusion

The Hearing Officer is of the opinion that the Parents' have sustained their burden of proof on this issue. The IDEA requires that each IEP include "a statement of the program modifications or supports for school personnel that will be provided for the child..." 20 U.S.C. 1414(d)(1)(A)(i)(IV). The District failed to include staff training that would be necessary to design, implement and monitor the ABA program that the Student has been receiving that has created progress. The April 20, 2012 IEP removed consultation from [REDACTED] specifically [REDACTED] and did

not provide for a replacement person who would have the expertise to design and oversee the ABA program that is necessary and has documented successes for the Student. The District has not sufficiently documented how it is that the more restricted segregated setting at [REDACTED], that does not provide an ABA program, compares to the gains the Student has made with ABA programming at [REDACTED]. Therefore, the Hearing Officer finds that the Student was denied a FAPE as her IEP was not reasonably calculated to confer her educational benefit. See *Rowley*, 476 U.S. at 176.

9. **The Student's IEP team predetermined her placement for the 2012-2013 school year and did not allow for meaningful parental participation.**<sup>21</sup>

Parents' Position

Parents' allege in their DPCN that the Student's IEP team predetermined her placement in the Life Skills Program and did not allow for her mother and step-father to meaningfully participate in the decision regarding her kindergarten placement. Parents' claim that a school district's pre-determination of a child's placement is a violation of IDEA because it deprives the child's parent of meaningful participation in the IEP process. See *James*, 642 F. Supp. 2d at 821; see also *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988) (a school system violates the very purpose of the IEP requirement of meaningful participation if it pre-determines placement); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004) ("Because it effectively deprived [student's] parents of meaningful participation in the IEP process, the predetermination caused substantive harm and therefore deprived [student] of FAPE"). Parents' aver that in the instant case, documents and witness testimony indicate that the Student's mother did not have the opportunity to meaningfully participate in the decision

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<sup>21</sup> Formerly Issue # 12 in Parents' Amended DPCN.

regarding her child's placement for the 2012-2013 school year.

██████████ the District's superintendent, testified that he knew prior to the April 20, 2012 IEP meeting what placement the school would be recommending for the Student. *Transcript*, at 43:18. He attended a planning session prior to the IEP meeting, which included members of the Student's IEP team and excluded the parent. *Transcript*, at 43:23-44:6. ██████████ testified that, at that planning meeting, the group determined the Student's placement for the 2012- 2013 school year. *Transcript*, at 43:22. When the Student's mother documented her disagreement with that placement recommendation in a letter to ██████████ on April 29, 2012, he denied her request for an IEP meeting to discuss the Student's placement. *PD-956-958*. ██████████ testified that he believed that the April 20, 2012 IEP meeting considered all of her concerns regarding placement. *Transcript*, at 76:13. However, the Student's mother documented several concerns about the Life Skills Program, which were not documented as part of the discussion at the IEP meeting and ██████████ testified were not considered at the meeting. For example, she documented her concerns that the Student's behavior and speech would regress in the Life Skills Program. *PD-956*. These are concerns that ██████████ did not recall as part of the placement discussion at the April 20, 2012 IEP meeting. *Transcript*, at 496:9-19. Despite these unaddressed concerns, the District denied the Student's mother's request for an IEP meeting.

Parents' claim that the District's predetermination of the Student's kindergarten placement for the 2012-2013 school year denied the Student's mother's ability to meaningfully participate in the educational planning for her daughter. First, the District made a decision regarding the Student's kindergarten placement at a meeting that did not involve the Student's parent. Following this meeting, the District denied the Student's mother's request to reconvene the IEP team to discuss relevant concerns raised about the proposed placement, which had not been discussed previously. The District did not want to reconvene the IEP team because it had already predetermined the Student's placement and denied her parent the opportunity to meaningfully participation in the decision. As a result, the District denied the Student a free appropriate public education in the least restrictive environment.

