

Case Number: 2013-0107

█ vs. █
Hearing Officer: Michael Risen

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

SPECIAL EDUCATION
SERVICES

**Impartial Due Process Hearing Decision
Cover Page**

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

District Name: █ Phone: █
Superintendent █
Address █
Represented by █

Parent Name █ Phone: █
Address █
Represented by █

Date and Timelines

Date of Written Request: 08/30/2012
Date of Pre-Hearing Conf: 11/29/2012
Date of Hearing: 03/19/2013 to 03/22/2013
Date of Decision: 03/30/2013

Summary of Decision:

Parents met their burden of proof on three of four submitted issues. The IHO determined one issue identical to Parents' requested relief and addressed the issue as relief. Parents proved the District failed to provide the Student with an appropriate IEP, proved the District failed to properly write goals and measurable objectives or provide appropriate related services necessary to address the Student's on-going social/emotional deterioration that impacted the Student's school attendance and academic progress. As a result of the District's failures, the Parents unilaterally placed the Student in a residential placement. The unilateral placement resulted in the Student demonstrating clear growth for the 10 months attending the residential facility. Parents awarded full tuition reimbursement and other compensatory education for two years denial of FAPE.

FINAL DETERMINATION AND ORDER

BACKGROUND

This hearing involved a sixteen (16) year old male student. The Student's most recent IEP identified the Student's disabilities as: Asperger's disorder, major depressive disorder, mood disorder, and ADHD. The Student's IEP program and services, placement, modifications and accommodations are part of the dispute. Subsequently, the Parents unilaterally placed the Student in a residential facility and notified the District, thereby prompting this complaint. On August 30, 2012, the Parents' representative, [REDACTED] (Parent) filed the due process complaint on behalf of the Student and his Parents. The Illinois State Board of Education appointed this impartial hearing officer (IHO) on September 4, 2012. The appointed IHO has jurisdiction to hear and decide this matter under 105 ILCS 5/14-8.02a et seq., 23 Illinois Administrative Code §226,600 et seq., and the Individuals with Disabilities Education Act 20 USC 1400 (IDEA), and 34 CFR §300.507 et seq.

On November 29, 2012, the parties completed the pre-hearing conference (PHC). During the recorded PHC the parties agreed to provide witness resumes/vitas as appropriate. This enabled the parties to avoid the time needed at the hearing to review this information. The parties also agreed to provide the IHO and each other a copy of the closing statement and copies of case law each party submitted for consideration by the IHO.

On December 7, 2012, the District filed a motion seeking an order to re-evaluate the Student. On December 13, 2012, the Parent filed the response to the motion and objected to any unauthorized evaluation of the Student. The IHO denied the District's motion for failure to provide prior written notice and failure to secure informed consent from the Parents.¹

On January 31, 2013, the Parent filed a motion seeking an order of enforcement of stipulation against the District to compel the District to reimburse the Parents for educational costs incurred at the residential facility. The District stipulated to this payment during the recorded PHC. During the PHC,

¹ See IHO exhibit 32, pp. 140-141.
Illinois State Board of Education
Due Process System

the parties agreed that the IHO should include a directive in the final order the District must pay the stipulated educational costs if the District did not pay the before the start of the hearing. Thus, the IHO denied the motion for enforced stipulation.²

On March 13, 2013, the District filed a motion seeking the authority to excuse from testimony a district employee on maternity leave and the authority to produce a replacement employee as a replacement witness. The Parent had no objection to the witness on leave, but objected to the replacement witness. The District disclosed the replacement witness to the Parents prior to the close of the 5 business day deadline. The IHO approved the District's motion as submitted but limited the replacement employee's testimony to a review and/or interpretation of relevant reports filed in the Student's records unless the District established a proper foundation for further testimony.

On March 19, 2013, the IHO opened the hearing and completed the hearing process on March 22, 2013. The Parent elected a closed hearing. [REDACTED] and [REDACTED] (Parent) provided representation for the Parents. [REDACTED] and [REDACTED] provided representation for the District (District).

The following witnesses testified: [REDACTED] Dean of Students at [REDACTED] [REDACTED] where the Student attended his Freshman and Sophomore years, [REDACTED] clinical psychologist and private therapist for the Student hired by the Parents, [REDACTED] Special Education Coordinator for [REDACTED] Guidance Counselor [REDACTED] Student's therapist at [REDACTED] (Student's Current Residential Placement) [REDACTED], [REDACTED], Academic Advisor [REDACTED], [REDACTED] Principal [REDACTED] Student's Case Manager and a teacher at [REDACTED] [REDACTED] Associate Director of Student Services & Special Education for [REDACTED] [REDACTED] Associate Director), [REDACTED] Father of the Student, [REDACTED], Mother of the Student.

² See IHO exhibit 33, pp. 143-145.

³ The IHO noted that prior to becoming a special education administrator two years ago, [REDACTED] served as one of the District's school psychologists for seven years.

The exhibits included a binder of documents submitted by the Parent and numbered "PD 0001 thru PD 0518," a binder of documents submitted by the District and numbered "0001 thru 0314," and a binder of documents from the impartial hearing officer and numbered "MS HO 1 thru MS HO 198."

The parties requested four separate extensions of the 45 day timeline. The IHO approved all four requests. At the end of the hearing, both parties presented oral closing statements and provided the IHO written copies of each party's identified case law. The IHO did not have a copy of the transcript when the decision was written.

ISSUES

During the PHC, the parties identified four issues. As a result of the review of testimony and documents during the four days of the hearing, the IHO concluded the fourth issue was identical to one of the Parents' requested remedies, and therefore, the IHO did not specifically address the fourth issue as a distinct issue in the Conclusions of Law.⁴ As a result, the three issues to be decided are:

- I. Did the District deny the Student a Free Appropriate Public Education (FAPE) by failing to develop a sufficient IEP?
- II. Did the District deny the Student a FAPE by failing to properly evaluate the Student in order to identify the Student's needs and implement services that appropriately and adequately address the Student's educational, emotional and social needs?
- III. Did the District deny the Student a FAPE by failing to provide an appropriate placement with sufficient therapeutic, academic and behavioral supports designed to enable the Student to make appropriate progress?

The Parent proposed the following remedies:

- I. Order the District to reimburse the Parents for the educational and residential costs related to the Student's placement at [REDACTED] in [REDACTED] retroactive to May of 2012. (The District stipulated during the PHC the District would pay the educational costs of [REDACTED] retroactive to May of 2012).
- II. Order the District to write an appropriate IEP that provides for the Student's placement at the Heritage School and require the District to fund the residential and educational costs of the program. The IEP should include appropriate goals and related services needed to provide the Student with a FAPE for a period of one year from the date of the order.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this IHO's Findings of Fact are as follows:

- 1) On March 17, 2009, the District conducted the Student's annual review in preparation for his IEP for the upcoming year in eighth grade. The IEP called for the Student to receive "special services"

⁴ For a reading of the fourth issue as documented in the PHC Summary, see the description in the PHC summary located in the IHO submitted documents on p. MS HO 103.

73.33% of the time in school.⁵ The IEP planned for Occupational Therapy and Social Work consult services.⁶ Goals for the Student included a goal for math problem solving, communicate ideas in writing, manage emotions and behavior, skill development related to personal and academic goals, and identification and management of the Student's emotions and behavior.⁷ The Parents uncontradicted testimony revealed the District provided the Student with a one to one aide during seventh and eighth grade.

- 2) On January 15, 2010, second semester of grade eight, the Student had a primary eligibility of Autism and a secondary eligibility of Other Health Impaired (OHI) and Attention Deficit Hyperactivity Disorder (ADHD).⁸ The Student received specialized instructional services in the Instructional Resource program at [REDACTED] (MS).⁹ The Student had five IEP goals including a goal for math problem solving, a goal for algebraic concepts and procedures, a goal for composing well organized and coherent writing, a goal for communicating ideas in writing, and a goal for developing self-awareness and self-management skills to achieve school and life success. The objective for this goal stated: "[The Student] will identify when it is appropriate to socialize with a peer, as well as what topics [sic] behaviors are acceptable for school." The extent of the Student's progress on these goals/objectives ranged from still needs support to inconsistent to emerging. None of the goals reflected mastery or proficiency at the time of the transition IEP.¹⁰ Testimony of both Parents and the Case Manager revealed these were all on-going areas of need for the Student.¹¹ The Student had a one to one aide who served to assist the student with organizational skills, assist the Student to interpret communications due to the Student's deficiency in pragmatic language, and assist the Student with self-advocacy issues.¹² Parent concerns recorded in this IEP reflected the Parents wanted a check out at the end of each day to help the Student with homework organization.¹³ This IEP reflected the

⁵ See PD 0258.

