

Case Number: 2013-0031

[REDACTED] vs. [REDACTED]

Hearing Officer: Joseph P. Selbka

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

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**Impartial Due Process Hearing Decision
Cover Page**

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

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

Date and Timelines

Date of Written Request: 01/04/2013
Date of Pre-hearing Conf: 01/08/2013

Date of Hearing: 04/04/2013 to 04/04/2013
Date of Decision: 4/15/2013

Summary of Decision: The Parent sought due process for a claimed inappropriate placement, inappropriate location of services, inappropriate BIP and behavioral goals; and a claim that the District predetermined the placement. The IHO found for the Parent on inappropriate placement and location of services and found for the District on all other issues. [REDACTED] and [REDACTED] represented the Parent. [REDACTED] represented the District.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) ISBE CASE NO. 2013-0031
)
) Joseph P. Selbka
) Impartial Due Process
) Hearing Officer

I. Introduction and Procedural History

1. The Due Process Complaint was filed on July 25, 2012. The Parents, [REDACTED] ("Parents") filed their initial due process complaint *pro se* on behalf of their son, [REDACTED] ("Student"). Parents objected to the placement and location of services the District was proposing at [REDACTED]. Parents sought to preserve Student's location of services at [REDACTED]. The District responded on August 6, 2012.

2. On August 9, 2012, Parents moved for a stayput order. The matter was fully briefed and argued, and on August 14, 2012, the undersigned entered an initial stayput order in this matter.

3. After the stayput order, the parties subsequently agreed upon a district location of services at [REDACTED]. The parties also subsequently conducted a mediation session on August 21, 2012, and agreed to a ninety day interim placement at the [REDACTED] prior to going to hearing.

4. After the 90 day interim placement, the Parents continued to be dissatisfied with the placement at [REDACTED]. The Parents subsequently retained [REDACTED] and [REDACTED] to represent them. Parents' counsel filed an amendment to the due process complaint on January 14, 2013.

5. A prehearing conference occurred on February 1, 2013. At the prehearing conference, the parties agreed to the issues set forth below.

6. On March 11, 2013, The Parents moved to amend the issues to include a motion for reconsideration of the undersigned's stayput order on August 14, 2012.

7. The evidentiary portion of the hearing occurred on March 12, 13, 21, and 22, 2013. The following exhibits were admitted into evidence at hearing without objection: JD1-1210 and SD1-373 (including SD216A-E) and PD1-10. The parties initially sought both closing argument and closing briefs on April 3, 2013. The parties subsequently waived closing oral argument on April 1, 2013, and stood on their respective closing briefs. IHO Exhibits ##1-3 were admitted into evidence. The District objected to all IHO exhibits. The undersigned admitted the Parent's documents under my authority set forth in 105 ILCS 5-15/8.02a(g-55) of the School Code to require and obtain any information necessary to make my decision, and/or the Parent Exhibits were legal authority which are not in the nature of evidence. The District presented no authority that I exceeded my authority under the School Code. The undersigned also gave the District five business days prior to cross examination or consideration of the IHO exhibits. Hearing officers

have the discretion to allow documents into evidence so long as a party is given 5 business days to prepare for the hearing. *Letter to Steinke*, 18 IDELR 739 (1992). OSEP's interpretation of its own regulations are entitled to deference as long as said interpretations are reasonable. *Walk v. Illinois Department of Children and Family Services*, 926 N.E.2d 773, 399 Ill.App.3d 1174(2010); *Joseph v. Holder*, 579 F.3d 827, 831 (7th Cir. 2009). As the School Code uses nearly identical language as the federal regulation, it should be interpreted identically.

8. The following witnesses testified at hearing: the Parents; [REDACTED] ("Special Education Coordinator"); [REDACTED] ("[REDACTED] Director"); [REDACTED] ("Parent's Counselor"); [REDACTED] Ed.D ("Superintendent"); [REDACTED] ("District Special Ed Director"); [REDACTED] ("District Program Coordinator"); [REDACTED] ("Aunt"); [REDACTED] ("School Psychologist"); [REDACTED] ("Teacher"); [REDACTED] ("Teacher"); [REDACTED] ("District Program Psychologist"); [REDACTED] ("School Nurse"); and [REDACTED] ("District Speech Language Pathologist").

9. On April 3, 2013, the District requested a continuance to filing closing briefs to April 4, 2013. The continuance was granted and extended the decision deadline to April 15, 2013.

II. Issues to be Decided

10. The issues initially to be decided in the Parent's amended complaint are:

- a) Whether the District has denied FAPE by failing to provide an appropriate placement at [REDACTED]
- b) Whether the District has denied FAPE by failing to provide an appropriate location of services at [REDACTED]
- c) Whether the District denied Student FAPE by failing to conduct an appropriate FBA (conducted over the months of September and October, 2012 as part of Student's reevaluation);
- d) Whether the District failed to design an appropriate IEP, in November, 2012 by failing to formulate appropriate behavioral goals and an appropriate BIP;
- e) Whether the District predetermined Student's placement at a public location of services ([REDACTED]) before May, 2012;

Parents seek as relief compensatory education in the form of therapy and counseling; an appropriately revised IEP, and a prospective placement at [REDACTED] (a private therapeutic day school).

Issue C was subsequently withdrawn at hearing, and the Parents request reconsideration of the stayput order entered by the undersigned in this case.

The due process hearing was held and a decision in this matter is being rendered, pursuant to 20 U.S.C.A. 1400 et seq., and its implementing regulations, 34 CFR 300 et seq. and the pertinent sections of the Illinois School Code, 105 ILCS 5-15/8.02a.