### District's Position

Shortly after the April 20, 2012 IEP meeting where the Student's placement for her kindergarten year was determined, the Student's mother made a written request for an IEP to discuss change in placement to general education with supports, a functional behavior assessment and behavior intervention plan, an increase in occupational therapy, and training for the ESY paraprofessional. Her request for change in placement was based on information the Student's mother learned at a conference about Inclusion in General Education. (PD 111) The District denied the request for an IEP meeting because the matters raised had already been fully evaluated and resolved, and there was no new information about the Student or the District's educational programs. (PD 112) The Student's mother has actively participated in the IEP team since 2009. She has attended every IEP meeting, and the IEPs, communication notebooks, and testimony demonstrate her involvement in the IEP process. The fact that the parent's request to convene an IEP team meeting for matters which had already been resolved two weeks prior does not deny the Student's mother meaningful parental participation in the IEP process. Since the April 2012 IEP, there has been frequent contact between the Student's mother and school staff (PD 162), the Student's mother participated in the August 23, 2012 IEP meeting to revise goals from the April 2012 IEP per corrective action required by the investigator of the State Complaints (PD 55), the parents have consistently actively participated in IEP meetings, and the Student's mother's suggestions have been taken seriously by the IEP team even when not implemented in the final IEP. See *B.B. ex rel. J.B. v. Hawaii Dept. of Educ.*, 483 F. Supp. 2d 1042, 1051 (D. Hawaii 2006) (noting that when there was frequent contact between the parents and school staff, the parents actively participated in IEP meetings, and the parents' suggestions were taken seriously by the IEP team, the parents were not denied meaningful participation). The Student's mother

fails to sustain her burden of proof to show that the District failed to allow meaningful parental participation since April 29, 2012.

#### Hearing Officer Conclusion

It is the opinion of this Hearing Officer that the Parents' have not sustained their burden of proof on this issue. While testimony confirmed that the Superintendent attended a meeting prior to the convening of an IEP meeting where a final decision was to be made on placement of the Student for the 2012-2013 school year, there is no conclusive evidence to show that the decision was predetermined. An abundance of testimony offered by many if not all of the witnesses produced at the Hearing confirms that the Parents', especially the Student's mother, have been actively involved in the decision making process for their daughter. The District has demonstrated through its witnesses that Parents' opinions were heard and in many instances instrumental in changing or adding services. Parents' cannot claim they were denied active participation on the basis of the District's admission that a pre-meeting occurred prior to the convening of the IEP meeting in August, 2012, when in all other IEP meetings, there is no indication or evidence to show that the District did anything wrong. No denial of FAPE is proven by the Parents' on this issue.

**10. Whether the District failed to provide appropriate occupational therapy from August 16, 2011 to the present and failed to convene an IEP team with an occupational therapist on April 20, 2012?**<sup>22</sup>

#### Parents' Position

Parents' complain that the District did not provide appropriate occupational therapy to the Student during the 2011-2012 school year. Parents have previously demonstrated that the District did not hire an occupational therapist to provide school-based occupational therapy for [REDACTED] during the 2011-2012 school year.

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<sup>22</sup> Parents' Issue 9 from its Amended DPCN, Whether [REDACTED] failed to convene an IEP meeting with the required IEP team members on April 20, 2012 is included within this Issue.

*Transcript*, at 99:18, 694:22,699:7-18. [REDACTED] testified that no occupational therapist provided consultation or attended the Student's IEP meetings that school year. *Transcript*, 128:18-131:9. No occupational therapist participated in the Student's reevaluation meeting on April 20, 2012 when her placement was changed to the Life Skills Program. *PD-380*.

Parents' allege that the District also denied the Student a free appropriate public education by failing to convene her April 20, 2012 IEP meeting with an occupational therapist who could provide insight into the necessary IEP services for the Student. At the April 20, 2012 IEP meeting, the Student's mother provided a report from her child's private occupational therapist and requested that her child receive sixty minutes of occupational therapy, rather than thirty minutes. The IEP documents this request and the response from [REDACTED] administration. The IEP states that, "Without an O.T. present to address appropriate minutes to meet the requirement of educational therapy ...discussing changing minutes was not appropriate." *PD-402*. This statement, Parents' claim, acknowledges that the District did not convene an IEP meeting with the required participants to determine the appropriate related services for the Student.

In addition to needing an occupational therapist to make recommendations regarding the amount of minutes for the Student's related service, the District needed an occupational therapist to make recommendations for her goals. Although the Student's private occupational therapist reported that her fine motor skills, gross motor skills and attention to task had improved over the year, the Student was reported to be "well below average for her fine motor precision, fine motor integration, and manual dexterity." *PD-373*. Her private occupational therapist explained that "these skills decrease the Student's ability to perform age appropriate school based tasks such as writing and cutting." *PD-373*. Despite her need for continued development of fine motor skills, there were no new goals or objectives written to address these concerns. In fact, her fine motor objectives continued to be the same as they were written during the previous year: "The Student will imitate a circle and cross" and "the Student will cut a 5" square in half." *Compare PD-389 with PD-264*. Sadly, as the [REDACTED] administration fully admitted, because there was no occupational therapist at the IEP meeting, there was no person with the qualification to advise the IEP team regarding the need for changes to the Student's program. *PD-402*.