⁶ Id.

⁷ See pp. PD 0260-0264.

⁸ See PD 0207.

⁹ Id.

¹⁰ See pp. PD 214-218.

¹¹ See testimony of [REDACTED] and both Parents.

¹² See the uncontradicted testimony of both Parents.

¹³ See PD 0209.

transitional or articulation IEP for the Student from grade eight to grade nine or high school at [REDACTED].¹⁴ The District discontinued the Student's one to one aide without discussion or documentation at the transition/articulation IEP meeting and the Student did not receive related services after leaving the eighth grade.¹⁵

- 3) On September 22, 2010, less than one month into the Student's transition to high school, the Student's Father informed the Student's teachers at [REDACTED] that the Student had fallen behind seven assignments in Algebra.¹⁶
- 4) On September 26, 2010, the Student's Father informed the Student's teachers at [REDACTED] that the Father had organized a 3-ring binder for the Student separated by tabs to help the Student keep track of homework.¹⁷
- 5) On September 29, 2010, the Student's Father informed the Student's teachers at [REDACTED] the Student had one hour of Algebra homework on top of an hour of other homework for other subjects.¹⁸ Further, the Student's Father informed the Student's Case Manager that he was not seeing the Student's IEP accommodations reflected in any of the Student's mainstream classes and expressed frustration over the mounting Algebra homework issues. The Case Manager responded that she would make sure the Student knew what his accommodations were and how to ask for his accommodations.¹⁹
- 6) On October 4, 2010, one month into the Student's freshman year at [REDACTED], the Father informed the Student's Case Manager that he wanted an IEP meeting to discuss the Student's failures in Health, Algebra and Biology. The Father also expressed frustration that "it's been really challenging to try to hold things together from home" and that he did not "see things getting any better..."²⁰
- 7) On October 14, 2010, (East) conducted [at the prompting of the Father] the first IEP meeting for the Student since the middle of the Student's eighth grade year [1/15/10] at [REDACTED].

¹⁴ See testimony of District staff and both parents.

¹⁵ See uncontradicted testimony of both parents and p. PD 0227.

¹⁶ See p. PD 0474.

¹⁷ Id.

¹⁸ See P. PD 0473.

¹⁹ Id. (Note: Parent's testimony reflected frustration over this response due to the Student's identified and significant pragmatic language issues and inability to self-advocate due to his Aspergers disability).

²⁰ See PD 0472.

Parents expressed concern they wanted a “check out at the end of the day and wanted someone to check his bag to make sure he has his homework.”²¹ The Student’s high school teachers completed District forms labeled “Individual Education Plan (IEP) Planning Notes.” The “planning notes” reflected that the Student’s teachers believed the team should consider goals for the Student to address the Student’s attendance, address his inability to self-advocate [ask for help], address the Student’s need for constant prompting to begin work and turn in work, assist the Student to focus by breaking down tasks and working on them individually, address his classroom participation, address the Student’s need to improve following directions and pay attention to due dates.²² The IEP team did not develop ew goals or recommend related services for the student. The IEP team maintained the same two goals from his January 15, 2010 IEP , a goal for math and a goal for writing.²³

- 8) On October 19, 2010, four days after the IEP meeting, the Parents informed the District the Student suffered from migraine headaches sometimes accompanied by vomiting. The Father informed the Student’s Case Manager regarding the Father’s concerns that “the stress of school, all the homework, the poor grades, are contributing to the migraine situation.” Further, the Father asked for Social Work services to “help him deal with all this stress.” His Case Manager agreed to talk with the counselor, the Student’s social worker, and the Case Manger’s supervisor.²⁴ Testimony revealed that she did not talk with her supervisor about the Father’s request for social work services.²⁵
- 9) On October 27, 2010, one week later, the Social Worker met with the Student and told the Student she would check in with him once in a while and he could seek her out when he wanted assistance.²⁶ Testimony revealed the Social Worker did not have further contact with the Student after this date.²⁷
- 10) On November 03, 2010, one week later, and two months into the Student’s Freshman Year at [REDACTED], the Mother of the Student informed the Case Manager that the Student developed an eye tic from all

²¹ See SD 0133. (Note: This is the exact same request the Parents had made during the transition IEP in January of 2010).

²² See SD 0134-0141.

²³ See PD 0230-0231.

²⁴ See PD 0471.

²⁵ See testimony of [REDACTED] and [REDACTED]

²⁶ See PD 0469. (Note: Parents expressed frustration that the social worker would suggest the Student with poor self-advocacy skills should check in with her rather than the other way around – see testimony of both parents).

²⁷ See testimony of the Father and [REDACTED] the Case Manager.

of the school related stress the Student had experienced. The Mother further shared that the Student no longer wanted to come to school and the Mother had to battle with the Student to get him dressed and out the door. The Mother testified that she had to put shoes on her 14 year old son. Mother also expressed great concern relative to the Student's grades indicating the struggle the Student had experienced his freshman year. In response, the Case Manager forwarded the email to her supervisor and the Assistant Principal and proposed changing the Student's class schedule. The Mother responded that both Parents shared the concern that the Student had the ability to learn but due to the diagnosis of ADHD/PDD [Aspergers], "the Student has difficulty staying on task and advocating for himself when he needed assistance." The Case Manager responded by changing the Student's schedule to include two more in program (special education classroom) classes.²⁸

- 11) On November 18, 2010, the Mother informed the Case Manager about the serious struggle the Parents experienced when requiring the Student to shower and go to school. The Mother further expressed concern that her son with Aspergers had these serious behavioral issues, social issues and learning disabilities that impacted the school attendance behaviors. The Mother also explained during testimony that she tried to tell the school the Parents needed assistance with the Student's escalating anxiety about school.²⁹
- 12) On January 10, 2011, the Case Manager informed the Father that the Student had a 54% in his modified Biology class. The Father responded simply: "I must say, I don't understand how a child on the spectrum, in a modified class should receive anything less than a "C"..."³⁰ The Father explained that he did not understand how a student with the degree of disability of his Son could have anything less than a "C" if the IEP was structured to accommodate the disability.³¹
- 13) On February 9, 2011, the Mother informed the Case Manager that the Student had numerous problems with his Biology homework because he only brought home part of the material he needed to complete the work and this caused a lot of frustration. The Student's special education biology

²⁸ See pp. PD 0467-0468.

²⁹ See p. PD 0466 and the testimony of the Mother.

³⁰ See p. PD 0463.

³¹ See testimony of the Father.

teacher responded that he would not accept late work³². The Father then wrote the Case Manager and the biology teacher seeking a better system. The Father pointed out the Student felt a complete sense of loss when he discovered that making up the work would not result in credit for the effort. The Father further shared that the Mother could no longer handle the Student's behavior at home when the Father traveled for work. The Father specifically asked the Case Manger to develop a protocol at school to insure the Student brought home everything he needed to complete homework. This was the third time the Parents' requested a homework check out system at school dating back to the 1/15/10 transition IEP meeting at [REDACTED]. The Case Manger responded that they could talk about at the next meeting.³³

14) On February 18, 2011, the District completed the Student's annual review and three year re-evaluation.³⁴ The Student's teachers completed "IEP Planning Notes" that recommended goals for the IEP team's consideration. These goals included the Student working independently, initiating work, understanding appropriate peer interactions, and advocating for self.³⁵ The team did not add the recommended goals to the February 18, 2011 IEP, or subsequent IEPs for the Student.³⁶ The IEP team reviewed the only assessment results completed by the District since the January 15, 2010 IEP meeting. Four of the Student's teachers provided information as it related to the Student on the Behavior Assessment System for Children (BASC). The results revealed the Student presented with clinically significant scores in the areas of Hyperactivity, Externalizing Problems, Attention, Learning Problems, School Problems, Atypicality, and Behavioral Symptoms Index.³⁷ Testimony confirmed that the District did not add goals for these identified clinically significant behaviors. Testimony also revealed the District failed to add related services or even consider related services to address these clinically significant findings.³⁸

³² See p. PD 0462.