III. Findings of Fact

Preliminary Discussion on Findings of Fact

11. In large part this dispute arose after the District chose to create a public therapeutic program ([REDACTED]) for its students on the autism spectrum. Prior to the 2012-2013 school year, the District sent students in need of a therapeutic environment to private therapeutic day schools like [REDACTED] (Tr. 267-268, 270). Both parties presented evidence as to the District's motives in creating the [REDACTED]. According to the Parents, the [REDACTED] is a cost saving measure. According to the District, the [REDACTED] is an attempt to provide better academic services to disabled children and an attempt to partially mainstream more disabled children.

12. As the undersigned discusses below, the District generally has discretion as to how to structure its programs to provide disabled children with FAPE. Budgetary considerations are permissible in determining how to structure said programs. Similarly, districts are entitled to choose among reasonable methodologies to provide disabled children with FAPE. As such, because all the proposed reasons behind the District's decision to create the Castle Program are permissible under IDEA, the undersigned is not going to adjudicate the wisdom of the District's decision to create the [REDACTED]. To do so would impinge on the discretion vested in the District's Board of Education and Administration.

13. Rather, the undersigned is going to determine whether: (1) the services provided at the [REDACTED] can provide Student FAPE; and (2) whether the District's actions in transferring Student from [REDACTED] to [REDACTED] deprived Student of FAPE.

Student's History and Aspects of Student's Disability

14. Student is a nine year old boy born on January 21, 2004 (JD 625). Student is eligible for special education under the disability term of autism (JD 626). Student has been diagnosed with pervasive developmental disorder not otherwise specified (JD 463). Student has also exhibited symptoms consistent with Aspergers, obsessive compulsive disorder, and a high level of anxiety (JD 412).

15. Student has had behavioral issues since the age of two (Tr. 32). Student has exhibited abnormal tantrums, attempts to elope, and aggressive behavior since that time (Tr. 32).

16. Student reacts badly to large crowds (Tr. 41). Large crowds will upset student a great deal more than a nondisabled student would react (Tr. 41).

17. Sensory accommodations like stress balls; sensory stimulation; tight squeezes, and weighted vests have been ineffective for addressing Student's behaviors at home (Tr. 51). Similarly, positive and negative reinforcement has also been ineffective at home (Tr. 52).

18. Student has had behavioral interventions since preschool (Tr. 32-33). However, Student has been expelled from multiple day care and preschool programs for his behaviors (Tr. 34-35). Student exhibited behaviors like hitting, biting, and kicking when he first entered school (Tr. 35-36).

19. Student's aggressive behaviors continued through preschool into kindergarten (Tr. 34-38). Student kicked, hit, bit other teachers, students, and Parents (Tr. 34-38).

20. In Kindergarten, Student also had extensive behavioral problems at school and home including throwing himself on the floor, wailing, hitting himself, kicking, biting, scratching, and throwing things at parents and family members (Tr. 40, JD 237). Student had occasional toileting accidents at home and school in Kindergarten (JD 238). Student had problems with attention and disruptive behaviors in Kindergarten (JD 238).

21. Student's behaviors continued to deteriorate through his first grade year in the District's public placement (Tr. 50, JD 357, JD 414). Student had frequent problems in the class with aggression, self-regulation, social immaturity, and behavioral overreaction (JD 357, JD 412-414). Student began to engage in self-injurious behavior and continued acting in a highly aggressive manner to peers and teachers during his first grade year (JD 482).

22. By the beginning of Second Grade, Student was unable to access education even in a self-contained special education classroom (Tr. 57-58, JD 533-535). In September, 2011, the IEP Team agreed to send Student to a therapeutic day placement (JD 537). The physical location of services ultimately chosen was [REDACTED] (JD 567).

Student's Experience at [REDACTED] and the [REDACTED] Program

23. [REDACTED] is a day treatment facility for children with autism spectrum disorders (Tr. 119). [REDACTED] is accredited by "ISACS", the Independent School Accreditation of the Central State (Tr. 120).

24. At [REDACTED] Student was taught in a classroom with an approximate 3:1 student to staff ratio (Tr. 128). A clinical therapist provided group and individual therapy to Student as well as pushing in to provide therapeutic interventions (Tr. 128-129). [REDACTED] has a speech and language therapist and an occupational therapist who push in and works with Student (Tr. 129).

25. At [REDACTED], Student's schedule was pre-mapped to have a preferred task followed by a non-preferred task with visual schedules to explain what is expected of the students (Tr. 129). The visual schedules are known as PECS (Tr. 129).

26. Student's teachers at [REDACTED] were experienced in teaching children on the autism spectrum (Tr. 130).
27. [REDACTED] used differential reinforcement to replace Student's aggressive behaviors (Tr. 132). As soon as Student learned replacement behaviors, he used the replacement behaviors (Tr. 136).
28. At [REDACTED] Student did not physically pinch or hit other students or staff (Tr. 137). Student's behaviors at home also improved markedly at [REDACTED]
29. [REDACTED] also had a sensory room and a "White Room" where Student could take a sensory break (Tr. 133). Most children on the autism spectrum have sensory processing disorders (Tr. 133). When children on spectrum become overstimulated, they are often craving sensory input (Tr. 133-134). [REDACTED] provides sensory breaks throughout the day so the children can get the sensory input (Tr. 134). At [REDACTED], Student used sensory interventions known as fidget toys; swings and a ball pit (Tr. 134). These sensory breaks were helpful for Student (Tr. 135). Student also used the White Room to calm himself (Tr. 135).
30. [REDACTED] used and uses evidence based practices that are proven to work, including: differential reinforcement; a token economy system; functional behavior analysis; pivotal response treatment; discrete trial training; shaping/chaining/task analysis; social stories/social narratives; picture exchange system; video modeling; prompting; extinction; positive reinforcement; speech generating devices; computer based interventions; visual supports; social skills groups (Tr. 142-143; IHO #2, pg.2).
31. Student had no problems with toileting at Edgewood LOS (Tr. 140).
32. [REDACTED] is a 100% out of general educational placement with no possibility of mainstreaming.
33. Student made satisfactory behavioral progress at [REDACTED] (Tr. 65-67, Tr. 630-635, Tr. 147-153, JD 607-610, JD 617-620).