The IEP explains that the newly-hired occupational therapist, [REDACTED] was on maternity leave at the time of the meeting and could not attend. PD-402. Although the Student's mother signed a meeting excusal for [REDACTED] a therapist who was on maternity leave and had never worked with the Student, she did not believe it was appropriate for no occupational therapist to attend the meeting. PD-378. That excusal was specific for [REDACTED] and did not represent any acknowledgement that the District did not need to have an occupational therapist at the meeting. The Parents' conclude that by not convening an IEP meeting with the necessary individuals to determine the Student's appropriate related services, the District denied the Student a FAPE.

#### District's Position

Occupational therapist [REDACTED] attended the Student's IEP meeting on August 16, 2011. At that time, [REDACTED] recommended a reduction in OT minutes due to the Student's progress in alertness, attention, fine motor and continued support to the school staff to incorporate strategies during the school day. The parents disagreed with this recommendation. Upon discussion, [REDACTED] Director of [REDACTED] ECSE program and program supervisor, recommended keeping the minutes at 30 minutes per week because [REDACTED] Cooperative had not been successful in recruiting additional occupational therapy staff and would be offering to reimburse for outside occupational therapy. (PD 28, p. 236) The Student did receive the private occupational therapy for 30 minutes per week in accordance with the Student's IEP, which was paid for by [REDACTED] Cooperative. (PD 33) Additionally, [REDACTED] had an occupational therapist that was available to the IEP team if they had questions or concerns. (TR. 10/11/2012, p. 863-864) The Student's teacher, who had worked with her for the past two school years, testified that she did not have any concerns during

the 2011-2012 school year where she needed an occupational therapy consult. (TR. 10/4/2012, p. 460)

The Student received occupational therapy during 2012 ESY in accordance with her IEP. (PD 22) The Student is currently receiving occupational therapy services per her most recent IEP. (Tr. 10/3/2012, p. 132-133; 316-318) The only evidence the Parent produced to dispute the amount of school occupational therapy services was the [REDACTED] multidisciplinary evaluation from July 2010 which recommended consultative and direct school OT for sixty minutes per week. However, the evaluation is two years old, and the Student's current IEP with the thirty minutes per week for occupational therapy reflects her current needs. It should be noted that the occupational therapy update from the outside occupational therapist dated June 11, 2012, indicated that she provided therapy once per week for 30 minutes (PD 48, p. 406) but in the summary she recommended the Student "continue" school based occupational therapy twice per week for 30 minutes (PD 48, p. 407), which is certainly not a clear recommendation for an increase in occupational therapy minutes. The outside occupational therapist, [REDACTED], did not testify at hearing. The District concludes that the Parents have failed to meet their burden of proof to show the District has failed to provide appropriate occupational therapy.

The District avers that the Student's mother excused occupational therapist A [REDACTED] and [REDACTED] the [REDACTED] ABA consultant from the April 20, 2012 meeting. (SD 3; PD 46, 378) See 20 U.S.C. §1414(d)(1)(C)(i). All of the remaining IEP team members required by 20 U.S.C. §1414(d)(1)(B) and Ill. Admin. Code, tit. 23, §226.210 were present. The team agreed to reconvene in the fall to discuss occupational therapy and ABA therapy minutes, and the occupational therapy minutes remained at thirty minutes per week of direct services. (PD 46, p.402) Furthermore, the IEP team

considered the occupational therapy report from the Student's outside therapist, who provided educational occupational therapy during the 2011-2012 school year, and who recommended continuing the same amount of occupational therapy. (PD 46, p. 406-407)

#### Hearing Officer Conclusion

Each IEP must include "a statement of the program modifications or supports for school personnel that will be provided for the child...to be involved in and make progress in the general education." 20 U.S.C. 1414(d)(1)(A)(i)(IV). Through the District's own admissions, an occupational therapist was not hired during the 2011-2012 school year nor did and OT attend any IEP meetings for the same period. Although the parent may have signed a release for the OT on maternity leave not to attend the IEP meeting, the release does not provide blanket coverage for any other OT to attend the meetings. The District's failure to not provide an OT in attendance at the IEP supports the Parents' averment and therefore denial of FAPE. The Hearing Officer is of the opinion that the Parents' have sustained their burden of proof and finds the District's failure to provide an Occupational Therapist during the 2011-2012 school year is a denial of FAPE. Additionally, the District's failure to have an OT attend the Student's IEP in April of 2012 also amounts to a denial of FAPE.