³³ See pp. PD 0461-0462.

³⁴ See p. PD 0164.

³⁵ See pp. PD 0166-0170.

³⁶ See goal pages of the IEP on pp. PD 0178-0179.

³⁷ See p. PD 0172.

³⁸ See the uncontradicted testimony of both Parents, testimony of [REDACTED] and [REDACTED]

15) On May 20, 2011, the Student's English teacher emailed the Parents and expressed serious concern about the Student. The teacher wrote: "I [sic] concerned for [the Student's] grade this quarter along with his demeanor in class. He is clearly having a hard time keeping awake and is barely able to keep his eyes open and his head up. He is also not doing well on the modified quizzes I have been giving him for which he has extra time and additional support from [REDACTED] This is a big change from the bright and alert young man who was doing so well in our class before spring break, but who now seems to be more like he was at the beginning of the school year." Parents reported that the staff at (East) did not take action to address this concern beyond reporting to the Parents.³⁹ The Student's IEP also reflected the Student's eligibility of Autism caused deficits in social interaction, verbal communications and non-verbal communications.⁴⁰ The Case Manager testified that a Speech and Language Pathologist provides services for the communication issues experienced by the Student and that a Social Worker provides services for the social interaction issues experienced by the Student. Testimony revealed the District took no new action at this time to address these identified areas of need.⁴¹

16) On September 6, 2011, one week into the Student's sophomore year, the Student's English teacher reported a grade of "F" for the Student due to failure to turn in work. Parents reported the staff at (East) did not take action to address this concern beyond reporting to the Parents.⁴²

17) On October 11, 2011, the Father emailed the Case Manager his concern that the Student continued to fail his special education English class due to missing assignments. He detailed the additional study hall class that was added and sought assistance for the Student to help him make up missing work. The Case Manager did not respond to the email. The English teacher responded she would inform the Student of his missing assignments and do all she could to help him. The Parents reported the District took no further action to assist with the Student's missing homework problems. The Parents confirmed the link between the homework problems and the Student's disabilities of Aspergers and

³⁹ See p. PD 0460

⁴⁰ See p. PD 0174.

⁴¹ See testimony of [REDACTED], Case Manager.

⁴² See p. PD 0430 and testimony of both Parents.

ADHD. The Parents' uncontradicted testimony revealed the Student's school anxiety continued to worsen due to the frustrations related to his organizational skills, lack of self-advocacy skills, and pragmatic language issues. Parents' testimony also revealed the Parents had talked with the Student's Case Manager in addition to the emails noted herein about these concerns. The Parents' testimony also revealed they had talked with the Dean about their concerns and asked for help from a truancy officer. Under examination by the Parents' attorney, the Dean reported the District did not have a truant officer. Parents' uncontradicted testimony revealed the District had specialized staff to assist parents with getting students to school. This assistance included sending staff to homes to assist with these problems. Case Manager ██████████ confirmed the District had this service. Yet the testimony of the Parents, the Dean and the Case Manager confirmed the District failed to offer these services. When the Parents personally asked the Dean for a truancy officer, he responded that the District did not provide truancy related services.⁴³ Parents' uncontradicted testimony further revealed that the Student's on-going and intense school anxiety was the direct cause of the following:

- a. Student's absenteeism at school;
- b. Student's migraine headaches that sometimes led to vomiting at home;
- c. Student's significant behaviors related to school avoidance and defiance at home when Parents attempted to administer consequences at home for school related behaviors.⁴⁴

18) On October 28, 2011, the District conducted an IEP team meeting to address the Student's frequent absences. Both the IEP team meeting notes and testimony of the Dean of Students, ██████████ revealed the Student continued to have significant attendance issues. ██████████ testified that he agreed that poor student attendance constituted a school related behavior. ██████████ testified, and the IEP notes reveal, that the Dean attended this IEP meeting and expressed his concern about the Student's attendance issues. The IEP meeting notes and the Dean's testimony revealed the only action taken by the District was to place the Student on medical leave only policy. The Dean and other staff, as well as the Parents, revealed through testimony that medical leave only policy meant

⁴³ See the testimony of Dean ██████████, Case Manager ██████████, both Parents.

⁴⁴ See testimony of both Parents.

that the Student could only receive an excused absence if the Student's Parents produced a written excuse from a physician. The testimony of the Dean, the Case Manager, and Associate Director revealed that the District did not add behavior goals, social work goals, speech and language goals, or occupational therapy goals for the Student when the District completed this IEP. The District maintained the same math goal and the same writing goal for the Student that had been in the Student's IEP since his transitional IEP on 1/15/10, two years earlier.⁴⁵ Testimony of the Parents and the IEP section labeled "Related Services – within Special Education Program" revealed that the District did not provide related services as a result of this meeting.⁴⁶ The IEP and testimony of the Dean, of Special Education Coordinator [REDACTED], of Case Manager [REDACTED] and both Parents [all of whom attended the IEP team meeting] revealed the District did not discuss or conduct a Functional Behavior Assessment (FBA), develop a Behavior Intervention Plan (BIP), or otherwise take formal action in an effort to address the Student's continuing and worsening school anxiety issues. Testimony established the Student's school issues were directly related to his disabilities of Aspergers and ADHD. Additionally, evidence demonstrated the Student's school anxiety directly caused the Student absences.⁴⁷ Testimony also revealed the District made no attempt to gather data on the Student's anxiety issues related to school. School witnesses testified they would have reviewed and used such data if it existed.⁴⁸ The IHO also notes that the District conducted this IEP less than two months into the Student's sophomore year at [REDACTED]. The District also excused the attendance of the social worker at this IEP team meeting, despite the District's acknowledged awareness that the Student's social emotional health was deteriorating.⁴⁹ The Student's transition plan listed goals related to the Student's desire to complete his secondary education and attend a four year college studying graphic arts design. The IEP listed services related to these two goals that included services from the Counseling and Guidance Department. Testimony of the Guidance Counselor, [REDACTED],

⁴⁵ See pp. PD 0150-0151.

⁴⁶ See p. PD 0155. [Note: The District formally excused the team social worker from attending the IEP despite the Student's known and worsening social emotional needs/anxiety issues related to school attendance – The IEP notes reflected "(The Student) will not be receiving social work." See top of p. PD 0144].

⁴⁷ See pp. PD 0115.

⁴⁸ See testimony of [REDACTED], School Psychologist and Special Education Administrator.

⁴⁹ See p. PD 0143.

revealed she could not recall working with the Student in response to these two goals during his two years at (East) as prescribed in the IEP.⁵⁰

- 19) On January 4, 2012, the Mother wrote the Case Manager and informed the Case Manager the Student spent most of the winter break sleeping and the Parents took him to a psychiatrist, [REDACTED] who diagnosed the Student as suffering from depression and prescribed Prozac for the Student. She further expressed concern over the Student earning “straight Ds in all of his modified classes...” She asked the Case Manager to inform all of the other team members. The Case Manager responded she would forward the email and check with the Student “frequently and discuss progress with his teachers as much as possible.”⁵¹ The Case Manager testified she forwarded the email to the Dean and told the Student’s teachers about the email’s content. Testimony revealed she did not see a need for completing a FBA to determine the root cause of the Student’s school related behaviors of school anxiety/school avoidance because the Parents provided the Student with outside therapists, psychiatrists and medication. The Case Manager’s testimony also revealed she knew all of this was occurring and that the behaviors were in fact impacting his ability to access his specialized instruction services. She also testified that she knew that missing school and falling grades negatively impacted the Student’s access to the Student’s specialized education programming. Parents also informed the Case Manager that the Student reported other students made daily offers to give him drugs at school. The Student reported to his Parents that this pressure to avoid the drug use caused him stress, and Parents’ testified they believed that the pressure to say no to his peers further exacerbated the school avoidance issues. The Case Manager responded by forwarding the Parents’ email to the Dean.⁵²
- 20) On January 10, 2012, the beginning of the second semester of the Student’s sophomore year at (East), the Father wrote the Case Manager almost pleading for assistance from the School and the Student’s teachers and IEP team. The Father informed the Case Manager the Student now had a formal diagnosis of depression and that the Student felt “defeated” because the Student reported that many of the Student’s teachers did not allow him to make up assignments. The Father wrote: “Being he has

⁵⁰ See p. PD 0158 and testimony of [REDACTED], Guidance Counselor.

