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DEC 03 2013

**SPECIAL EDUCATION
SERVICES**

Case Number: 2013-0256

[REDACTED] vs. [REDACTED]

Hearing Officer: Joseph P. Selbka

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

**Impartial Due Process Hearing Decision
Cover Page**

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

District Name [REDACTED] Phone: 773-553-1501
Superintendent [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

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

Date and Timelines

Date of Written Request: 12/12/2012
Date of Pre-hearing Conf: 07/12/2013

Date of Hearing: 10/16/2013 to 11/15/2013
Date of Decision: 11/25/2013

Summary of Decision: The Parents challenged the District's evaluations, eligibility determination and failure to implement Student's IEP, as well as a procedural issue. The IHO found for the District on all issues.

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ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

**SPECIAL EDUCATION
SERVICES**

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)
) **ISBE CASE NO. 2013-0256**
)
) **Joseph P. Selbka**
) Impartial Due Process
) Hearing Officer

FINAL HEARING OFFICER DETERMINATION AND ORDER

I. Introduction

1. The Parents, [REDACTED] [REDACTED] ("Parents"), filed the instant due process complaint on December 12, 2013. The Parents challenged the eligibility determination and implementation of Student, [REDACTED] ("Student") IEP.
2. The parties conducted a mediation on January 7, 2013. No issues were resolved. A prehearing conference occurred on July 12, 2013.
3. The timeline was continued from time to time by the parties, and ultimately, the hearing occurred on October 23 and 25, 2013. Closing briefs were submitted on November 15, 2013. At the hearing, District Exhibits pp. 1-110 were admitted as joint exhibits without objection.

II. Issues for Hearing

4. The issues to be decided in the Parent's complaint are:
 - a) Whether the District violated the student's rights to FAPE when the district failed to provide specialized instruction to the student as required in the IEP dated 5-21-2012 from the beginning of the 2012-2013 school year until November 19, 2012;
 - b) Whether the District failed to conduct a sufficiently comprehensive evaluation to identify all of the student's special education needs during the re-evaluation of November 19, 2012 (Parent claims the psychological report is inadequate);
 - c) Whether the District failed to provide adequate specialized instruction to the student as required in the IEP dated 5-21-2012 after November 19, 2012 despite a stay-put agreement (specifically, the Parent contends Student should have received 40 minutes in language and math in pull out);
 - d) Whether the district denied a continuation of the student's IEP on May 28, 2013 despite an evaluation that identified "a unique learning profile", a "weakness in working memory skills", "difficulty with mathematical computations", and a detailed recommendation for additional learning assistance (whether the District failed to continue to find Student eligible for special education);
 - e) Whether the District failed to consider parental input during both Eligibility Determination Meetings (November 19, 2012, and May 28, 2013) and whether this is a procedural violation of IDEA.

III. Findings of Fact

Findings of Fact Related to Student's Disability and Progress at the District

5. Student is a fourteen year old student at [REDACTED]. Student is currently in the eighth Grade. Student has a gifted range IQ (99.9 percentile in some area), but still has some impairments in both reading and writing ability and math.

6. Student is in a selective enrollment program at [REDACTED]. Student currently consistently works at above grade level in reading and math. She is in an advanced curriculum program at [REDACTED]. In some subjects her curriculum is at level of a sophomore in high school. Student consistently receives A's and B's in all her academic classes. Over the time period where Student has received half-time in special education and then no special education at all, she has still maintained A's and B's for all academic classes. Thus, for nearly a year and a half with relatively little support, Student was still able to excel in the curriculum and achieve at far above grade level.

7. While Student does have some problems in both spelling and math as set forth below, she is still currently able to access the curriculum and perform at far above grade level.

Findings of Fact Related to the Various Evaluations

8. Student was evaluated in November, 2012, and May, 2013, by the District using two different District Psychologists. Testing revealed that Student struggles with fractions; lacked mastery of multi-digit multiplication; and had problems telling time on an analog clock. All psychologists admitted that, in some areas of learning, Student had a statistically significant discrepancy. Specifically, in several areas of mathematics and word attack skills were significantly discrepant. Student's working memory is also comparatively weaker than other areas tested.

