

Case Number: 2013-0358

Hearing Officer: Michael Risen

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

JUL 16 2013

## 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: 217-285-2147  
Superintendent [REDACTED]  
Address [REDACTED]  
Represented by [REDACTED]

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

### Date and Timelines

Date of Written Request: 03/07/2013  
Date of Pre-hearing Conf: 04/08/2013

Date of Hearing: 06/07, 06/10, 06/11, &  
06/13/13, record closed on 07/05/13 with the  
filing of post-hearing briefs.  
Date of Decision: 07/12/13

### Summary of Decision

Parent prevailed on two of three issues. District denied Student a FAPE for two years by failing to properly assess and evaluate the Student as required by the IDEA and failing to provide the Student with individualized goals designed to enable the Student to receive educational benefit. The District prevailed on the issue of allegedly failing to provide the Student with related services targeting the Student's depression and failing to protect the Student from bullying and harassment. The IHO ordered the District to convene an IEP team meeting and consider the recommendations of the Student's clinical psychologist and psychiatrist who documented the existence of the following disabling conditions: learning disability in math, PDD NOS and OHI (major depressive disorder). As compensatory education, the IHO ordered the District to provide 80 hours of tutoring in mathematics, outside counseling targeting the Student's depression, and participation in a social skills group for 52 sessions.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)  
) **ISBE CASE NO. 2013-0358**  
)  
) **Michael Risen**  
) Impartial Due Process  
) Hearing Officer

**FINAL DETERMINATION AND ORDER**

**BACKGROUND**

This hearing involved a male student who was 15 years and 11 months old at the time of the hearing. The Student's most recent IEP identified the Student's disabilities as: Specific Learning Disability. In a letter dated March 4, 2013, 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 March 11, 2013. 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 April 8, 2013, the parties completed the pre-hearing conference (PHC). In an effort to expedite the hearing process, the parties agreed to provide witness resumes/vitas as appropriate. The parties also requested and received approval to continue the closing date of the hearing to July 5, 2013 to enable the parties to file closing briefs by 5:00 PM.

On March 15, 2013, the District filed the required response to the Parents' DPCN both by facsimile and USPS with the IHO.<sup>1</sup> On March 22, 2013, the parties mutually waived both the resolution session and mediation and decided to proceed directly to hearing.<sup>2</sup>

On April 8, 2013, the parties completed the Pre-Hearing Conference via recorded teleconference. The parties identified three issues to be addressed during the hearing.

<sup>1</sup> See IHO exhibit 4, pp. 33-41.

<sup>2</sup> See IHO exhibit 7, pp.51-57.

On May 31, 2013, the Parents sought subpoenas from the IHO. The IHO printed the requested subpoenas, signed, dated and scanned the requested subpoenas and returned them to the Parents for proper service on May 31, 2013.<sup>3</sup>

The following witnesses testified: [REDACTED] Mother of the Student, [REDACTED] the Student, [REDACTED] Transition of Western Illinois, [REDACTED] substance abuse counselor, [REDACTED] special education teacher, [REDACTED] Superintendent, [REDACTED] Principal, [REDACTED] special education coordinator, [REDACTED] General Education Biology Teacher, [REDACTED] special education teacher, [REDACTED] SASS worker, [REDACTED] Dean of Students, [REDACTED] special education teacher, [REDACTED] basketball coach, [REDACTED] guidance counselor, [REDACTED] Director of Special Education for the District, [REDACTED] clinical psychologist.

The exhibits included a binder of documents submitted by the Parent and numbered "P1 thru P195," two binders of documents submitted by the District and numbered "D0001 thru D000687," post-hearing briefs and supporting case law submitted by both parties, and a binder of documents from the impartial hearing officer with exhibits 1-48 and numbered "[REDACTED] HO 1 thru [REDACTED] HO 355.

The parties jointly requested one extension of the 45 day timeline to enable the hearing dates to be scheduled and to permit the filing of post hearing briefs. The IHO approved the joint request. The District requested a 30 day continuance of the start of the hearing on June 3, 2013. The Parents objected to the continuance and the IHO denied the request. The hearing closed after the conclusion of witness testimony and review of identified documentary evidence and the parties did not present closing statements or arguments. Instead, both parties agreed to file written closing briefs and include copies of identified case law. The IHO had a copy of the transcript when the IHO wrote the decision.