⁵¹ See p. PD 474 A.

⁵² See testimony of Case Manager [REDACTED].

an IEP, can't we make some accommodations to allow him to complete missed assignments, redo assignments he has failed?...I don't feel like his IEP is supporting his needs. How is it possible for a kid on the spectrum with all modified classes to be getting straight "Ds?" We need some intervention here."⁵³

- 21) The following day, on January 11, 2012, the Father wrote the Case Manager and expressed real concern over the District's only intervention to date for the Student's school anxiety/avoidance/attendance issues. The Father stated: "We cannot bring him to the doctor every time he has a migraine...Issuing us tickets, sending us to court, and fining us \$200 is not a solution. In fact it just adds to our stress."⁵⁴
- 22) On January 12, 2012, The Father wrote the Case Manager and informed the school about the Student's migraines; "Another migraine, and more vomiting today...This is beyond absurd."⁵⁵
- 23) On January 19, 2012, one week later, the Father wrote an email to the Case Manager to express his frustration because the Father had followed up with one of the Student's teachers, as suggested by the Case Manager, and the teacher never responded to the inquiry. The Father expressed, "I must say, that's unacceptable. You also were going to follow up with [The Student's] English teacher...where are we on this?...It's this kind of lack of support that will be the front and center of our discussion at the next IEP."⁵⁶ The uncontradicted testimony of the Parents, and the direct examination of District staff revealed the District made no effort to respond to these pleas for assistance made by the Father. When asked under direct examination, testimony of the Special Education Supervisor, [REDACTED], the Case Manager, [REDACTED] and the Dean of Students, [REDACTED] all revealed the District responded by continuing the medical only leave policy and the District's liaison officer issued a ticket that resulted in the four court appearances and a \$200 fine for the Parents as identified in the January 11, 2012 email.

⁵³ See p. PD 0427.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

24) On February 3, 2012, the team conducted an IEP meeting at the request of the Parents to allow the Student's private clinical psychologist to discuss her concerns about the Student. Case Manager ██████████ ██████████ acknowledged she did not invite the school social worker despite the now overwhelming evidence that the Student suffered from somatic symptoms related to social emotional health/school anxiety/school avoidance issues. Case Manager ██████████ testified that she knew prior to the February 3, 2012 IEP meeting the Parents had begun calling the local police to try and assist them to get their son to school. ██████████ further testified that the conclusion of this IEP team meeting did not result in changing his goals beyond a math and writing goal. ██████████ further testified the District did not undertake assessments, including FBA, development of a BIP, or a social developmental study in an effort to get to the root cause of the Student's continuing decline. The Student's continued poor attendance provided the District with evidence of a behavior that impeded the Student's learning. Additional evidence of student needs considered by the District included the Parents' pleas for assistance [both through documented emails and in person with staff],⁵⁷ the concerns of the Student's teachers, and the Student's declining grades. At this meeting, ██████████ ██████████ Ph.D., licensed clinical psychologist attended. Her testimony and that of Case Manager Seward revealed that ██████████ recommended the IEP Team develop a plan that included a "a visual check list" for the Student and for use by his teachers on a daily basis "so we can see immediately that he is anxious and respond to it."⁵⁸ The uncontradicted testimony of the Parents, and acknowledgement of ██████████ confirmed the District did not implement the visual check list for the Student. Further, the first step of the plan included the statement: "[The Student] is to come to school every day unless he has a fever."⁵⁹ When asked under direct examination if this step of the plan was akin to writing a plan that states the "student will walk" for a student who is in a wheelchair, the Case Manager was unresponsive. The 7th step of the plan called for the Case Manager to email ██████████ with updates. The testimony of ██████████ the Parents, and the Case Manger revealed this never happened. The District wrote into the IEP the accommodation requested by the Parents to

⁵⁷ See testimony of both Parents.

⁵⁸ See p. PD 0131 IEP meeting notes under ██████████ paragraph.

⁵⁹ Id.

provide the Student with a daily homework checklist and checkout system when the Student left at the end of the day.⁶⁰

25) On February 7, 2012, the Mother emailed the entire IEP team and informed them the Student again had trouble getting out the door for school. The Mother also asked the team to provide some reinforcement to the Student.⁶¹

26) On February 8, 2012, one of the Student's teachers emailed the Mother indicating the teacher had tried some additional one on one attention with the Student and the Student seemed to appreciate it and the Student seemed better that day as result of the one on one attention. Mother responded affirming that the Student "thrives on one-to-one attention" and thanked the teacher for her efforts.⁶²

27) On February 10, 2012, the same teacher emailed the Mother and indicated she did not think the Student brought home the necessary "bag of stuff" he needed that night for homework.⁶³ The Mother responded with an email to the IEP team. In that email, she reminded the team of the obligation that was implemented in the most recent IEP to include the necessary "bag of stuff" for the Student. She also informed the team that she and the Student had been in court for the fourth time the day before due to the School's previous issuance of a truancy ticket. The Mother informed the IEP team that this experience caused the Student to go "down a path of doom and gloom and a sense of feeling overwhelmed and worthless." The Mother further expressed concern that the District had placed the Student on "medical leave only" again without the Parents' knowledge. Despite the recent IEP team meeting with the Student's private therapist and clinical psychologist one week prior, the only strategy implemented to date to address the school anxiety/school avoidance issues included the issuance of a truancy ticket that resulted in four trips to court for the family and a \$200 fine.⁶⁴ Testimony from the Case Manager acknowledged the strategy employed by the District failed to include assessments of the Student, failed to implement an anxiety check list, and failed to

⁶⁰ Id. [The IHO also notes that "Additional Notes/Information" section in the Student's IEPs and testimony of both Parents, revealed the Parents had been seeking this accommodation since the transition IEP in January of 2010].

⁶¹ See p. PD 474F.

⁶² See p. PD 474 D & E [email from Lacy Foy].

⁶³ The IHO notes that Student's most recent IEP from one week earlier specifically called for the Student to have a homework checklist and checkout system at the end of the day [See p. PD 0131].

⁶⁴ See p. PD 474 C.

conduct psychological or social developmental testing. [REDACTED] further acknowledged the only other strategies employed included schedule changes and communication with the family and she acknowledged these proved to be ineffective. Testimony from the Case Manager also confirmed the Parents performed considerable outside work in support of their son and remained cooperative with the school throughout this two-year period of time. The Case Manager also testified that she knew of the suicide prevention services available from the District, the outside agencies the District had available to refer parents and students to, the Student's worsening condition and depression diagnosis, but she did nothing to inform or refer the Parents to either the District's suicide prevention services or available outside agencies.⁶⁵

28) On February 8 and 10, 2012 the Student refused to attend school. The Parents called the local police to assist them with the Student's defiant behavior. The Father informed the Student's clinical psychologist/therapist of these occurrences in an email dated February 13, 2013. He also shared with the therapist that the police informed the Father they could no longer keep coming to the house to assist with the Student's school related behaviors. He further shared that the Student was threatening to do damage to the family home if the Parents administered any of the prearranged consequences the Student was supposed to receive for not cooperating relative to school attendance.⁶⁶

29) On February 27, 2012, the Father emailed the Student's clinical psychologist/therapist to determine if she had recommendations for residential placements for the Student that the family could consider. The Father expressed: "I'd still like to at least begin researching options for schools with more support for [The Student's] behavior."⁶⁷

30) On April 17, 2012, the Mother sent an email to the IEP team and informed them the Parents enrolled the Student in a local school avoidance program conducted at [REDACTED]. The Mother also asked the Case Manager if the Student qualified for a home tutor while in the hospital day treatment program at [REDACTED].⁶⁸

⁶⁵ See testimony of both Parents and Case Manager, [REDACTED]

⁶⁶ See pp. PD 0423-0424.

⁶⁷ See p. PD 0423.

⁶⁸ See p. PD 0422.