9. The two District Psychologists recommended that Student not be found eligible for special education based on the fact that Student did not qualify for a learning disability. Both District Psychologists rejected the severe discrepancy model for diagnosing learning disabilities.

10. At the hearing, both District Psychologists opined that, even under the severe discrepancy model Student would not be diagnosed with a learning disability. To wit, because Student is able to excel in the current curriculum despite her impairments, a diagnosis for a specific learning disorder would be improper. The undersigned adopts this opinion and the facts upon which it is based- specifically, the fact that Student is currently excelling in the [REDACTED] curriculum.

Findings of Fact Related to Considering Parents' Input to the Process

11. The District held an eligibility meeting on November 19, 2012, which the Parents attended. Thereafter, the Parents filed for due process. The District then agreed to a new reevaluation with a second District Psychologist who came to the same determination. In all meetings, the District members of the IEP Team listened to the concern on the Parents.

12. The Parents contend that the District failed to consider their input. However, the only basis for this is that the District rejected eligibility based upon a severe discrepancy model. The undersigned makes a credibility finding that District personnel misunderstood the law by rejecting the severe discrepancy model. The undersigned makes an inference that this misunderstanding led to the District's appearance of not considering Parents' input regarding Student's special education services.

Findings of Fact Related to District Provision of Services During the Pendency of the Complaint

13. Student's IEP requires 40 minutes of pull out special education time in math every week and 40 minutes of pull out time in language arts (SD 66).

14. At hearing, District personnel presented uncontradicted testimony that they only provided Student 40 minutes of pull out time for the 2012-2013 school year. For part of the time which Student was in tutoring, she was not tutored because the special education teacher believed there was nothing to do.

15. The District stipulated that it has not provided any special education services for this school year (from approximately August, 2013, to late November, 2013).

16. Parents provided no evidence what additional services, if any, would remediate the District's failure to provide special education for the time periods in question. District witnesses were unable to offer any opinion even upon direct questioning by the undersigned.

IV. Conclusions of Law

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

17. 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.*

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

burden of production, the ultimate burden of persuasion then shifts to the filing party to prove his/her/its case. The parties must prove their cases by a preponderance of the evidence.

19. 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).

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

21. 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)

¹This aspect of Illinois administrative law is different than federal administrative hearings 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).

100,610 (2nd Dist. 2011); *Sykes v. District of Columbia*, 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

22. 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).

23. Admissions by counsel 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).

24. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Smith v. Tri-R Vending*, 249 Ill.App.3d 654, 661 (1993). Hearing officers can make reasonable inferences from the evidence adduced at trial. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Moreover, any inference a hearing officer makes must be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support his/her conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

25. 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).

26. 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).

27. 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, all special education cases, hearing officer decisions must be based on substantive grounds as to whether the child's special education needs are being met. 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).

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

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

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

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

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

30. A district must take into account and consider a Parent(s)' opinions and information regarding the student's placement and the nature of the student's disability. 34 CFR 300.322, 300.324(a)(ii). However, the regulations do not require that the District accept every request of a Parent in regard to placement, accommodations, or services.

31. Students must be reevaluated when the District determines that the child's educational and related services needs require reevaluation and, at a minimum, once every three years. 34 CFR 300.303(a),(b)(2). In general, reevaluations are necessary when there is a significant change in placement- including an exit from special education or a particular service the District provides. 34 CFR 104.35(a); *De Soto (KS) Unified School District #232*, 52 IDELR 20 (OCR 2008).

32. There are additional requirements for evaluating students suspected of having a specific learning disability. 34 CFR 300.307-310. The additional requirements relevant to this case are set out below.