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<sup>3</sup> See IHO exhibit 36, pp. 319-329.

## ISSUES

During the PHC, the IHO and the parties discussed and clarified three issues: Did the District deny the Student a Free and Appropriate Public Education (FAPE) by:

- a. Failing to evaluate the Student after a request by the Parent and a request from a local mental health center to determine the degree of the Student's emotional disturbance in violation of 20 USC §1414(a)(2) and 34 CFR §300.303(a).
- b. Failing to write an IEP that included measurable goals designed to address the Student's anxiety and depression.
- c. Failing to include related services of counseling and social work services specifically targeting the Student's anxiety and depression and to provide the Student with protection from bullying in school in violation of 20 USC §1414(d)(IV) and 34 CFR §§300.321 and 300.324(b). (Plaintiff objects on the record to the reframing of the three issues).

The Parent proposed the following remedies:

- I. Provide for, and contingent upon Parental approval, a qualified and independent "go-to" person to consult with the Student immediately if he is taunted or subjected to harassment; (Parent acknowledged at the PHC the burden to present testimony relative to this requested relief that will enable the IHO to fashion specific relief that is both understandable and enforceable).
- II. Provide in the IEP the related service of independent counseling to be

available to the Student – (Parent acknowledged at the PHC the burden to present testimony relative to this requested relief that will enable the IHO to fashion specific relief that is both understandable and enforceable, e.g., include how much, how often, provided by, etc.,).

III. Include in the Student’s IEP related services of social work to address the culture of racial hostility; (Parent acknowledged at the PHC the burden to present testimony relative to this requested relief that will enable the IHO to fashion specific relief that is both understandable and enforceable, e.g., include how much, how often, provided by, etc.,).

IV. Such other and further relief as may be just and proper. (Parent acknowledged at the PHC the burden to present testimony relative to this requested relief that will enable the IHO to fashion specific relief that is both understandable and enforceable, e.g., include how much, how often, provided by, etc.,).

### **FINDINGS OF FACT**

After considering the evidence, as well as the arguments of both counsel, the IHO made these Findings of Fact:

- 1) On November 27, 2007, the Student was in the fourth grade. The school social worker, [REDACTED] reported the Parent’s concerns in the social developmental study. Included in the social developmental study was the comment: “concerned about (the Student) telling her he is hearing voices.”<sup>4</sup>
- 2) On January 29, 2008, the Student’s medical history report in the Student’s records reflected the Student was “being evaluated ...for signs of emotional disturbance.”<sup>5</sup> Other health

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<sup>4</sup> See D000223.

<sup>5</sup> See D000221.

- concerns reflected the Student was “currently under care of counselor and has appt (sic) 11/6 because he hears voices.”<sup>6</sup>
- 3) On September 13, 2008, the Student’s physician wrote a referral to the school seeking assistance for the Student with the Student’s diagnosed emotional distress.<sup>7</sup>
  - 4) On September 23, 2008, the Student’s psychiatrist placed the Student in a psychiatric hospital in [REDACTED] due to suicidal ideations until October 2, 2008. The Parent went to the school each day to retrieve the Student’s homework so the Student could keep up with his school work during the hospitalization. The Student had reported to the school counselor, [REDACTED] that the Student had thoughts of hurting himself. The Parent informed the school secretary of the hospitalization and the assignment of a SASS worker for the Student after his release from the hospital. The SASS worker met with the Student at the school.<sup>8</sup>
  - 5) On October 3, 2008, the Student returned to school accompanied by the Parent. The school principal, [REDACTED] and the special education administrator [REDACTED] suggested the Parent should enroll the Student in the local Baptist private school as he was not wanted at the school district. [REDACTED]
  - 6) On October 7, 2008, [REDACTED] psychiatrist, diagnosed the Student with major depressive disorder (MDD).<sup>10</sup> [REDACTED] continued to treat the Student for MDD through the present time.
  - 7) On October 24, 2008, the beginning of the Student’s 5<sup>th</sup> grade school year, an IEP team met with the Parent and the Student’s outside counselor, [REDACTED]. At the meeting, the team discussed the Student’s reluctance to attend school due to the alleged harassment of the Student by the Student’s special education teacher and school Principal.<sup>11</sup>

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<sup>6</sup> See D000222.

<sup>7</sup> See D000313.

<sup>8</sup> See Parent’s uncontradicted testimony Vol 1, p. 48-49.