- 31) On April 24, 2012, the Mother wrote the Case Manager again asking if the Student qualified for a tutor while in the hospital day treatment program and shared that she still had not heard from two of the Student's teachers at [REDACTED] regarding the schoolwork he needed to complete while at [REDACTED] school avoidance day treatment program.⁶⁹
- 32) On May 4, 2012, the District conducted an IEP team meeting with a staff member from [REDACTED] in attendance to plan for the Student's transition back to [REDACTED]. The Parents shared with the IEP team their interest in a residential facility in [REDACTED]. The Parents' testified that IEP team members cautioned the Parents about Illinois residential facilities due to concerns those team members had about the quality of the programs. For the first time since the Student's transitional IEP in January of 2010, the District proposed data gathering for immediate feedback with short-term updates to monitor overall trends. The District also proposed the inclusion of social work services, the first related service offered to the Student since January 15, 2010. The District scheduled the new services for the following school year. The Case Manager testified she knew of the serious depression the Student was dealing with as the Father had informed her prior to the meeting. The Case Manager also testified that she still did not tell the Father about the suicide prevention staff or referral services the District had available for students and their families.⁷⁰
- 33) On May 12, 2012, the Parents took the Student via ambulance from home to [REDACTED] at approximately 2:00 PM after the Student attempted suicide. The Student first hurled himself against his second story bedroom window glass and then attempted jumping from the home's second story balcony. In both instances, the Student's Father ultimately restrained the Student. The Parents called 911 and transported the Student via ambulance to the [REDACTED] staff who treated the Student and determined the Student should be admitted for in-patient therapy. Testimony revealed the [REDACTED] staff attempted to admit the Student into three different pediatric psychiatric facilities but no beds were available. By midnight, the Student had calmed down and fallen asleep. As a result, the emergency room

⁶⁹ See p. PD 0421. The IHO notes neither party presented clear evidence who had actually paid for the educational costs at [REDACTED] school avoidance treatment program.

⁷⁰ See testimony of [REDACTED], Case Manager and both Parents.

personnel sent the family home at approximately 1:00 AM. Testimony revealed the Parents kept the Student on constant supervision through the night. During the night, the Father purchased airline tickets to fly himself, the Student's Mother and the Student to [REDACTED]. The Parents testified they were desperate at this time and believed their son's life was in imminent danger.⁷¹

34) On May 13, 2012, the Parents accompanied the Student on a flight to [REDACTED] to enroll the Student at the [REDACTED]. Parents' testimony revealed the Parents believed this strategy was necessary to save the life of their son.⁷²

35) On May 14, 2012, the Father sent the Case Manager an email and informed [REDACTED] of the Parents' decision to enroll the Student in a private residential facility and sought her assistance in making the transition.⁷³ Testimony of the Parents, the Case Manager, the Special Education Supervisor [REDACTED], the Associate Director [REDACTED] all confirmed that no one from the District, either in response to this email, or at a later date, made an effort to insure the Parents were aware of their procedural rights as required under the IDEA.⁷⁴

36) On May 15, 2012, the [REDACTED] in [REDACTED] enrolled the Student.⁷⁵ Placement occurred due to the Student's diagnoses of Asperger's Disorder, Major Depressive Disorder and ADHD Combined Type. Additionally, Student's frequent migraine headaches, sometime accompanied by vomiting, were diagnosed by a neurologist as caused by the Student's school anxiety. The diagnosis included the statement: "Going to school has been very stressful to him and likely contributes to the anxiety he feels that leads to his headaches and missing more and more school."⁷⁶ The primary focus of treatment at [REDACTED] addressed the Student's anxiety related to social situations at school and his school avoidance issues.⁷⁷ Testimony and review of documents demonstrated the program at [REDACTED] included: a ratio of better than 2 staff members for every 1 student, structure and expectations designed to help the Student with school anxiety issues and insure he attends school daily, close

⁷¹ See testimony of both Parents.

⁷² See testimony of both Parents and [REDACTED] Intake documents on pp. PD 0371-0385.

⁷³ See p. PD 0420.

⁷⁴ See 34 CFR §300.148 (e)(1)(ii).

⁷⁵ See p. PD. 0366.

⁷⁶ Id.

⁷⁷ See testimony of [REDACTED] Therapist, [REDACTED].

coordination between the Student's residential life and school life, a treatment plan designed around the Student's Asberger's disability, weekly team meetings to review student data and mark progress or problems. The Student's plan included goals focused on academics, social/emotional therapy, and residential goals.⁷⁸ Goal attainment is tracked through measurable objectives to assist staff with Student's progress, inform the Student and Parents, and to provide motivation for the Student.⁷⁹ Since enrolling at ██████, the Student's headaches dramatically diminished, the Student's medication needs decreased, the Student participated on three different athletic teams and performed in the School play.⁸⁰ The Student's grade point at ██████ after nine (9) months of attendance was 2.9 on a 4.0 scale and he had earned 6.5 credits towards graduation.⁸¹ During the Students two years at ██████ the Student had the equivalent of a 1.7 GPA on a four point scale and had earned a total of 9.5 credits or 4.75 credits per 9 months of attendance.⁸² At the rate of credits earned at ██████ the Student was not on track to graduate with enough credits [needing 24 to graduate]. Assuming arguendo that the Student continued to make the same or similar progress going forward at (█████), the Student earned enough credits in the first nine months at ██████ to graduate in another 1.5 years of enrollment [when combined with earned credits from ██████].

37) On August 16, 2012, the District conducted an IEP team meeting and discussed the Student's residential placement at the ██████ School. During the meeting, the IEP team found the following areas worthy of evaluation and investigation: Academic achievement, functional performance for school refusal and school/social anxiety, communication skills to assess pragmatic language and social-language skills, update of health history, and the Student's social emotional status to include a social developmental study and adaptive behavior scales.⁸³ This was the first IEP, out of six (6) previous IEPs, that the District determined these assessments were appropriate for the Student.

⁷⁸ Id. and Parent's testimony and PD 0386-0402.

⁷⁹ See pp. PD 0386-0402 and testimony of therapist, ██████.

⁸⁰ Parents' uncontradicted testimony revealed these activities were all "firsts" for the Student.

⁸¹ See p. PD 0478 (calculation completed by IHO based upon a 4.0 scale and allowing for per cent of credit per grade, e.g., course grade of "A" = 4 points; credit of .125 per course would require 8 grades for 1.0 credit).

⁸² See p. PD 0317 (Note: Testimony of the Guidance Counselor reflected the recorded grade point of 2.944 reflected 2.944 on a five (5) point scale).

⁸³ See pp. PD 0110-0111.

Testimony revealed that this would have been good practice to pursue these assessments earlier. Testimony also revealed that the District did not explain the Parents' procedural obligations relative to notice. Testimony from the Associate Director, ██████████, revealed that she did not contact the Parents between the Student's placement at ██████████ and the August 16, 2013 IEP meeting. ██████████ testified she did not explain the 10 day notice, and that when she did receive a letter from the Parents' attorney providing the 10 day notice, she responded that she forwarded the letter to the District's attorney.⁸⁴

38) On March 1 and March 7, 2013, the Parent provided documented evidence of the ISBE approved daily rate for the residential and educational costs at the ██████████. The IHO finds that the per diem cost for the time frame from May 15, 2012 through March 31, 2013 for the educational per diem component was \$132.63 and the residential component was \$172.37 per diem.⁸⁵

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, this section includes the Conclusions of Law of this Hearing Officer as it relates to the issues agreed to by the parties and the clarified issues identified through the review of documents and testimony and discussed earlier.⁸⁶

Issue I: Did the District deny the Student a Free Appropriate Public Education (FAPE) by failing to develop a sufficient IEP?

A. Based on the review of the information provided by both parties, the District failed to meet the requirements of 34 CFR §300.320 (2)(i)(A)(B) [Definition of individualized education program] and 105 ILCS 5/14-8.02a (g-55) [Burden of Production]. 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.⁸⁷ However, the Illinois School Code has placed a heightened burden on school districts.⁸⁸ In a due process proceeding, the school district bears the initial burden of production to show that the special education needs of the student are identified and that the special

⁸⁴ See testimony of ██████████ Associate Director.

⁸⁵ See p. PD 0476 and p. PD 0476B respectively.

⁸⁶ See *Supra*, note 4.