33. The determination of whether a student has a specific learning disability must be made by the child's parents and a team of qualified professionals including the student's regular teachers and a person qualified to conduct individual diagnostic examinations such as a school psychologist. 34 CFR 300.308. The group may determine that the student has a specific learning disability if the student is not achieving adequately; is not making progress in response to research based interventions; or the child exhibits a pattern of strengths and weaknesses which indicate the existence of a specific learning disability. 34 CFR 300.309. The school district must ensure that a student is observed in the learning environment to document academic performance and behavior in the areas of difficulty and use the observed information to determine whether the student has a specific learning disability and the extent of that disability. 34 CFR 300.310.

34. There are generally two ways in which a child can be diagnosed with a specific learning disability. First, testing may reveal a severe discrepancy between the child's cognitive potential and the child's academic achievement. 71 Fed. Reg. 46,647 (2006), 23 Ill.Admin. Code 226.130(d). Second, when general education interventions are ineffective in providing a child an educational benefit relative to his/her peers, the child may be diagnosed with a specific learning disability. 34 CFR 300.307. The severe discrepancy model will often diagnose highly intelligent children with a learning disability who can keep up with their peers despite having a learning disability.

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

Conclusions of Law Related to Findings of Eligibility for Special Education

36. IDEA requires that a student not only have a disability as defined by the pertinent regulations, but also that the disability requires that the student needs special education services. 34 CFR 300.8(a)(1). In most circumstances, the student must show that the disability has a significant adverse impact on the student's educational experience. 34 CFR 300.8(c), *Marshall Joint School District No. 2 v. C.D.*, 616 F.3d 632 (7th Cir. 2010). However, in regard to specific learning disabilities, a child's disability does not need to adversely affect educational

performance, 34 CFR 300.8(c)(10). Rather, to qualify for a specific learning disability, a child need only have a disorder in one or more basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read write, spell or do mathematical calculations, including conditions such as perceptual disabilities. *Id.*

37. This does not end the inquiry, however. *Marshall Joint School District No. 2 v. C.D.*, 616 F.3d 632 (7th Cir. 2010). A student must also need special education in order to be eligible for special education. *Id.* Specifically, a student must be denied access to a basic floor of opportunity to benefit from the curriculum in the regular classroom before a school district is required to provide special education. *Hood v. Encinitas Union School District*, 486 F.3d 1099, 107 LRP 26108 (9th Cir. 2007). Therefore, as an additional factor to any finding of eligibility under a disability term, the hearing officer must also find that the Student needs special education services. *Marhsall Joint School District No. 2, supra, Alvin Independent School District v. AD*, 48 IDELR 240, 503 F.3d 378 (5th Cir. 2007).

38. Some factors which courts and hearing officers use to determine whether a student's disabilities necessitate a special education eligibility finding are: (1) whether a student is making academic progress, *Alvin Independent School District v. AD*, 503 F.3d at 384; (2) whether a student is performing at or above grade level, *Hood v. Encinitas Union School District*, 486 F.3d at 1106-1109; (3) whether Student has difficulty learning in class on a consistent basis as demonstrated by continued inconsistent grades across an academic career, *Williamson County Board of Education v. C.K.* 52 IDELR 40, 109 LRP 12171 (M.D. Tenn. 2009); (4) any other aspect of the disability where a student's education is being significantly impacted by the symptoms or manifestations of the disability.

39. Every child who is advancing from grade to grade is not necessarily making academic progress depending on the situation. *Board of Education, Henrick Hudson Central School District*, 458 U.S. 176, 203, fnote 25 (1982). In determining how FAPE is defined in any given case, a child's intellectual potential must be considered- even though a district does not need to maximize a student's intellectual potential. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3rd Cir. 1999). A child who is spspected of having a learning disability must be measured against his/her own expected performance and not some general arbitrary standard. *Letter to Ulisi*, 18 IDELR 683 (OSEP 1992).