<sup>9</sup> Id. pp. 50-51.

<sup>10</sup> See P156 and T. Vol 2, p. 50-52.

<sup>11</sup> See Parent testimony Vol 1, pp. 54-55, testimony of [REDACTED] document at P124, T. Vol 1, pp. 271-273. (Note, the District did not have the 10/24/2008 IEP in the Student’s records). Parent also testified credibly regarding the conduct of the 10/24/2008 IEP meeting and the fact that the teacher and Principal

- 8) From the remainder of 5<sup>th</sup> grade through the 8<sup>th</sup> grade, issues with staff improved. The Student continued to experience harassment and bullying from other students during the same time period. Harassment included other students calling the Student “nigger.” The bullying and harassment were reported to the Principal, [REDACTED] and the Assistant Principal, [REDACTED].<sup>12</sup>
- 9) On February 21, 2012, the IEP team noted the Student demonstrated social/emotional issues of high anxiety. No action was taken by the IEP team to address the identified concerns.<sup>13</sup>
- 10) In August, 2012, a teammate harassed the Student in the locker room during basketball practice and the teammate pulled down the Student’s pants. The Student also experienced additional name calling during this time including “black boy,” “nigger,” and “skank.” The Parent reported these incidents to the school authorities.<sup>14</sup>
- 11) During the Fall of 2012, the student transitioned from Middle School to High School. Testimony revealed that staff and administrators from the Middle School did not communicate with staff or administrators at the High School.<sup>15</sup> During this same time period, records and testimony reveal that the Student experienced considerable difficulty in his Freshman level Industrial Tech class. Importantly, an accommodation in his 8<sup>th</sup> grade IEP, “give directions in small distinct steps,” did not seem to be communicated to the Student’s Industrial Tech teacher. The Student’s IEP notes reflected that the Industrial Tech teacher commented during the IEP “(the Student) does not follow directions well and I would like to see (the Student) try harder.” Further, the Industrial Tech teacher commented that the Student “needs to remember to ask for his make-up assignments when he is absent,” despite

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when confronted with the alleged harassment stormed out of the meeting. The meeting adjourned and was never reconvened according to Parent testimony and the testimony of [REDACTED].

<sup>12</sup> See Parent’s testimony generally. The reported bullying was on and off from 2008 through the spring of 2012.

<sup>13</sup> See D000112 and testimony of Director of Special Education [REDACTED] T. Vol 2, pp. 247-249.

<sup>14</sup> See Parent’s (e.g., T. Vol 1, p. 65) Student’s testimony (e.g., T. Vol 2., pp. 10-11).

<sup>15</sup> See T. Vol. 2, p. 35.

the fact that one of the Student's accommodations included an "assignment sheet or planner."<sup>16</sup>

- 12) In September of 2012, the son of the school principal pointed out to the Student that someone had written the word "nigger" on the Student's locker. The Parent reported this incident to the Principal and indicated a belief that the Principal's son had written the word on the locker. The issue remains unresolved.<sup>17</sup>
- 13) In December, 2012 members of the Student's basketball team harassed the Student. At a practice during Christmas break, a teammate pulled the Student's pants down. There were two other players present at the time. The Parent complained about the incident to the principal. This issue also remains unresolved.<sup>18</sup>
- 14) On January 8, 2013, just prior to basketball practice, another teammate harassed the Student and called the Student a "skank" on the way to practice. While in the locker room, the teammate grabbed the Student in a "bear hug" from behind and the teammate told the Student to show the other players the Student's "big, black dick."<sup>19</sup> While the teammate held the Student, the son of the Principal allegedly patted the Student's face and allegedly said, "this is good, make him mad and he will practice harder."<sup>20</sup> When the Parent discussed the harassment with the Student, the Parent became worried the Student would attempt to hurt the other boys and the Parent self-reported the Student to the crisis hotline to seek intervention.<sup>21</sup>
- 15) On February 4, 2013, the District convened an IEP team meeting at the request of the Parent. The Parent's concerns included the Student's social/emotional status and the need for the Student to have a trustworthy staff member that the Student could go to any day the Student

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<sup>16</sup> See p. D000132 and D000138.

<sup>17</sup> See testimony of Parent (Vol 1, pp. 66-67) and Principal [REDACTED] (T. Vol. 2, pp. 38-39).

<sup>18</sup> See Student's testimony T. Vol. 2, p. 11 and Parent's testimony, T. Vol. 1, p. 66.