⁸⁷ See *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁸⁸ See 105 ILCS 5/14-8.02a (g-55).

education program and related services proposed are adequate, appropriate and available.⁸⁹ After the District meets this initial burden of production, the ultimate burden of proof then shifts to the parent as the filing party.

- B. The Individuals with Disabilities Education Act (IDEA) requires that school districts write both academic and functional goals that result from the disability. The IDEA further requires that these goals then enable the child to make progress in the general education curriculum.⁹⁰ The District completed six (6) IEPs for the Student from January 15, 2010 through May 4, 2012. During that period, the Student's IEP reflected the same two goals once the Student started at (East): a math goal and a writing goal,⁹¹ despite the Student's high school teachers suggesting goals for many other areas of identified need.⁹² During this same two-year period, the Parents, the Student's outside providers (including a clinical psychologist and psychiatrist), provided almost weekly evidence of the Student's needs in the areas of attendance, work completion, self-advocacy and pragmatic language, overall social/emotional health and well-being. The IHO concludes the District failed to suggest or undertake the steps necessary to address the identified areas of need as required by the IDEA.⁹³ The IHO concludes the District's failure resulted in the Student's documented an increase in the Student's school related anxiety, absenteeism, declining grades throughout the two years the Student was at (East), and eventually the Student's attempted suicide. The IHO concludes that the District knew, or should have known, that goals for each identified area of need should have been written into the IEP.⁹⁴ The IHO concludes that the District failed to provide both academic and functional goals that addressed the Student's disability as required by the IDEA. Further, the IHO concludes the District failed to provide the Student with the opportunity to progress in the general education curriculum, thus denying the Student a FAPE.⁹⁵
- C. The IDEA requires that properly constructed IEPs and specialized educational programming include a transition plan for the Student. The transition plan must be "designed within a results-oriented process that is focused on improving the academic and functional achievement of the child" in order to facilitate the ultimate transition of the student from the school to "post-school activities." The IDEA further requires that the transition plan include instruction, related services, community experiences,⁹⁶ etc. The IHO concludes that the District failed to provide the required transition plan instruction and transition plan related services that the IDEA expects.⁹⁷ Further, the District presented

⁸⁹ *Id.*

⁹⁰ See 34 CFR §300.320 (2)(i)(A)(B).

⁹¹ See *Supra*, FF #2,7,14, 18, 24 and 32.

⁹² See *Supra*, FF #7 and 14..

⁹³ See *Supra*, footnote #89.

⁹⁴ See *Supra*, FF #18.

⁹⁵ See *Supra*, footnote 89.

⁹⁶ See 34 §CFR §300.43 (a)(1)(2)(i-v)(b).

⁹⁷ See *Supra* FF #18..

no evidence [as required by Illinois Statute] of any activities, services or other programming designed to facilitate the Student's stated goals in the IEP transition plan and thus failed to meet their burden of production.⁹⁸

- D. The IHO concludes this failure to write goals specific to each of the child's educational needs⁹⁹ that result from the child's disability (both academic and functional) and the District's failure to properly implement the Student's transition plan, amounts to a denial of FAPE by the District. Additionally, the IHO concludes that the District failed to meet their burden of production and the Parents substantially met their required burden of proof. Therefore, the IHO rules entirely for the Parent on Issue 1.

Issue II: Did the District deny the Student a FAPE by failing to properly evaluate the Student in order to identify the Student's needs and implement services that appropriately and adequately address the Student's educational, emotional and social needs?

- A. The IHO concludes that the District is failed to meet the requirements of 34 CFR §300.304 (c)(4)(6) [Evaluation Procedures]. The District has the responsibility to conduct a full and individual evaluation in accordance with pertinent regulations and assess the child in all areas related to the suspected disability, including "...social emotional...communicative status."¹⁰⁰ The District has the burden of showing that its evaluation was "appropriate."¹⁰¹ An appropriate evaluation is one which complies with the pertinent federal and state regulations.¹⁰² The IDEA requires that districts assess the student in all areas related to the suspected disability including "social and emotional status"¹⁰³ and "communicative status."¹⁰⁴ Further, the IDEA requires that the district's evaluation of the child is "sufficiently comprehensive to identify all of the child's special education and related services needs."¹⁰⁵ The Court in *Rowley* also requires that the district: 1) follow the procedures of the IDEA, and; 2) provide the Student with a placement and services that are reasonably calculated to provide educational benefit.¹⁰⁶ Although the School District must comply with the procedural requirements of IDEA, hearing officers can only enter an order against the District if the procedural inadequacies: (1) impeded the Student's right to a free appropriate public education; or (2) denied the student educational benefit; or (3) significantly impeded the parents' ability to participate in the decision

⁹⁸ See 105 ILCS 5/14-8.02a (g-55).

⁹⁹ See *Supra* FF #6.

¹⁰⁰ See 34 CFR §300.304(c)(4)(6).

¹⁰¹ See *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167, 1169 (7th Cir. 1994).

¹⁰² See *Krista P. v. Manhattan School District*, 255 F.Supp.2d 873, 887 (N.D.Ill. 2003) (federal and state regulations "provide the minimum requirements for an evaluation").

¹⁰³ 34 §CFR §300.304 (c)(4).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (6).

¹⁰⁶ See *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 207 (1982)

making process regarding the provision of a free appropriate public education.¹⁰⁷ The District was provided substantial information relative to the Student's "social emotional status" over a 2.5 year period. The information provided by the Parents, the Student's teachers, and private service providers of the Student provided the evidence the District needed to conclude that an effective IEP required assessments relative to the Student's social emotional health and the impact this was having on the Student's performance in school. The Student's behaviors relative to school anxiety, school avoidance, disorganization, failure to complete work were all symptoms of behaviors that impeded the Student's success in school. This was evidenced by his increasing absenteeism, his falling grades, and his Parents' pleas for help and assistance. Whenever a student presents with evidence that the student's behavior impedes the student's learning or that of others, districts are required to use positive behavioral interventions and supports, and other strategies, to address the behaviors.¹⁰⁸ The IHO concludes that the District failed to meet both prongs of *Rowley*, in that the District failed to follow the procedures as detailed in the IDEA, and the procedural violations (1) impeded the Student's right to a FAPE, and (2) the District failed to implement service that appropriately and adequately addressed the Student's educational, emotional and social needs, and therefore denied the Student educational benefit.

- B. The IHO concludes that the District knew, or should have known, that best practice requires school districts, when faced with behaviors that impede a student's learning, districts must complete a Functional Behavior Assessment (FBA).¹⁰⁹ Illinois defines the FBA as: "An assessment process for gathering information regarding the target behavior, its antecedents and consequences, controlling variables, the student's strengths, and the communicative and functional intent of the behavior, for use in developing behavioral interventions."¹¹⁰ Further, the IHO concludes that the District knew, or should have known, that the best practice use of the results of the FBA would be to develop a Behavior Intervention Plan (BIP).¹¹¹ Illinois defines the BIP as: "An intervention based on the methods and empirical findings of behavioral science and designed to influence a child's actions or behaviors positively."¹¹² The IHO concludes the District knew, or should have known, of the District's obligations related to the provision of both the FBA and BIP. The IHO further concludes that the District failed to conduct a FBA or develop a BIP based upon the completion of appropriate assessments.¹¹³ The IHO concludes that the one assessment completed by the District during the two years the Student attended (East), the BASC, revealed many areas of clinically significant need for

¹⁰⁷ See 20 U.S.C.A. 1415(f)(E)(ii)(I-III).

¹⁰⁸ See 34 CFR §300.324 (a)(2)(i).

¹⁰⁹ See *Supra*, FF#24.

¹¹⁰ See 23 Ill Admin Code §226.75 [Definitions].

¹¹¹ See *Supra*, FF#37 [The District planned to provide assessments related to the Students need for a social developmental study and adaptive behavior scales].

¹¹² See *Supra*, footnote #90.

¹¹³ See *Supra*, FF #24.

the Student.¹¹⁴ The IHO concludes the District chose not to assess further, or use the results of the BASC, in order to develop goals or otherwise address the Student's identified behaviors that negatively impacted the Student's education.¹¹⁵ The IHO rules that the Parent met their burden of proof for Issue II and rules the District denied the Student a FAPE by failing to properly evaluate all areas of needs related to the Student's disability, including the Student's educational, emotional and social needs and therefore rules completely for the Parent on Issue II.