40. IDEA does not prohibit intellectually gifted children from qualifying for special education. *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010). A child cannot be disqualified from special education because he/she is highly intelligent. *Id.*

41. In regard to an eligibility case, the child's performance and symptoms must be carefully analyzed. *M.P. v. North East Independent School District*, 49 IDELR 37, 107 LRP 68824 (W.D. Tex. 2007). The analysis is, by necessity, fact-intensive. *Id.*

42. The failure to develop an IEP when a student is eligible for special education constitutes a denial of FAPE and a violation of IDEA. *Scott v. District of Columbia*, 45 IDELR 160 (D.D.C. 2006).

Conclusions of Law Related to the Failure to Implement an IEP

43. Material violations of a student's IEP will be a denial of FAPE and a violation of IDEA for which a parent and student can obtain redress in a due process hearing. *Sumter County School District 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011); *Van Duyn v. Baker School District 5J*, 502 F.3d 811, 822 (9th Cir. 2007); *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1027, nt. 3 (8th Cir. 2003); *Houston Independent School District v. Bobby R*, 200 F.3d 341, 349 (5th Cir. 2000).
44. A district must comply with the terms of the IEP to deliver FAPE. *Board of Education of the City of Chicago v. Illinois State Board of Education*, 55 IDELR 133, 741 F.Supp.2d 920 (N.D. Ill. 2010). Therefore, “. . .The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail in an implementation failure claim, although the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” *L.J. v. School Board of Broward County*, 58 IDELR 220 (S.D.Fl. 2012); *Board of Education of the City of Chicago, supra*. The reason for this rule is to prevent a district from drafting an elegant IEP and then ignoring it until the parents can prove an educational harm. *Board of Education of the City of Chicago, supra*.
45. In determining whether there has been a material violation of the IEP, “. . .the focus is on the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld.” *L.J. v. School Board of Broward County, supra*; *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C. 2011).
46. The District must implement the IEP as written, and cannot change the written requirements of the IEP without an amendment of the IEP by the IEP Team. *Independent School District No. 281 v. Minnesota Department of Education*, 48 IDELR 222, 107 LRP 56347 (M.Ct. App. 2007).
47. In considering whether an IEP is being implemented properly, the snapshot rule should not apply where a school district has discretion to change tactics and methodologies to provide a student with an educational benefit. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692 (10 Cir. 1998). An IEP is a program consisting of both the written IEP document and the subsequent implementation of that document. *Id.* The implementation of the IEP document is an on-going, dynamic activity, which must be evaluated as such. *Id.* Thus school districts cannot implement an IEP document in a way which is clearly failing. *Id.*
48. 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).
49. The purpose of the “stay put” provision is to remove the unilateral authority that the districts originally had to exclude disabled students from school. *Kevin T. v. Elmhurst Community School District No. 205*, 34 IDELR 202, (N.D. Ill. 2001).
50. The stay- put placement is determined primarily by the language of the IEP. *John M. v.*

Board of Education of Evanston Township High School District 202, 502 F.3d 708, 715 (7th Cir. 2007); 34 CFR 300.116(b)(2).

Conclusions of Law Related to Remedies

51. 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).

52. Compensatory education is an equitable remedy hearing officers may award to parents and students. The purpose of compensatory education is to replace lost educational opportunity. *Board of Education of Oak Park, District 200 v. Illinois State Board of Education*, 79 F.3d 654 (7th Cir. 1996). Compensatory education, if awarded, should compensate Student for the District's failure to provide FAPE. *Petrina W. v. Chicago Public School District 299*, 53 IDELR 299 (N.D. Ill. 2009); *See also Branham v. the Government of the District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005); *Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). In determining whether compensatory education, the award should be based upon the equitable factors present in each case (including the conduct of the parties). *Id.* A hearing officer's decision should set forth a reasoned way in which the compensatory services will make the student whole for loss of FAPE. *Id.* A hearing officer does not need to award compensatory education when there is no basis in the record to calculate a compensatory education award. *Gill v. District of Columbia*, 56 IDELR 129, 770 F.Supp.2d 112 (D.D.C. 2011).