<sup>19</sup> See Parent's and Student's testimony. See testimony of Superintendent [REDACTED], Principal [REDACTED] Assistant Principal [REDACTED]

<sup>20</sup> Id. The involvement of the principal's son was never resolved. Evidence presented demonstrated that students who were investigated by the school administration provided inconsistent testimony to investigators of the incident, but investigators accepted the student's statements as presented and truthful and did not pursue an investigation of the inconsistencies (e.g., see p. D000196 and T. Vol. 2, pp. 67-70).

<sup>21</sup> See Parent's testimony T. Vol 1, p. 141.

felt the need due to harassment, bullying or other safety concerns.”<sup>22</sup> The District discussed staff members who could serve in this role. The discussion included the possibility of the school custodian fulfilling this responsibility. The District finally identified the Student’s math teacher, [REDACTED] as the “go to” person for the Student. The IEP reflected that the Student had a SASS worker who saw the Student regularly at school. IEP notes reflected that the Student saw an outside counselor at school at least once each week and the Student saw a psychiatrist twice each month. The IEP had goals related to game design, writing, algebra, and in reading. The IEP documentation revealed the District did not discuss completing any testing for social emotional concerns or a referral to the District’s social worker for an evaluation.<sup>23</sup>

16) On March 11, 2013, the District convened another IEP team meeting. The Parent reported concerns with the identified “go to” person. The Parent explained that the Student did not trust [REDACTED]. The Student’s counselor reported that [REDACTED] made disparaging comments and exhibited disparaging body language during the IEP team meeting. The counselor reported that [REDACTED] said things like “I can’t stand her,” (referring to the Parent). The counselor described that [REDACTED] would roll her eyes each time the Parent made statements at the IEP meeting or utter comments under her breath.<sup>24</sup> As a result, the Parent asked for a new “go to” person for the Student. The team identified the guidance counselor, [REDACTED] as the new “go to” person and designed a “check-in, check-out” procedure for the Student to monitor the Student’s emotional health at the start and conclusion of each day.<sup>25</sup> The IEP reflects that the check-in check out was designed as a “log

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<sup>22</sup> See D000131. (It was noted the Student’s IEPs dating back to 2006 all included the same student strengths recorded in the Student’s IEP. Additionally, each IEP reflected the same essential goals related to improving reading, math and language goals. Goals were not individualized (e.g., see testimony of Director Wright at T. Vol. 2, pp. 247-249) as required by 34 CFR §300.320(2)(i)(A)(B) until the February 14, 2013 IEP).

<sup>23</sup> See D000127 thru D000147. (Note: The Parent testified (See T. Vol 1, pp. 153-155) that on this same day, the senior son of the High School Counselor, [REDACTED] threatened to hit the Student in the face. When the Parent reported this to the Principal, the Principal wanted the Student to apologize to the senior student. The Parent acknowledged the Principal eventually got the two students to shake hands.)

<sup>24</sup> See testimony of [REDACTED] T. Vol 1, pp. 275-276.

<sup>25</sup> See D000156 (Note: The District expressed the need to conduct a social/emotional evaluation of the Student and possibly a psychiatric examination of the Student. The District was fully aware of the

for attendance and a rating scale on how he starts and ends his day.”<sup>26</sup> The Student’s outside counselor testified she did not understand the discussion at the IEP meeting included the “check-in, check-out” procedure as having an “attendance” purpose.<sup>27</sup> Rather, the Student’s counselor understood the IEP team designed the “check in, check out” procedure to enable the counselor to monitor the Student’s social emotional health and to contact the Parent if issues were observed or noted.<sup>28</sup> The District then changed the location of the “check-in, check-out” procedure from the office of the school counselor [REDACTED] to the classroom of [REDACTED] due to the Student’s occasional tardies to class as a result of the time required to complete the check in process in the morning.<sup>29</sup>