Issue III. Did the District deny the Student a FAPE by failing to provide an appropriate placement with sufficient therapeutic, academic and behavioral supports designed to enable the Student to make appropriate progress?

- A. The Parents unilaterally placed the Student in a residential facility located in [REDACTED] and their unilateral placement of the Student constitutes the issue of "appropriate placement" in this DPCN. If residential placement is deemed necessary for a student, the IDEA requires that districts make the residential facility available to the student (including non-medical care and room and board) at no cost to the parents.¹¹⁶ In the instance when a parent unilaterally places a student in a residential facility, an IHO can only require a district to provide the placement at no cost to the parents if the IHO makes a determination that the district 1) failed to provide the student with a FAPE and; 2) the residential placement made by the parents does indeed provide the student with the required FAPE.¹¹⁷ The evidence in this case strongly supports the allegations by the Parents that the District's IEPs for the Student failed to meet his identified needs in the areas of therapeutic, academic and behavioral supports. Despite "relentless" pleas (to quote one of the Father's emails in relation to the Student's struggles), the IHO concludes that the District failed to identify and program for the Student's continued decline.¹¹⁸ The IHO concludes that the evidence describes a Student whose entrance one month into high school quickly evolved from a bad experience, to a worsening experience, to an almost catastrophic experience. In those instances when a child's regressive behaviors threaten the child's well-being, parents face a difficult situation. Parents must answer the question: do they continue to acquiesce to the plan completed by the district and risk the health and safety of their child, or do the parents pay for the program that the parents believe to be the more appropriate. Additionally, the IDEA requires cooperation between the parents and the district when making placement decisions. But when the district believes the placement inappropriate, such cooperation is unlikely. The Court in *Carter* required that the unilateral placement by parents be "appropriate" in

¹¹⁴ See p. PD 0172.

¹¹⁵ See *Supra*, FF #14.

¹¹⁶ See 34 CFR §300.104.

¹¹⁷ See 34 CFR §300.148(c).

¹¹⁸ See *Supra*, FF #2, 7, 14, 18, 24, 32, & 37.

the Student.¹¹⁴ The IHO concludes the District chose not to assess further, or use the results of the BASC, in order to develop goals or otherwise address the Student's identified behaviors that negatively impacted the Student's education.¹¹⁵ The IHO rules that the Parent met their burden of proof for Issue II and rules the District denied the Student a FAPE by failing to properly evaluate all areas of needs related to the Student's disability, including the Student's educational, emotional and social needs and therefore rules completely for the Parent on Issue II.

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¹¹⁶ See 34 CFR §300.104.

¹¹⁷ See 34 CFR §300.148(c).

¹¹⁸ See *Supra*, FF #2, 7, 14, 18, 24, 32, & 37.

order to be eligible for reimbursement.¹¹⁹ The Court in *Burlington* concluded “that [when] such placement, rather than a proposed IEP, is proper under the Act” then reimbursement to parents for unilateral residential placements is appropriate.”¹²⁰

B. The District argued that if the IHO rules that the District failed to provide a FAPE and the unilateral placement meets the standards of the IDEA, *Carter* and *Burlington*, the Parents are not entitled to reimbursement because the District alleges the Parents failed to follow notice requirements.¹²¹ The same section of the IDEA that requires parental notice also provides for exceptions. Two of the exceptions must be considered here: 1) parents had not received notice of the requirement to serve notice to the district, and; 2) compliance would have likely resulted in serious physical harm to the Student.¹²² The evidence is clear in both instances.¹²³ The IHO concludes the District failed to meet the requirements as stipulated in the IDEA to inform the Parents of their rights and responsibilities relative to notice.¹²⁴ The failure of the District to meet the IDEA requirement to communicate the Parents rights amounts to a waiver of this protection. In addition, even if the ruling were such that the Parents did have knowledge of the notice obligations and failed to meet them, the imminent threat to physical harm and even death to the Student was clear to everyone involved in this DPCN, and therefore exempts the Parents from the required notice in its most proper form. Thus, the IHO rejects the District’s argument of failure to provide proper notice. The IHO concludes that the District failed to provide an appropriate placement with sufficient supports for the Student’s academic, therapeutic and behavioral needs and failed to provide the Student with a placement that enabled the Student to experience educational benefit.¹²⁵ Further, the IHO rules that the placement at the [REDACTED] provided the Student with the necessary academic, therapeutic and behavioral supports and the [REDACTED] provides the Student with educational benefit and the required FAPE required by the IDEA.¹²⁶ Thus, the IHO rules completely in favor of the Parents on Issue III.

In light of the ruling in favor of the Parents on all three submitted issues, the IHO rules the District denied the Student a FAPE for two years prior to the filing of the DPCN. As a result, the IHO awards the Parents their proposed relief as submitted and also awards additional compensatory education as

¹¹⁹ See *Florence County Sch. Dist. IV v. Shannon Carter* 510 U.S. 114, 361 (1993).

¹²⁰ See *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369 (1985).

¹²¹ See 34 CFR §300.148 (d)(1-2)

¹²² *Id.* (3)(e)(1)(ii-iii).

¹²³ The IHO notes that a case could be made that the Father’s email notice to the District constituted proper notice, and the Parents’ serious discussions at the May 4, 2012 IEP meeting with IEP team members about residential placements, the inappropriateness of some Illinois residential placements, and the Parents constant pleas for more assistance could be interpreted as a rejection of the District’s proposed plans for the Student, the IHO concluded it is not necessary to justify these arguments. See *Supra*, FF #32 & 35.

¹²⁴ See *Supra*, FF #35.

¹²⁵ See *Supra*, footnote #117.

¹²⁶ See *Supra*, FF #36.

requested during the testimony of both Parents at the hearing. In order to award the Parents' requested compensatory education, the foundational element must be a finding of a denial of FAPE.¹²⁷ Both the OSEP, the IDEA administering agency¹²⁸ and the courts¹²⁹ have ruled that IHOs have the authority under the IDEA to award compensatory education. OSEP has also opined that "Where 'appropriate' placement is at issue, the hearing officer's scope of authority includes deciding what placement would be appropriate for the child."¹³⁰ The accompanying Order details the Parents' awarded relief and awarded compensatory education. Compensatory education, if awarded, should compensate Student for the District's failure to provide FAPE.¹³¹

ORDER

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

1. The IHO orders the District to pay the Parents as awarded relief the documented costs of [REDACTED] in [REDACTED] beginning with the Student's placement on May 15, 2012 through March 31, 2013. The stipulated amount of reimbursement shall be \$73,368.35. By April 30, 2013, the Parents must submit to the District proof of payment totaling \$73,368.35 from the period May 15, 2012 thru March 31, 2013. Failure to submit proof of payment, either in the form of a cancelled check(s), credit card statement(s), or otherwise documented evidence of payment by the Parents to the [REDACTED] shall make this part of the Order null and void. If Parents submitted documentation is either higher or lower than the amount stipulated herein, the District shall reimburse the Parents in the amount equaling the Parents' documented payments to the [REDACTED] for the period May 15, 2012 thru March 31, 2013. The identified amount shall be paid to the

¹²⁷ See, e.g., *Board of Education of Oak Park, District 200 v. Illinois State Board of Education*, 79 F.3d 654 (7th Cir. 1996); *Petrina W. v. Chicago Public School District 299*, 53 IDELR 299 (N.D. Ill. 2009).

¹²⁸ See, e.g., Letter to Anonymous, 21 IDELR 1061 (OSEP 1994) (advising that a SEA and a hearing officer may require compensatory education; Letter to Kohn, 17 EHLR 522 (OSEP 1991).

¹²⁹ See, e.g., *Diatta v. District of Columbia*, 319 F. Supp. 2d 57 (D.D.C. 2004), *Harris v. District of Columbia*, 19 IDELR 105, 107-08 (D.D.C. 1992); *Cocores v. Portsmouth Sch. Dist.*, 779 F. Supp. 203 (D.N.H. 1991); *Big Beaver Area Sch. Dist. V. Jackson*, 615 A.2d 910 (Pa. Commw. Ct. 1992) (found that the IHOs had authority to grant compensatory education).