V. Application of Law to Fact

53. The undersigned finds that Student's evaluation was not comprehensive in that the District inappropriately ignored the significant discrepancies between Student's cognitive potential and academic achievement. In so doing, the District failed to identify Student's unique needs in conducting the evaluation.

54. The undersigned finds, however, that this is a harmless procedural error. Due to Student's academic success, the undersigned finds Student would not qualify as eligible for special education even under the severe discrepancy model. To wit, the severe discrepancy model requires that Student be unable to access some major portion of the curriculum for a diagnosis.

55. Moreover, the undersigned finds that Student does not need special education. Specifically, Student does not need special education and related services in order to access the curriculum. Student is several grades ahead of her peers. She is able to excel at classes in an accelerated curriculum without any special education services whatsoever. She has been able to maintain a high level of achievement over a long period of time. As such, Parents' eligibility and continuation of IEP arguments must fail.

56. Parents make an argument that eventually, Student will need accommodations and services to access the curriculum, and at that point in time, will need special education.

However, the Seventh Circuit in *Marshall Joint School District No. 2 v. C.D.*, 616 F.3d 632 (7th Cir. 2010) rejected that argument. A potential need for special education at some future point in time is not a basis for finding a child eligible for special education.

57. The undersigned finds that the District violated the stay put injunction by failing to implement Student's IEP while this due process request was pending. To wit, the District provided half (or less than half) as much time in tutoring with a special education teacher in the 2012-2013 school year as the IEP required and no special education services at all in the 2013-2014 school year. The undersigned finds this to be a material violation of Student's IEP.

58. However, it is unclear what remedy (if any) should be provided in this case because the undersigned found (and finds) Student did not need any special education services for the time period in question. Student's IEP during the time period in question was completely superfluous. While loss of an educational benefit is not a prerequisite to an IEP implementation claim, Student suffered no damages from the District's failures.

59. Moreover, the Parents failed to present any evidence whatsoever as to what compensatory education would make Student whole for loss of an educational benefit. The undersigned was also unable, upon questioning District witnesses, to determine a basis for awarding compensatory education.

60. In light of: (1) the lack of evidence supporting a compensatory education award; (2) the lack of any other appropriate remedy since Student did not need special education to receive FAPE; and (3) Student's success in school (and relatedly, the lack of evidence of a loss of educational benefit to Student; the undersigned finds no remedy is appropriate for the District's failure to implement Student's IEP. The Parents did not carry their burden as to damages for the District's failure to implement Student's IEP.

61. The undersigned finds that the District considered the Parents' input, and the District's perceived obstinance arose from its misunderstanding regarding the effectiveness of the severe discrepancy method.

62. The undersigned therefore finds that Parents have not met their burden as to any aspect of their complaint. Specifically, their evaluation claim against the District is a harmless procedural error. Their eligibility claim (and their continuity claim which is simply an extension of the eligibility claim) fails because Student doesn't need special education. Their implementation claim fails because of lack of damages. Their failure to consider input claim fails because the undersigned found that the District considered Parents' input.

VI. Order

63. Parents' requests are denied. The District need take no further action.

VII. Right to Request Clarification

64. Section 14-8.02(a(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

65. This decision shall be binding upon all parties.

IX. Right to File Civil Action

66. 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(1) that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.

Joseph P. Selbka
Impartial Due Process Hearing
Officer

Date:11/25/2013

Joseph P. Selbka
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Rolling Meadows, IL 60008
847-749-2239
jselbka@sbcglobal.net

CERTIFICATE OF SERVICE

TO: Ms. Mary Long
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001

[REDACTED]

[REDACTED]

[REDACTED]

The above stated parties have been served a copy of the Final Hearing Officer Determination and Order Via certified mail, return receipt requested.

/S Joseph P. Selbka

Joseph P. Selbka
The Hearing Officer

11/25/2013

Date