17) On May 29, 2013, [REDACTED], Clinical Psychologist, completed a psychological evaluation of the Student. The evaluation included input from the Parent, three of the Student’s teachers, and the Student. Results revealed the Student lacks insights into his own symptoms and behaviors.<sup>30</sup> Further, [REDACTED]’s evaluation diagnosed the Student with Pervasive Developmental Disorder (PDD) not otherwise specified (NOS).<sup>31</sup> Testimony by [REDACTED] revealed the PDDNOS caused the Student to struggle with certain characteristics of bullying in a manner that normal functioning students might not be as troubled or might even shrug off the name calling and harassment. The completed psychological testing contrasted with the identified strengths as noted in the Student’s IEPs dated February 24, 2012 and February 4, 2013 and the testimony of [REDACTED] the Student’s math teacher. While the Student’s records and [REDACTED] noted that basic math facts were a strength for the Student, the psychological test conflicted with these statements. The testing reflected basic math facts as a weakness for the Student. The testing reflected the Student confused

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Student’s involvement with [REDACTED] a psychiatrist but did not request Parent’s permission to contact [REDACTED] or ask the Parent for permission to see any of the Student’s psychiatric medical records.)

<sup>26</sup> See D000164.

<sup>27</sup> See testimony of [REDACTED] T. Vol. 1, p. 227.

<sup>28</sup> Id. T. Vol. 1, p. 226.

<sup>29</sup> The IHO notes that [REDACTED] is the “go to” person who the Parent asked to be removed from that function due to her apparent negative attitude towards the Parent as described in the testimony of [REDACTED] and the Parent’s documented concerns that the Student did not trust Ms. Daniel.

<sup>30</sup> See P167 and testimony of [REDACTED] T. Vol. 4, pp. 40-43.

<sup>31</sup> See P. 169-170.

basic math signs (e.g., multiplication sign confused with division sign), counted on the Student's fingers when attempting to solve problems, the inability to perform basic division operations and scored in the 4<sup>th</sup> percentile and at a 3.9 GE. The test concluded the Student had a significant learning disability in math that had previously been undiagnosed by the school district. Testimony of ██████ reflected the Student's problems should have been identified earlier and that the Student required counseling and school supports for social emotional concerns. ██████ testified that the social/emotional issues could be traced back to the Student's hospitalization in 2008 and should have been addressed.<sup>32</sup> ██████ also took issue with the District's placement of the Student in a pre-algebra class. ██████ observed that the Student could not calculate change and therefore required an approach that would build his basic math skills and functional math skills first. ██████'s testimony contradicted the testimony of the Student's teachers, in particular his math teacher ██████. Further, ██████'s evaluation contradicted the District's IEP development, contradicted the strengths of the Student as identified in all of his IEPs, and identified additional disabilities not identified by the District. The IHO found the testimony of ██████ credible. Where ██████'s testimony conflicted with the testimony of District staff (e.g., ██████), the IHO found ██████'s testimony more credible. The IHO found ██████'s testimony persuasive when combined with the information contained in ██████'s evaluation of the Student.

#### 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 identified during the pre-hearing conference.

Issue #1: Did the District deny the Student a Free and Appropriate Public Education (FAPE) by: Failing to evaluate the Student after a request by the Parent and a request from a

<sup>32</sup> See testimony of ██████. Vol. 4, pp. 73-78.

local mental health center to determine the degree of the Student's emotional disturbance in violation of 20 USC §1414(a)(2) and 34 CFR §300.303(a).

A. Based on the review of the information provided by both parties, the District failed to meet the requirements of 20 USC §1414(a)(2) and 34 CFR §300.303(a) [Evaluations, eligibility determinations, individualized education programs, and educational placements] and [Reevaluations]. The IDEA requires, "...the IEP Team and other qualified professionals, as appropriate, shall review existing evaluation data on the child, including evaluations and information provided by the Parent."<sup>33</sup> Testimony and documents establish the Parent provided the District with significant information relative to the Student's social emotional needs since November 27, 2007. Additional information provided by the Parent over the course of the next school year should have triggered either a request by the District to examine the Student's medical records or resulted in the District evaluating the Student to determine whether the Student's social/emotional needs rose to the level of an emotional disability.<sup>34</sup> Further, 20 USC §1414(b)(d)(B) requires that districts assess students in "all areas of suspected disability." This requirement to assess in all areas of disability applies to reevaluations as well.<sup>35</sup> As noted earlier, the IHO found ██████████'s IEE credible and persuasive.<sup>36</sup> It is important to note that not every procedural violation constitutes a denial of FAPE. However, procedural violations that "results in the loss of an educational opportunity" are a denial of FAPE.<sup>37</sup> Further, courts have ruled that when districts fail to identify existing disabling conditions that it is not possible to develop an IEP that is reasonably calculated to provide the student with meaningful benefit.<sup>38</sup> Similarly, courts have determined when districts fail to provide the correct diagnosis of a student's disability, the

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<sup>33</sup> See 20 USCS §1414 c)(A)(1) and 34 CFR §300.305 (a)(1)(i)..