The May 23, 2012, IEP Meeting and the District's Decision to Transfer Student to [REDACTED]

34. On May 23, 2012, the District held an IEP Meeting (SD 626). According to the Parents, the District had no interest in discussing the transfer from [REDACTED] to [REDACTED] (Tr. 70). The District admits that, at the meeting, the Parents had reservations regarding the transfer (Tr. 416-418). Moreover, the District never directly contradicted that it intended to transfer Student from [REDACTED] to [REDACTED]. However, the District contends (and parents do not deny) that the District actively considered the program which Student was to receive at either location of services (including goals, accommodations, services) (Tr. 405-414). Moreover, the District did discuss the Parent's concerns regarding the transfer from [REDACTED] to [REDACTED] (Tr. 418-419).

35. Ultimately, the District, after discussion, made a recommendation for the placement at [REDACTED] (Tr. 418-419).

36. Students on the autism spectrum have difficulty adjusting to change of any kind, including change arising from a transfer from one school to another (Tr. 513-514, 657-658).

37. Parents and [REDACTED] Director argued for Student to remain at [REDACTED] or for a long transition so that Student could be successfully moved from [REDACTED] to [REDACTED] (Tr. 654, 414-415). The District members of the IEP Team rejected the request for a transition period in because the District members of the IEP Team "felt" that the beginning of the school year was a natural point in time for change (Tr. 656). The District did not base its determination on any psychiatric opinion (Tr. 655-656). At hearing, the District did not justify the "feeling" of its IEP Team on any reason implicating professional discretion in light of the unique needs of this child (Tr. 655-658). Indeed, in nineteen years of experience, the District Special Education Coordinator couldn't recall ever transferring a child on the autism spectrum without a plan in place to transition the child from one environment to another (Tr. 657).

Parents' Actions After the IEP Meeting and Prior to the Transfer to [REDACTED]

38. Parents disagreed with the decision to transfer Student to [REDACTED] and decided to file for due process (SD 162-168). Parents contacted [REDACTED] who, according to the Parents, informed Parents that as long as the Parents filed before the transfer, the stayput would protect the Parents and prevent the transfer (Tr. 77-78).

39. In late August, 2012, Student was transferred to [REDACTED] following an agreement between the Parents and the District after the undersigned's initial order on stayput (JD 702).

40. In July, 2012, Student's psychiatrist, [REDACTED], sent the District a letter stating that due to Student's problems with transitions, Student should not be transferred from [REDACTED] to [REDACTED] (SD 160-161, 169-170). The letter also noted that if the District intended to move forward with the transfer, Student needed a long transition period in light of his disabilities (SD 160-161, 169-170). There is no evidence the District IEP Team reconsidered its decision not to include a transition plan in light of the letter. There is no evidence the District convened an IEP meeting in light of the letter. Rather, the District apparently ignored the letter (Tr. 655).

41. At hearing, the [REDACTED] Director (an educator with years of experience teaching children on the autism spectrum and extensive knowledge of Student) testified to a reasonable degree of professional certainty that before Student was transferred: (1) the District needed to determine whether Student could generalize coping skills to different environments and educators; and (2) prepared for the change using a number of practices (Tr. 532-537, Tr. 546-549, 550-553, 561-562). The undersigned makes a credibility finding in favor of Educational Director and adopts the opinion of [REDACTED] Director that the District needed to determine whether Student could apply coping mechanisms across different environments and that the District needed to prepare Student for the transfer. The undersigned bases this credibility finding (as well as the adoption of the expert inferences embedded in [REDACTED] Director's opinion) based on her experience and reasoning set out at the hearing; the lack of reasons set forth by the

District as to was unnecessary; and the fact that all parties agree that problems with transitions are some of Student's unique needs.

Student's Experience after Transfer to [REDACTED] and the [REDACTED] Including Student's BIP and Behavioral Goals

42. [REDACTED] is one of the classrooms designated as part of the District's [REDACTED] (Tr. 356-358). The program at [REDACTED] is similar to the program at [REDACTED] (Tr. 356-358).
43. The [REDACTED] Program was designed by the District to have the therapeutic components of the various private therapeutic day schools along with research based academic programs (Tr. 333, 335). The [REDACTED] Program uses the following evidence based practices: discrete trial rotation/applied behavioral analysis (Tr. 338-341); social skills training through the [REDACTED] Program (Tr. 342); positive behavioral reinforcement (Tr. 366) including pivotal response training (Tr. 367), and a token economy system/tangible reinforcement (Tr. 367); planned ignoring (Tr. 367); sensory diets (Tr. 370).
44. The [REDACTED] Program has nearly all the programs and services available as Student could/would receive at [REDACTED] (Tr. 376-397).
45. [REDACTED] also has a calming room (Tr. 371); a sensory tent (Tr. 371); a de-escalation room (Tr. 372); and other sensory items (Tr. 374).
46. [REDACTED] also has speech and language services, occupational therapy services, and social work services available (Tr. 369).
47. The [REDACTED] Program also has a peer mediated intervention (a form of partial mainstreaming) wherein students on the autism spectrum can interact with their nondisabled peers (Tr. 349-351). In October, 2012, when large groups at lunch and recess seemed to overwhelm Student, the District attempted to provide more intensive supports at lunch and recess along with recess by himself (JD 700, 765, 766). Student required lunch with a set group of students (JD 766).
48. The [REDACTED] Program provides research based reading and math programs depending on Student's individual needs (Tr. 352-353).
49. Staff were trained in the various evidence based practices available through the [REDACTED] Program (Tr. 338-339, 362-364).
50. The District is extensively monitoring the staff's fidelity to the discrete trial practices developed for the [REDACTED] Program (Tr. 365, 924-932). The District monitoring has shown that District staff is properly applying discrete trial practices (Tr. 924-932). In light of the District monitoring results, the undersigned makes an inference that the District staff have been adequately trained to carry out the services and methodologies in the [REDACTED] Program.