#### VII. COMPENSATORY EDUCATION

Parents' aver that their Child is entitled to compensatory education due to the District's denial of their daughter's right to a free appropriate public education. First, the Student is entitled to compensatory services to remedy her occupational therapy and speech language deficits for the period when she was denied FAPE. *See, e.g., Reid*, 401 F.3d at 522 (holding that compensatory instruction is a logical extension of the Supreme Court's ruling in *Burlington*). In addition, the Student's mother believes she is entitled to reimbursement in the amount of \$2,650 for the

independent educational evaluation conducted by [REDACTED] that she obtained and presented to the District in August 2010. *See, e.g., Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186*, 41 F.3d at 1169 (affirming a decision that a school district must reimburse parents for an independent evaluation when they disagreed with the district's evaluation). Finally, the Student's mother believes she is entitled to reimbursement in the amount of \$1,020 for the ABA program in which she enrolled the Student at [REDACTED] and was "reasonably calculated" for her to benefit. *See, e.g., Mary P.*, 919 F. Supp. at 1181 (citing *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993) for the principle that a court can order reimbursement if a school district denied FAPE and, as a result, the parent obtained appropriate private services for the child). Due to the District's sustained denial of a FAPE for the Student, she is entitled to compensatory education.

Parents' correctly posit that compensatory education is an equitable remedy purposed "to 'remedy an educational deficit created by an educational agency's failure to provide a FAPE to a student.'" *Petrina W v. City of Chicago Pub. Sch. Dist.* 299,2009 WL 5066651 (N.D. Ill. 2009)(quoting *Reid ex ref. Reid v. Dist. of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005)); *see also Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ.*, 79 F.3d 654, 656 (7th Cir. 1996). Compensatory services should be awarded in an amount that places the student in the position that she would have occupied without the denial of FAPE. *Petrina W*, 2009 WL 5066651. Hearing officers have great discretion to determine how much compensatory education is required. *Petrina W.*, 2009 WL 5066651. Finding that a school district has denied a student a FAPE, a hearing officer is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief." *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 374 (1996). This includes reimbursing parents for the costs of private special education if the hearing officer determines that such placement, rather than the student's IEP, was proper. *TH.*, 55 F. Supp. 2d at 844 (citing *Burlington*, 471 U.S. at 369). Furthermore, parents are entitled to reimbursement

for the cost of a unilateral placement when the school district has violated the IDEA failing to follow the procedures set forth in the Act, which in turn results in a denial of a FAPE. *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. No. 200,21* F. Supp. 2d at 874 (citing *Board of Educ. of Murphysboro v. Illinois State Bd. Of Educ.*, 41 F.3d 1162, 1168 (7th Cir. 1994)).

Hearing Officer Conclusion:

This Hearing Officer finds that the Student and her Mother are entitled to compensatory education for the violations of FAPE that have been averred by the Parents' and supported by the case law provided by Parents' in their *Brief Closing Arguments*.

In finding for the Student, documentary and testimonial evidence provided at the hearing substantiated the District's denial of FAPE from August 2, 2010 to August 16, 2011, wherein the District failed to provide an appropriate ABA program, including consultation from a qualified behavioral analyst. This documented failure supports an award of "additional" speech and language services as well as occupational therapy services for the child.

In finding for the mother, her testimony that she expended the amounts of money that she did and are alleged both in her complaint and in Parents' *Brief Closing Arguments*, supports an award of \$2,650 for the independent educational evaluation conducted by [REDACTED] that she obtained and presented to the District in August 2010 and reimbursement in the amount of \$1,020 for the ABA program in which she enrolled her child at [REDACTED] including transportation to and from the program location and her home.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

- A. The District shall place the Student in the general education kindergarten at [REDACTED] to include the necessary pull-out special education,

as well as accommodations, modifications, supplementary aides and related services as determined by the IEP team.