<sup>34</sup> See *Supra* FF #1-4.

<sup>35</sup> See 20 USC §1414 (a)(2) (A), 34 CFR § 300.303, and 23 Ill. Admin. Code §226.120.

<sup>36</sup> See *Supra* FF #16.

<sup>37</sup> *Heather S. v. Wisconsin*, 125 F.3d 1045,1059 (7<sup>th</sup> cir.1997).

<sup>38</sup> *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202, 1210 (9<sup>th</sup> Cir. 2008).

failure amounts to a denial of FAPE. The court reasoned that the differing diagnoses require differing education plans, and therefore the District failed to properly execute a meaningful IEP for the student.<sup>39</sup> In this instance, the District failed to identify that the Student had a significant disability in math (in fact the District planned for the Student as if math was a strength) and the District failed to identify the Student's disability on the Autism spectrum (PDD NOS).

B. The Individuals with Disabilities Education Act (IDEA) requires that school districts:

"...must ensure that reevaluation of each child with a disability is conducted in accordance with §§300.304 through 300.311."<sup>40</sup> The IDEA further requires that the evaluations include information provided by the Parent.<sup>41</sup> In addition, the IDEA requires that students be assessed in all areas of suspected disability including "social emotional."<sup>42</sup> It is also important to note that the IDEA requires that Districts conduct evaluations such that "...each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."<sup>43</sup> The IEPs established for the Student were narrowly focused on the Student's learning disability in reading. The Student's strengths identified in the IEPs dating back seven (7) years reflected the same strengths and the District failed to write individualized goals as required by the IDEA.<sup>44</sup> The District was aware the Student was seeing a SASS counselor at school on a weekly basis, that the Parent was providing the Student with a private counselor once each week, the Student had been previously hospitalized for suicidal ideations, the Student confessed to "hearing voices" and had thoughts of injuring other students and staff members,

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<sup>39</sup> *Bell v. Bd. Of Educ.*, No. CIV 06-1137 JB/ACT, 2008 U.S. Dist. LEXIS 108748 (DNM, Nov. 28, 2008).

<sup>40</sup> See 34 CFR §300.303 (a).

<sup>41</sup> See 34 CFR §300.304 (b)(i).

<sup>42</sup> *Id.* (4).

<sup>43</sup> *Id.* (6).

<sup>44</sup> See *Supra* Note 17.

and the Student was seeing a psychiatrist two times each month.<sup>45</sup> In spite of this knowledge, the District failed to seek authorization from the Parent to review the Student's outside provider records, failed to seek authorization from the Parent to review the Student's medical records, and failed to conduct their own social/emotional assessments of the Student, thereby failing to provide the Student with the social/emotional supports at the school that were needed by the Student.

- C. The IHO concludes the District failed to assess the Student and the District failed to identify all of the Student's disabling conditions (including the degree of the Student's emotional disturbance) that impacted the Student's education. Therefore, the IHO rules for the Parent on Issue 1.

Issue II: Did the District deny the Student a Free and Appropriate Public Education (FAPE) by: Failing to write an IEP that included measurable goals designed to address the Student's anxiety and depression?

- A. In order to write measurable goals designed to address the Student's anxiety and depression, the District must first properly evaluate and assess the Student to identify these as disabling conditions that require special education services and accommodations. The IHO concludes that the District failed to meet the requirements of 34 CFR §300.304 (c)(4)(6) [Evaluation Procedures] and 34 CFR § 300.320 (a)(2)(i)(A)(B) [IEPs defined]. 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."<sup>46</sup> The District has the burden of showing that its evaluation was "appropriate."<sup>47</sup> An appropriate evaluation is one which complies with the

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<sup>45</sup> See testimony of school principal, IEP notes, psychological report completed by district psychologist [REDACTED] social developmental reports completed by district social worker [REDACTED]

<sup>46</sup> See 34 CFR §300.304(c)(4)(6).