52. Student appears to be responding to the District's attempts at planned ignoring in the classroom (Tr. 378).

53. Student has a behavior intervention plan as [REDACTED] (Tr. 354). Student also has a goal designed to measure and reduce Student's aggression in school (Tr. 106 JD 503).

54. The Parent provided no evidence that the BIP is inappropriate other than Student is being restrained too much and the BIP is not actually reducing Student's aggressive behaviors. Similarly, the Parent provided no evidence that the behavioral goals are inappropriate other than the fact that student is making inadequate progress. Rather, the evidence presented by the parent suggested strongly that a goal to reduce aggressiveness is a necessary behavioral goal for the student. Parents' actual concerns are not the technical propriety or construction of the BIP or the language of the behavioral goals, but rather that there is lack of progress on Student's behavioral issues (See eg. Tr. 106).

55. Student has been making good progress academically while at [REDACTED] (JD 699-700). Parents' Counsel admitted that the academic components of Student's IEP and instruction at [REDACTED] is not at issue in this case (Tr. 1001).

56. Behaviorally, Student has not made sustained progress on controlling aggressiveness and maladaptive behaviors at home and school (JD 698-699, 702-703, 807; JD 841-847, Tr. 501, 503, 662-665, 681-683; 703-704). While he occasionally seems to progress, he then regresses in behaviors at home and at school (*Id.*). Student has hit staff on multiple occasions; sent his teacher to the hospital due to biting; punched another student in the face, and threatened to kill himself (Tr. 662-663). Student has had to be physically restrained between eight and ten times over a five month period at [REDACTED] (Tr. 478-493). Student is having daily toileting problems where such problems did not exist prior to transfer to [REDACTED] (Tr. 81-82). This demonstrates significant regression (Tr. 502-504). Student has had a significant uptick in aggression (including hitting, biting, throwing objects), lying, stealing, and tantrums at home following the transfer to [REDACTED] (Tr. 83-84, 86). Student engages in self-injurious behaviors at home including banging his own head against the wall (Tr. 83-84). Student will attack the family pet and attack other children at home if Student is left unattended (Tr. 87-88).

57. Student's physician has responded by increasing the dosage of Student's medication and adding medications (Tr. 85).

58. The undersigned makes an inference that Student's behavioral issues arise not out of a faulty goal (except for a goal for home behavior discussed below) or out of a faulty BIP, but rather out of the District's failure to consider the effects of a transfer on this Student. The undersigned bases this inference on the extensive evidence admitted that Student could be affected by physical transition from [REDACTED] to [REDACTED] and the lack of evidence that the BIP or behavioral goals were technically deficient in some way.

59. The undersigned makes a further inference that the transfer without appropriate transitions caused Student's regressions as opposed to the alternative hypotheses offered by the District. Specifically, the District contended that Student's regression may have been caused by

the amended complaint was filed in January, 2013, nor allowed to address the home aggressive behaviors in an IEP context.

Other Facts Related to Parents' Remedies Not Already Discussed

64. [REDACTED] is a private therapeutic day school designed for children on the autism spectrum (Tr. 119). [REDACTED] is on the approved list for reimbursement by Illinois (Tr. 120). [REDACTED] has the appropriate services, staff, and classes to implement any conceivable appropriate IEP for Student at this time (IHO Ex. #2, pp. 124-137, 141-144), with one exception. [REDACTED] has no opportunities for mainstreaming or reverse mainstreaming (Tr. 145). The District has admitted that [REDACTED] programs are appropriate for Student and, by voluntarily sending Student to [REDACTED] the District has implicitly admitted that the cost of [REDACTED] is reasonable by voluntarily sending Student to [REDACTED].

65. The only compensatory education program any party presented to the undersigned at hearing was 18 months (Tr. 539) to return Student the educational benefit he would have had but for the inappropriate transfer. No party suggested an alternative remedy to allow Student to remain in a public placement with compensatory services of a different kind. The undersigned therefore adopts the opinion of [REDACTED] Director that 18 months of services at [REDACTED] LOS will compensate Student for the behavioral regression and lost progress incurred by Student due to the District's failure to provide Student with FAPE.

IV. Conclusions of Law

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

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

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

68. In determining whether a placement is proper under IDEA and the School Code, the hearing officer does not need to defer to the school district witnesses. *School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002)(like Wisconsin ALJ's, Illinois Impartial Due Process Hearing Officers are presumed to be experts on special education and special education law, see 105 ILCS 5/14-8.02c); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167 (7th Cir. 1994)(hearing officer characterized as expert witness in determining whether placement is proper).

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

69. In Illinois state administrative proceedings, hearsay which has been objected to is generally inadmissible. *Sudzus v. Department of Employment Security*, 393 Ill.App.3d 814 (2009).¹ To the extent hearsay is admitted without objection, the evidence can be given its natural weight. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 Ill.App.(2d) 100,610 (2nd Dist. 2011); *Sykes v. District of Columbia*, 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

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

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

72. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Smith v. Tri-R Vending*, 249 Ill.App.3d 654, 661 (1993). Hearing officers can make reasonable inferences from the evidence adduced at trial. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j.