¹³⁰ See, Letter Eig, EHLR 211:174 (OSEP 1980); see also *Manchester Sch. Dist. V. Christopher B.*, 807 F. Supp. 860 (D.N.H. 1992).

¹³¹ See *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). 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).

Parents no later than May 31, 2013. Proof of compliance with this Order shall be submitted to [REDACTED], Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 by 5:00 PM on June 15, 2013. The calculated amount of the award stipulated herein by the IHO includes the following: The documented total cost from Heritage (including residential and educational costs from PD 0476), educational costs for 19 school days in February, 2013 @ \$132.63 per day, educational costs for 21 school days in March, 2013 @ \$132.63 per day, residential costs for 28 days in February, 2013 @ \$172.37 per day, and residential costs for 31 days in March, 2013 @ \$172.37 per day.¹³²

i. Per Parent Document PD 476	\$79,910.00
ii. Educational Cost 2/1/13 thru 2/28/13	\$ 2,519.97
iii. Educational Cost 3/1/13 thru 3/31/13	\$ 2,785.23
iv. Residential Cost 2/1/13 thru 2/28/13	\$ 4,826.36
v. Residential Cost 3/1/13 thru 3/31/13	<u>\$ 5,343.37</u>
vi. Total Costs 5/15/12-3/31/13	\$95,384.93
vii. Less District Payment SD 0314	<u>(\$22,016.58)</u>
viii. Total due to Parents by 5/31/13	\$73,368.35

If the District submitted subsequent and documented payments for the educational costs of the Student beyond the listed \$22,016.58, The District shall subtract such documented payment from the total of \$73,368.35 and submit documentation of payments beyond the recognized amount of \$22,016.58 to the ISBE as described herein.

2. As compensatory education for the loss of two years of a FAPE, the IHO orders the District to convene an IEP team meeting no later than April 30, 2013. At the convened IEP meeting, the IEP team must record in the Student's IEP that the Heritage School Residential placement is the least restrictive environment for the Student from 4/1/13 through 3/31/14. The IEP team must also record in the Student's IEP the current Master Treatment Plan [or updated Master Treatment Plan if available] from the [REDACTED] and record this as part of the Student's IEP from 4/1/13 through 3/31/14. The IEP must also include all related services reflected in the Master Treatment Plan for the Student. By 5:00 PM on May 15, 2013, the District is to submit a copy of this completed IEP to [REDACTED] Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777. The District shall pay Heritage School the residential and educational costs at the then ISBE approved daily rate for the

¹³² See *Supra*, FF #38.
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By 5:00 PM on May 15, 2013, the District is to submit a copy of this completed IEP to [REDACTED], Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777. The District shall pay [REDACTED] the residential and educational costs at the then ISBE approved daily rate for the [REDACTED] for the period April 1, 2013 thru March 31, 2014. The payment to the [REDACTED] shall be paid on a monthly basis, or such schedule that is consistent with the normal billing practices of the [REDACTED]. Documentation of these required monthly payments must be sent to [REDACTED] Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 within two weeks following the transmission of each payment to the [REDACTED].

3. As compensatory education for the loss of FAPE for two years, the District shall reimburse the Parents the documented costs associated with the Parents and Student's initial travel on May 13, 2012 to enroll the Student. Such reimbursement must include the documented [cancelled check, credit card receipt, credit card statement, or other acceptable means of documentation] cost of air travel, lodging, car rental, and meals per family member [including both Parents and the Student]. Further, any subsequent travel between May 14, 2012 and March 31, 2013 to the [REDACTED] in [REDACTED] that is documented by the Parents for airline travel, lodging, car rental and meals shall be paid to the Parents as reimbursement for these costs. Parents must submit documentation of reimbursable expenses as identified herein no later than April 30, 2013. The District must then reimburse to the Parents the documented amount submitted no later than May 31, 2013. Documentation of the required reimbursement must be sent to [REDACTED], [REDACTED], Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 no later than June 15, 2013.
4. As compensatory education for the loss of FAPE for two years, the District shall reimburse the Parents the documented travel costs associated with the Parents and/or the Student's sibling whenever the family travels to visit the Student as recommended and/or required by [REDACTED] during the Student's enrollment from 4/1/13 thru 3/31/14. Reimbursement shall include the documented cost of air travel at the economy class rate or equal, rental car, lodging and meals, not to exceed the ISBE then stipulated rate or per diem for car rental, lodging and meals. Parents must submit proof of such expenditures and justification from [REDACTED] for the visits within 30 days of the completion of each visit. Reimbursement shall then be provided to the Parents within 30 days receipt by the District of the Parents' documented expenses and accompanying protocol from [REDACTED] [REDACTED] justifying the visitations. If the Student is deemed ready and appropriate for

[REDACTED] for the period April 1, 2013 thru March 31, 2014. The payment to the [REDACTED] shall be paid on a monthly basis, or such schedule that is consistent with the normal billing practices of the [REDACTED]. Documentation that the District made these required payments must be sent to [REDACTED], Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 within two weeks following the transmission of each payment to the Heritage School.

3. As compensatory education for the loss of FAPE for two years, the District shall reimburse the Parents the documented costs associated with the Parents' and Student's initial travel on May 13, 2012 to enroll the Student. Such reimbursement must include the documented [cancelled check, credit card receipt, credit card statement, or other acceptable means of documentation] cost of air travel, lodging, car rental, and meals per family member [including both Parents and the Student]. Further, any subsequent travel between May 14, 2012 and March 31, 2013 to the [REDACTED] in [REDACTED] that is documented by the Parents for airline travel, lodging, car rental and meals shall be paid to the Parents as reimbursement for these costs. Parents must submit documentation of reimbursable expenses as identified herein no later than April 30, 2013. The District must then reimburse to the Parents the documented amount submitted no later than May 31, 2013. Documentation of the required reimbursement must be sent to [REDACTED], Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 no later than June 15, 2013.
4. As compensatory education for the loss of FAPE for two years, the District shall reimburse the Parents the documented travel costs associated with the Parents and/or the Student's sibling whenever the family travels to visit the Student as recommended and/or required by [REDACTED] during the Student's enrollment from 4/1/13 thru 3/31/14. Reimbursement shall include the documented cost of air travel at the economy class rate or equal, rental car, lodging and meals, not to exceed the ISBE then stipulated rate or per diem for car rental, lodging and meals. Parents must submit proof of such expenditures and justification from [REDACTED] for the visits within 30 days of the completion of each visit. Reimbursement shall then be provided to the Parents within 30 days receipt by the District of the Parents' documented expenses and accompanying protocol from Heritage School justifying the visitations. If the Student is deemed ready and appropriate for home visitations during this same time frame, the District shall reimburse the Parents the cost of the Student's travel and any accompanying adult within 30 days receipt of such documentation. Copies of all reimbursements shall be sent to [REDACTED].

Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 within 30 days of each occurred remittance to the Parents.

5. As compensatory Education for the loss of two years of FAPE, the IHO orders the District to reimburse the Parent the Amount of \$200.00 for the truancy ticket issued as a result of the District's liaison officer issuing a truancy ticket to the Parents of the Student during the 2011-2012 school year. The District is to make this payment by April 30, 2013 and submit a copy of the completed payment to [REDACTED], Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 by 5:00 PM on May 10, 2013.
6. As compensatory education and as required by Statute,¹³³ the District must either, a) submit a copy of a paid receipt from [REDACTED] for the educational costs incurred by the Student during his April, 2012 placement, or, b) pay to the Parent their documented costs for same. If the District did not make the payment for the educational costs and this payment is documented as paid by the Parents, the Parents must submit to the District documentation of their payments to [REDACTED] for educational costs incurred while the Student attended [REDACTED]. Upon receipt of the Parents' documentation, the District is to remit to the Parents by May 31, 2013 the total cost of the [REDACTED] educational costs and submit either a copy of this payment to the Parents, or the District's proof of payment made directly to [REDACTED] to [REDACTED], Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 by 5:00 PM on May 31, 2013.

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

¹³³ See 23 IL Admin Code §226.300 (a-h).
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does not permit a party to request reconsideration of the decision itself and the Hearing Officer is not authorized to entertain a request for reconsideration.

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.

IT IS SO ORDERED:

Dated: March 30, 2013



Impartial Hearing Officer

[222 E Surrey Lane, East Peoria, IL 61611
309-694-4864 phone
309-694-2295 fax]