<sup>47</sup> 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).

pertinent federal and state regulations.<sup>48</sup> The IDEA requires that districts assess the student in all areas related to the suspected disability including “social and emotional status.”<sup>49</sup> 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.”<sup>50</sup> 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.<sup>51</sup> 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 making process regarding the provision of a free appropriate public education.<sup>52</sup>

B. The Parent provided the District substantial information relative to the Student’s “social emotional status” over a seven (7) year period. The information shared by the Parent and private service providers of the Student should have served as the basis for the District to conclude that an appropriate 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, distrust of faculty members, the Student’s reactions to racially tinged harassment by other students, and bullying by other students, some of whom were children of influential faculty members (school principal and counselor) were all significant signs of social/emotional needs and suggested a social emotional disability. 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

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<sup>48</sup> 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”).

<sup>49</sup> 34 §CFR §300.304 (c)(4).

<sup>50</sup> *Id.* (6).

<sup>51</sup> See *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 207 (1982)

<sup>52</sup> See 20 USCS 1415(f)(E)(ii)(I-III).

interventions and supports, and other strategies, to address the behaviors.<sup>53</sup> The documented efforts by the District included: assigning one additional coach to supervise the locker room during the Student's basketball practices; a "check in, check out" procedure for the Student;<sup>54</sup> The system was supposed to be in response to the Student's well documented harassment and bullying by others, but instead punished the student rather than provided the Student with the required supports. Independent testing of the Student revealed an emotional disability that should have been discovered by the District prior to the intense bullying and harassment endured by the Student during the recent school year. Significant signs existed prior to the 2012-13 school year that should have triggered an assessment by the District to address the symptoms of an emotional disturbance and the District failed to meet this requirement of the IDEA.<sup>55</sup> 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 services that appropriately and adequately addressed the Student's educational, emotional and social needs, and therefore denied the Student educational benefit.

- C. The IDEA requires that District's write "measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability."<sup>56</sup> Each IEP goal should have corresponding items of instruction or services identified. Having goals without related programming indicates that the district is not providing FAPE.<sup>57</sup> Further, an IEP that lacks meaningful educational goals is defective and fails to provide the

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<sup>53</sup> See 34 CFR §300.324 (a)(2)(i).

<sup>54</sup> This approach failed on its face to achieve its purpose of gauging the Student's social emotional status. Evidence revealed the approach focused on the Student's attendance and tardy behaviors and resulted in the Student being punished when he failed that part of the "check in check out" system.

<sup>55</sup> See *Supra* Notes 34 and 35.

<sup>56</sup> 34 CFR § 300.320 (a)(2)(i)(A)(B).

<sup>57</sup> See *Burlington Sch. Dist.*, 20 IDELR 1303 (SEA VT 1994)

student with a plan that is measurable as required by the IDEA.<sup>58</sup> The goals included in a student's IEP must be specific enough for providers and the IEP team to determine whether the student is making progress. IEPs containing vague or immeasurable goals often are found to be deficient.<sup>59</sup> When district IEP teams write goals in the child's IEP that are expressed in subjective and inexact terms such as "to increase participation," and "to increase compliance," the team cannot make an objective analysis of whether the child was making progress toward the identified goals and objectives.<sup>60</sup> In determining the District's compliance with these requirements, courts require that the "snapshot rule" be applied to the analysis.<sup>61</sup> In other words, the analysis needs to "take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." The IEPs found to be deficient are the IEPs dated February 12, 2012 and February 4, 2013. The District argues the District attempted to cure the failures of these IEPs at the March, 2013 IEP meeting when the Parent did not give the District immediate permission to reevaluate the Student. However, the March 2013 IEP is not considered since that IEP team meeting was conducted after the Parent had filed the due process complaint notice. Utilizing the "snapshot rule," the IHO concludes that the IEPs in February of 2012 and 2013 were substantially deficient for failure to write functional goals related to the Student's learning disability in math and the Student's existing but not yet identified disability of PDD NOS. Further, the IHO concludes that the District failed to write individualized goals that were measurable and that provided the Student with the opportunity to progress in the regular curriculum and that addressed each of the Student's disabling conditions.

The IHO rules that the preponderance of the evidence submitted supports the Parents assertions related to Issue II and rules the District denied the Student a FAPE by failing to provide individualized and measurable goals designed to address the Student's learning disability

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<sup>58</sup> See *Susquentia Sch. Dist. v. Raelee S.*, 25 IDELR 120 (M.D. Pa. 1996)

<sup>59</sup> See, e.g., *In re: Student with a Disability*, 50 IDELR 236 (SEA NY 2008)

<sup>60</sup> See *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008)

<sup>61</sup> See *Roland M. v. Concord Sch. Comm.* 910 F. 2d 983, 992 (1<sup>st</sup> Cir. 1990).

in math and the Student's anxiety and depression and therefore rules for the Parent on Issue II.