¹This rule is different than federal administrative hearing where hearsay is admissible as long as it is relevant and material. *Otto v. Securities and Exchange Commission*, 253 F.3d 960, 966 (7th Cir. 2001).

dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Moreover, any inference a hearing officer makes must be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support his/her conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

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

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

75. Illinois law also imposes upon all administrative hearing officers the obligation to properly make an administrative record. *Meneweather v. Board of Review*, 249 Ill.App.3d 980, 984-985 (1992). As in most state administrative proceedings, Illinois administrative hearing officers have an obligation not only to listen to evidence presented by the parties, but to affirmatively find facts necessary to properly to determine which party should prevail under the law. *Meneweather, supra*; See also, Frank Cooper, *State Administrative Law*, Vol. 1, Bobbs-Merrill Company, Inc. (1965), pg. 336. Similarly, IDEA requires a decision based upon substantive grounds based on whether a child received FAPE. 20 U.S.C.A. 1415(f)(3)(i); *A.G. v. District of Columbia*. 57 IDELR 9, 794 F.Supp.2d 133 (D.D.C. 2011). This federal requirement also imposes upon all administrative hearing officers the obligation to structure the hearing so as to properly make an administrative record. *Id.*

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

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

Conclusions of Law Related to IEP Design and the Definition of FAPE

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

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

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

79. Illinois requires all school districts to teach students to manage emotions and behavior for both academic and life success. 405 ILCS 49/5, 15. Illinois social-emotional standards are available on the ISBE website and are made part of this administrative record as IHO Exhibit #4. Students must be taught: social and interaction skills; how to manage emotions and behavior; how to develop self-awareness and self-management skills; how to use social awareness and interpersonal skills to establish and maintain positive relationships; to develop skills to prevent,

manage, and resolve conflicts in constructive ways; to consider ethical, safety, and societal factors in making decisions. *Id.* The standards specifically require school district to teach social and emotional skills and protocols for establishing positive peer, family and work relationships (See IHO Ex. #4, Goal #2). The state standards require a school district to teach students to understand why unprovoked acts that hurt others are wrong (See IHO Ex. #4, Goal #3).

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

81. As part of the IEP Team's responsibilities, it must determine the safety and health needs of a child in order to provide accommodations designed to protect the child in his/her educational environment, and design an IEP which protects the safety needs of a child. *Lillbask v. State of Connecticut Department of Education*, 397 F.3d 77, 42 IDELR 230 (2nd Cir. 2005). To fail to protect a disabled child's physical and psychological safety when designing an IEP constitutes a denial of FAPE. *Id.* The physical and psychological safety of the child is also an important factor (mandated by regulation) to be considered in determining the LRE of the disabled child. 34 CFR 200.116(d).

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

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

84. In determining whether a student is making academic progress, objective factors such as regular advancement from grade to grade and achievement of passing grades is evidence of progress. *Alex R.*, *supra*, 375 F.3d at 615.

85. Another factor in determining whether an IEP is reasonably calculated to provide an educational benefit is whether the IEP addresses the Student's unique needs. *Jaccari J v. Board of Education, Chicago Public School District No.299*, 690 F.Supp.2d 687, 702 (N.D.Ill. 2010). In determining whether the District considered a student's unique needs properly in developing an IEP, general principles of reviewing decision making in administrative law are helpful. Decisions are unreasonable if the IEP Team: has relied on factors Congress has not intended it to consider; has entirely failed to consider an important aspect of the problem; has offered an

explanation for its decision counter to the evidence before the IEP Team; or is so implausible that the decision could not be ascribed to a difference in view or the product of IEP Team expertise. See *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (determining when an agency's decision making is arbitrary and capricious in rulemaking which is roughly synonymous/analogous to the task hearing officers have to judge the reasonableness of IEP Teams in making decisions regarding IEP design). Similarly, when educational professionals depart from well-established practices, there must be a good reason for doing so. *Id.*

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

87. Failure to properly set out the components of an IEP is a procedural violation of an IDEA. *A.I. by Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 44 IDELR 255 (D.D.C. 2005). Therefore, to the extent a district fails to provide measurable or concrete goals, this is a procedural violation of IDEA. *Rosinsky v. Green Bay Area School District*, 53 IDELR 193, 667 F.Supp.2d 964 (E.D. Wis. 2009).

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

89. Thus, in order to provide substantive FAPE, an IEP must establish goals which respond to all significant facets of a student's disability, both academic and behavioral. *Sarah D., supra*. A District must address all of a student's unique social-emotional needs like low self-esteem, anxiety, lack of trust, and depression with specific goals and short term objectives/benchmarks. *Sarah D., supra*; *Los Angeles Unified School District*, 39 IDELR 257 (Cal. SEA 2003).

90. A behavioral intervention plan contains accommodations and/or related services which are (whether the school district calls it such or not), part of the student's IEP. 34 CFR 300.324(a)(2). Failure to design an IEP with an appropriate BIP can be a denial of FAPE like any other design failure in an IEP. *Neosho R-V School District v. Clark*, 38 IDELR 61, 315 F.3d 1022 (8th Cir. 2003); *R.K. by R.K. and S.L. v. New York City Department of Education*, 56 IDELR 168 (E.D.N.Y. 2011)(magistrate judge report adopted at 56 IDELR 212); *judgment aff'd* 694 F.3d 167 (2nd Cir. 2012); *Long v. District of Columbia*, 780 F.Supp.2d 49 (D.D.C. 2011). When behavior problems interfere to an extent that a child loses academic benefits due to behavior problems, a district may need to provide a cohesive plan to address the child's behavior

problems. *Id.* To fail to formulate a BIP in such a circumstance is unreasonable, and thus results in a denial of FAPE. *Id.*

91. Although there are no substantive federal requirements for a BIP, Illinois has state standards which govern the content of a BIP. 23 Ill.Admin.Code 226.320(b) (2007). Illinois's state standards are enforceable through IDEA. *CJN v. Minneapolis Public Schools, Special School District No. 1*, 323 F.3d 630 (8th Cir. 2003). Illinois requires the district summarize the findings of the FBA; summarize prior implemented interventions; describe behavioral interventions to be used; including those aimed at developing alternative or more appropriate behaviors; identify the measurable behavioral changes expected and methods of evaluation; identify a schedule of review of the interventions' effectiveness; and identify provisions for communicating with the parents about the child's behavior and coordinating school-based and home-based interventions. 23 Ill.Admin.Code 226.320(b)(2007).