- B. The District shall provide a two-hour daily ABA program which employs Discrete Trial Format using errorless learning and includes consultation from a behavioral analyst qualified to design, oversee and evaluate an ABA program.
- C. The District shall conduct or otherwise contract for payment for a qualified individual to administer the Verbal Behavior Milestone Assessment and Placement Program (VB-MAPP).
- D. The District shall conduct or otherwise contract for payment for a qualified individual to administer an augmentative communication evaluation.
- E. The District shall convene an IEP meeting with the required IEP team members, including an occupational therapist and person qualified in ABA therapy, to do the following;
  - 1. develop appropriate, measurable annual goals that address the Student's academic, functional and communication needs, including a goal for structured peer interaction;
  - 2. provide weekly data reports detailing the Student's progress on her measurable IEP goals;
  - 3. implement the recommendations of the augmentative communication evaluation and provide the recommended devices;
  - 4. conduct a functional behavior assessment and develop and appropriate behavioral intervention plan for the Student;
  - 5. provide sensory integration accommodations, including an appropriate pressure vest; and
  - 6. provide a visual schedule to structure the school day, visual rule cards, and visual systems, including a Visual Time Timer;
  - 7. ascertain the specific amount of time of compensatory education the Student will be able to benefit from in each of the Student's deficit areas as identified by [REDACTED]'s evaluation and that is commensurate with the

child's abilities as determined by the IEP teams review of the additional tests conducted pursuant to and consistent with the findings of this Decision. The specific amount of time on a daily and/or weekly basis shall be calculated to reflect that period of time between August 2, 2010 August 16, 2011 which is the time determined by the Hearing Officer found that the District denied the Student a FAPE.<sup>23</sup>

- F. The District shall provide reimbursement for the independent educational evaluation that Parents' obtained from [REDACTED]
- G. The District shall provide reimbursement for the 2011 [REDACTED] ABA Summer Program, including transportation to and from the program; and,
- H. The District shall provide compensatory education in each of the Student's deficit areas for the period of time beginning August 2, 2010 through August 16, 2011 that the District denied the Student a FAPE. (See *Order E-7* above)

In accordance with 105 ILCS 5/14-8.02a(h), within 20 school days of receipt of this **Decision and Order**, the District shall submit proof of compliance to;

**Illinois State Board of Education  
Program Compliance Division  
100 North First Street  
Springfield, IL 62777-0001**

#### **NOTICE OF RIGHT TO REQUEST CLARIFICATION**

Pursuant to 105 ILSC 5/14-8.02a(h) either party may request clarification of this decision by submitting a written request to the Hearing Officer within five (5) days of receipt of the decision. The request for clarification shall specify the portions of the decision for which clarification is sought. A copy of the request shall be mailed to all other parties and the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, IL 62777. The right to request clarification does not

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<sup>23</sup> Parents' left the calculation of the amount of time of Compensatory Education up to the Hearing Officer, giving no preference or indication on what they believed is reasonable. Because of the Student's age (5) and deficits identified by the Independent Evaluation(s) and the need to have other evaluations conducted by an OT and behavior assessment, the Hearing Officer hesitates to make a reasoned guess on what may or may not be appropriate compensatory time sufficient enough to restore the Student to the position she would have occupied, had the District provided her with a FAPE during the period in which she was deprived of one. (See *Reid*, 401 F.3d at 518 ("Compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA."))

permit a party to request reconsideration of the decision itself and the Hearing Officer is not authorized to entertain a request for reconsideration.

**FINALITY OF DECISION**

This decision shall be binding upon all parties.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Pursuant to 105 ILCS 5/14-8.02a(i), any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within one hundred and twenty (120) days from the date the decision is mailed to the party.

Date: November 24, 2012

  
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HARRY A. BLACKBURN  
Impartial Hearing Officer

## CERTIFICATE OF SERVICE

The undersigned certifies that on November 24, 2012 before 5:00 p.m., the undersigned caused this DECISION AND ORDER to be served on each person listed below via e-mail and via Regular U.S. Mail postage pre-paid unless otherwise specified AND uploaded on to ISBE's Special Education Data System on the same date.

[REDACTED]

[REDACTED]

[REDACTED]

Special Education Due Process Coordinator  
Illinois State Board of Education  
100 North First Street  
Springfield, Illinois 62777  
(E-mail & Regular U.S. Mail Only)



Harry A. Blackburn  
Independent Hearing Officer  
P.O. Box 34  
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(815) 254-3658 (Facsimile)  
[hblackburnlaw@sbcglobal.net](mailto:hblackburnlaw@sbcglobal.net)

APPENDIX A

[REDACTED] v. Eastland CUSD #308  
Case No: CASE NO. 2012-0536

Child: [REDACTED]	
Attending School: [REDACTED]	
Child's Parent(s): [REDACTED] Mother/Petitioner	