92. An IEP must be revised "as appropriate" when a district knows or should know that the IEP is clearly failing. 34 CFR 300.325(b); *M.M. v. Special School District No. 1*, 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008).

93. A hearing officer need not accept school district claims as true regarding the reasonableness of IEP design, but neither should the hearing officer substitute his/her judgment for that of the school officials who have designed the IEP. *School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 37 IDELR 34 (7th Cir. 2002). The hearing officer determines reasonableness, not, what in a hearing officer's judgment, would be the best placement for a student. *Id.*

94. As such, in determining whether an IEP is reasonably calculated to provide FAPE, the undersigned must defer to the District as to disputes among appropriate methodologies to educate the student. *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988); *See also White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003); *G.D. v. Westmoreland School District*, 930 F.2d 942 (1st Cir. 1991);. The District is entitled to choose among reasonable methodologies to provide a student FAPE, and the parent does not have the right to veto the district's reasonable methodological choices. *Id.* The reasonable choice of the school district as to methodology need not even need to be the best choice available. *G.D., supra*. Therefore, in this case, it is important to focus on the District's placement rather than on the placement at the [REDACTED] which the Parents prefer² (See *G.D., supra*, "The hearing officer was correct in focusing primarily on the District's placement, rather than on the alternative that the family prefers.").

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

² The concentration on the District's proposed services is restricted to determining whether Student received FAPE at the [REDACTED]. In determining whether it would be an appropriate remedy to move Student back to [REDACTED] as compensatory education, the appropriateness of [REDACTED] is, of course, quite relevant.

95. In general, a school district has administrative discretion as to the location where children with disabilities will attend school. *Concerned Citizens and Parents for Continuing Education at Malcolm X School (PS 79) v. New York Board of Education*, 629 F.2d 751 (2nd Cir. 1980) *cert denied*, 449 U.S. 1078. Moreover, a school district has discretion to close down any of its schools for any reason and the closing of the school will ordinarily not amount to a change in placement for the students previously attending the school. *Id.* IDEA did not transfer fiscal discretion and budgetary decision making regarding the structure of special education services from local school boards to federal courts and/or due process hearing officers. *Tilton v. Jefferson County Board of Education*, 705 F.2d 800 (6th Cir. 1983). For this reason, the physical location of services of special education is usually a matter of administrative discretion within the purview of the school district administration³. *White v. Ascension Parish School Board*, 343 F.3d 343, 39 IDELR 182 (5th Cir. 2003).

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

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

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

99. However, many courts have held that when aspects of the physical location interact detrimentally with a student's disability, physical location must be considered part of the placement. *Carrie I. on behalf of Greg I, v. Department of Education, State of Hawaii*, 869 F.Supp.2d 1225(D.Hi. 2012); *Comb v. Benji's Special Educational Academy, Inc.* 745 F.Supp.2d

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

755, 767 (S.D. Tx. 2010); *R.B. v. Mastery Charter School*, 762 F.Supp.2d 745, 763 (E.D. Pa. 2010).

100. The Seventh Circuit has indicated that placement should generally be the educational program unless there is a concern in regard to either: (1) discipline or suspensions are involved; or (2) if the child is placed in an inappropriate school. *Board of Education of Community High School District No. 218, Cook County v. Illinois State Board of Education*, 103 F.3d 545, 548-549 (7th Cir. 1996)⁴. If one of the two above stated concerns are at issue, then placement should include location as a component. *Id.*

101. Apart from placement, IDEA requires an IEP to contain a location of services as part of Student's placement. See 20 USCA 1414(d)(1)(A)(i)(VII). Some courts have interpreted that section of IDEA to require the IEP Team to collaboratively determine the physical location of services—and that the failure to make such a collaborative determination constitutes a denial of FAPE. *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007); *Eley v. District of Columbia*, 59 IDELR 189 (D.D.C. 2012); *Madison Metropolitan School District v. P.R.*, 598 F.Supp.2d 938 (W.D.Wis. 2009). However, OSEP has interpreted that section of the law to mean not the physical location of services, but rather a more general statement of where a student will be placed (i.e. a resource room, a self-contained classroom etc.), *Brad K, supra*.

102. In any regard, no matter the exact underpinnings for their decisions, courts have nearly always allowed for claims for denial of FAPE when a physical location of services interacted with a student's disability in a way which causes the educational benefit of the IEP to be diminished (although courts disagree on the exact legal theory to underpin such claims). Moreover, courts have rarely conditioned a denial of FAPE claim on the defects in the physical location of services violating the four corners of the IEP. See *Charlie F. v. Board of Education of Skokie School District 68*, 98 F.3d 989 (7th Cir. 1996) (malicious behavior by classroom teacher in a physical location can be a violation of FAPE); *Shore v. Regional High School Board of Education v. P.S.* 41 IDELR 234, 381 F.3d 194 (3rd Cir. 2004) (bullying by fellow students in a physical violation is a violation of FAPE which a hearing officer has jurisdiction to remedy); *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007) (when physical location can cause a deprivation or dilution of educational benefit, an inappropriate physical location constitutes a denial of FAPE and inappropriate placement for which a hearing officer can provide a remedy); *Madison Metropolitan School District v. P.R.*, 598 F.Supp.2d 938 (W.D.Wis. 2009) (same); *Eley v. District of Columbia*, 59 IDELR 189 (D.D.C. 2012) (same); *TK v. New York City Department of Education*, 779 F.Supp.2d 289 (E.D.N.Y. 2011) (culture of bullying in a physical school is a violation of FAPE and IDEA for which a hearing officer can provide a remedy); *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985) (changes of location to a student who may be harmed by a transfer from one physical location to another can be a denial of FAPE which a hearing officer can remedy); *Block v. District of Columbia*, 748 F.Supp. 891 (D.D.C. 1990) (same); *Holmes v. District of Columbia*, 680 F.Supp. 40 (D.D.C. 1988) (same); *Z.W. v. Smith*,

⁴ One district court has interpreted the Seventh Circuit's holding regarding placement more narrowly than the undersigned does, while one district court has interpreted the Seventh Circuit's interpretation of the law as the undersigned does. Compare and Contrast *Madison Metropolitan School District v. P.R.*, 598 F.Supp.2d 938 (W.D.Wis. 2009), with *Brad K v. Chicago Public School District 299*, 787 F.Supp.2d 734 (N.D. Ill. 2011).

210 Fed.Appx. 282 (4th Cir. 2006). (district changes of physical location of services mid-year or in the final year of high school can be a denial of FAPE).

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

104. Students on the autism spectrum by definition of their diagnosis have needs related to problems with physical transitions. *P.V. v. School District of Philadelphia*, 60 IDELR 184 (E.D. PA. 2013).

Conclusions of Law Related to Predetermination

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

106. It is an open question as to whether the IEP Team must determine the physical school the student attends through a collaborative process with parents or whether determination of the physical school the student attends is a matter administrative discretion of the school district. Compare and contrast *Letter to Fisher*, 21 IDELR 992, pg. 4 (7/6/1994); *Letter to Wessels*, 16 IDELR 735, pg 4 (3/9/1990) (the physical school is a fundamental component of placement which the IEP Team must collaboratively decide) with *T.Y New York City School Board, supra* and *White v. Ascension Parish School Board, supra* (placement is the program provided to student while site selection is a matter of administrative discretion for the District). The Seventh Circuit has not yet ruled on whether Parents need to be included in the decision of a physical school the student is to attend.

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

Conclusions of Law Related to Stay Put

108. Federal special education law requires that a student remain in the same placement during the pendency of a due process hearing request. 20 U.S.C.A. 1415(J). In this case, the issue is what the Student's placement should be for the purpose of the "stayput" requirements.

109. A parent should not be able to prevent implementation of an IEP without using one of his/her remedies under the law (i.e. timely filing a due process request or pulling the Student out of special education completely). In general, a school district has authority to implement an IEP over a parent's objection. *S.J. v. Issaquah School District No. 411*, 52 IDELR 153, 109 LRP 25810 (9th Cir. 2009).

110. Upon developing an IEP which contains changes in placement, the District may implement the IEP after giving 10 days notice to the Parent. 34 CFR 300.503, 23 Ill.Admin. Code 226.520.

111. In determining the parties' rights under state and federal special education laws, the undersigned must look at the overall statutory scheme to determine the requirements of the law. *J.J. Garcia v. Board of Education of the Town of Ridgefield*, 558 IDELR 152, 558 LRP 8468 (D.Conn. 1986). In general, a parent should not be able to unilaterally decide upon a "stayput" placement of the child without using parental remedies provided by the regulations or statute. *Id.*

112. The stayput placement is determined by the language of the IEP—not the location of services which a district is providing at the exact moment the due process request is filed. *John M. v. Board of Education of Evanston Township High School District 202*, 502 F.3d 708, 715 (7th Cir. 2007). As discussed at length above, placement and physical location of services are not synonymous. *Board of Education of Community High School District No. 218, Cook County v. Illinois State Board of Education*, 103 F.3d 545, 548-549 (7th Cir. 1996). While the physical location of services can be a component of placement, the educational program is a fundamental component of placement. To the extent the educational program requires or contemplates a change of location of services, the undersigned holds that placement can encompass two physical locations of services.

Conclusions of Law Related to Remedies

113. A hearing officer is required to determine a remedy in a given case based upon equitable factors including the conduct of the parties prior to and during the due process hearing proceedings. *Branham v. the Government of the District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005); *Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

114. Compensatory education is an equitable remedy hearing officers can award to parents and students. The purpose of compensatory education is to replace lost educational opportunity. *Board of Education of Oak Park, District 200 v. Illinois State Board of Education*, 79 F.3d 654 (7th Cir. 1996). Compensatory education, if awarded, should compensate Student for the District's failure to provide FAPE. *Petrina W. v. Chicago Public School District 299*, 53 IDELR

299 (N.D. Ill. 2009); See also *Branham v. the Government of the District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005); *Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). In determining whether compensatory education, the award should be based upon the equitable factors present in each case (including the conduct of the parties). *Id.*

115. The purpose of compensatory education is to do more than provide “some educational benefit.” *Reid v. District of Columbia*, *supra*. Rather, compensatory education must compensate for past losses of educational benefit. Therefore, an order for a private service provider to provide compensatory education services is proper if such an award is more likely to compensate a student for a district’s failure to provide FAPE. *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (11th Cir. 2008). Also, a specialized educational program is a permissible form of compensatory education if the program can compensate the student for lost educational opportunity. *Reid v. District of Columbia*, *supra*.

116. The undersigned is forbidden from delegating to the IEP team calculation of the compensatory education award. *Reid v. District of Columbia*, *supra*.

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

118. In making decisions to award a prospective placement at a private locations of services, the undersigned must weigh the equitable factors in each case including: whether a particular placement is appropriate for the student; the nature and severity of the student’s disability; the student’s specialized educational needs; the link between those needs and the services offered by the private school; the placement’s cost; and the extent to which the placement represents the least restrictive environment. *Branham*, *supra*

V. Application of Law to Fact

119. The undersigned finds that the District had a right to move students to the [REDACTED] Program from private providers, and that decision, in and of itself, was not a denial of FAPE for Student.

120. The undersigned finds that the District acted unreasonably in designing the IEP in failing to design a transition plan for Student to safely transfer from [REDACTED] to [REDACTED] and later [REDACTED]. In so doing, the undersigned finds the District's actions unreasonable in that the District members of the IEP Team failed to properly consider the nature of Student's unique needs in transitioning from one physical location to another. The District failed to consider the relevant factor of this aspect of Student's unique needs and an important aspect of the problem of providing Student special education. The undersigned further finds that the District compounded its unreasonable conduct by failing to call an IEP Team meeting to consider the recommendations of Student's psychiatrist regarding the need for a plan to transition Student from one physical location to another (although a psychiatrist cannot prescribe special education, medical evidence regarding a student's unique needs is important evidence which the IEP Team must consider to come to a reasonable decision, *Marshall Joint School District No. 2 v. C.D. ex rel Brian D.*, 616 F.3d 632, 640 (7th Cir. 2010)).

121. The undersigned finds that the District's failure to include a transition plan for transferring Student rendered Student's program for special education services inappropriate. As such, the undersigned finds the Parents met their burden that the District provided an inappropriate placement beginning in May, 2012.

122. To the extent placement has as one of its components the physical location where Student receives services, [REDACTED] and [REDACTED] were rendered inappropriate placements due to the District's failure to properly plan to transition Student from [REDACTED] to [REDACTED].

123. To the extent the Parents have a right to a determination of an appropriate physical location of services where Student receives services, [REDACTED] and [REDACTED] were rendered inappropriate locations of services due to the District's failure to properly plan to transition Student from [REDACTED] to [REDACTED].

124. The undersigned therefore finds the Parents carried their burden on their inappropriate location of services and inappropriate placement claims.

125. The undersigned finds that the District did not predetermine Student's placement and location of services, and that the perceived obstinance from the District arose from the District's unreasonable failure to consider the need to properly transition Student from [REDACTED] to [REDACTED] or [REDACTED] and not from a refusal to engage the Parents in structuring Student's IEP.

126. The undersigned finds that the Student's BIP and behavioral goals were appropriately designed given Student's regression and the information the District had before the filing of the amendment to the due process complaint. Specifically, the undersigned finds the Student's BIP and goals appear defective because of Student's regression—not that a defective BIP and behavioral goals are preventing progress or causing regression. Moreover, while the District should formulate goals and provide services related to remedying Student's aggressive behaviors at home, the "snapshot rule" prevents the undersigned from entering an order against the District on this issue. Specifically, at IEP meetings, Parents told the District that aggression at home was

not a problem and never informed the District of aggression at home until the filing of the amendment to complaint. As such, the Parents did not carry their burden of persuasion on these issues.

127. The District failed to make its burden of production on the inappropriate placement and inappropriate location of services issue. The District made its burden of production on all other issues.

128. The undersigned finds that the original stayput order correctly decided that issue. The May 23, 2012, IEP contained a single placement with two locations of services. Since the Parents allowed the May, 2012, IEP to go into effect, the language of the IEP governed the services Student was to receive and where he was to receive them. The Parents' Motion to Reconsider is denied.

129. The undersigned finds that Student's behavioral regression and lack of progress arose from the improper transfer of Student from [REDACTED] to [REDACTED]. The undersigned finds that a prospective placement at [REDACTED] for 18 months will properly compensate Student. The undersigned adopts the opinion of [REDACTED] Director as to how much time at [REDACTED] will be necessary for Student to be compensated for the regression caused by the failure to transition Student properly.

130. In providing Student with a prospective placement at [REDACTED] the undersigned makes the following findings: (1) [REDACTED] is appropriate because it has the programs and staff to provide Student with the services necessary to meet Student's unique needs; (2) the severity of Student's disability and regression require the services offered by [REDACTED]; (3) there is a link between the services offered at [REDACTED] and Student's needs- as Student's needs were previously addressed at [REDACTED] and (4) Student is gaining little behaviorally from mainstreaming (as the District implicitly admitted by reducing Student's mainstreaming during recess in October, 2012), and Student needs to have his behavioral needs addressed. As such, the benefits of Edgewood LOS outweigh any academic and nonacademic benefits of mainstreaming in this case. Moreover, the cost is found to be reasonable because: (1) [REDACTED] is on the list of Illinois approved therapeutic day schools; and the District implicitly admitted the cost of [REDACTED] was reasonable by voluntarily sending Student there for his second grade year.

VI. Order

131. Within 30 days of this Order, the District shall send notice and convene an IEP Meeting. The IEP Team shall include representatives from [REDACTED]. The parties shall develop a transition plan to transition Student from [REDACTED] to [REDACTED]. The District shall then transfer Student from [REDACTED] to [REDACTED] pursuant to the terms of the transition plan developed by the IEP Team. The transfer must be effectuated completely within 90 calendar days of this order.

132. After developing a transition plan to transfer Student to [REDACTED] the District shall issue a prior written notice transferring Student to [REDACTED] and effectuating the transfer

of Student to [REDACTED]. The District may not change the location of services from [REDACTED] for 18 calendar months after the transfer is completely effectuated.

133. By this order, the Student's IEP is amended to have [REDACTED] Student's location of services. Student's IEP is also amended to have Student be in a 100% out of general education LRE.

134. The District shall demonstrate proof of compliance with this order to the Illinois State Board of Education, Compliance Division by September 15, 2013.

VII. Right to Request Clarification

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

VIII. Finality of Decision

136. This decision shall be binding upon all parties.

IX. Right to File Civil Action

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

/S Joseph P. Selbka

Joseph P. Selbka Impartial Due Process Hearing Officer

Date: April 15, 2013

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