Issue III. Failing to include related services of counseling and social work services specifically targeting the Student's anxiety and depression and to provide the Student with protection from bullying in school in violation of 20 USC §1414(d)(IV) and 34 CFR §§300.321 and 300.324(b).

A. There is no doubt that the Student was bullied at school over a period of several years. Numerous incidents were described via testimony by the Student, his Mother and several district administrators.<sup>62</sup> The record also reflects that in most instances the administration investigated the incidents<sup>63</sup> and acted by either issuing discipline or issuing changes in policy and practice as a result of the investigations (e.g., suspension of offending students or increase in the level of supervision of coaches required at practice and on away game busses). The Parent argued that this harassment either caused or exacerbated the Student's social and emotional disability. The Parent also asserted that the District failed to effectively address the harassment and therefore failed to provide the Student with protection from the bullying. Courts have ruled that when districts fail in this responsibility, the failure can amount to a denial of FAPE. One court found that: "When responding to bullying incidents, ..., a school district must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future."<sup>64</sup> The District established that school administrators investigated allegations of harassment, bullying and racially tinged name calling. The District also established that the identified perpetrators were punished. The

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<sup>62</sup> See *Supra* FF #7,9, 10, 12 13, and 14 and Notes 20 and 23.

<sup>63</sup> There was evidence that portions of the administrative investigations resulted in conflicting evidence generated by conflicting or inconsistent student testimony. There was also evidence that a proper or more complete investigation may have produced additional information that would have resulted in additional students identified as playing a role in the harassment and bullying. However, the evidence was far from conclusive and therefore not persuasive at the hearing.

<sup>64</sup> *TK v. New York City Dept of Educ.*, 779 F. Supp. 2d 289 E.D.N. Y. 2011).

District further established that policy changes were put into place and when appropriate, staff members apologized to the Student for misunderstandings that occurred.

B. While there is no doubt the incidents of bullying, harassment and racially charged name calling impacted the Student, both socially and emotionally, the extent these incidents impacted the Student's education was neither clear or persuasive. In fact, the District's documented failures related to assessment/evaluation of the Student and writing an IEP with individualized goals that targeted all of the Student's disabling conditions were the most convincing as the cause of the Student's angst in school and frustrations related to learning. While the District's documented actions may not have been as effective as they could have been, the evidence submitted does not support that the District displayed any deliberate indifference to the harassment/bullying of the Student. As a result, the preponderance of the evidence, when taken in total, failed to establish the Parent's burden of proving the District failed the Student as described in Parent's Issue III. Therefore, the IHO rules in favor of the District on Issue III.

#### Parent's Request for Compensatory Education

In light of the ruling in favor of the Parents on two of the 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 and also awards additional compensatory education as requested in the DPCN and discussed during the testimony of the Parent and her outside providers at the hearing. In order to award the Parents' requested compensatory education, the foundational element must be a finding of a denial of FAPE.<sup>65</sup>

Both the OSEP, the IDEA administering agency<sup>66</sup> and the courts<sup>67</sup> have ruled that IHOs have

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<sup>65</sup> 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).

<sup>66</sup> 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).

the authority under the IDEA to award compensatory education. Compensatory education services are a remedy that calls for services above and beyond the services normally due to a student and are intended to make up for a district's failure to provide FAPE. The purpose of compensatory education is not to provide additional benefits to the student, but rather to put the student in the position he would have occupied if the district had complied with its IDEA obligations. As such, many courts have rejected a "cookie-cutter" approach to compensatory education in which awards are based solely on the hours of services missed.<sup>68</sup> The award of compensatory education remains in the broad discretion of the court.<sup>69</sup> Compensatory education can take a number of forms. For example, a court may order a district to pay for the student to receive services from a private school or provider.<sup>70</sup> Compensatory education may also include awards of services themselves.<sup>71</sup> Compensatory education, if awarded, should compensate the child for the district's failure to provide FAPE.<sup>72</sup> In compensating for the district's failure to provide the Student with a FAPE, the IHO utilizes the qualitative approach for awarding compensatory education. The compensatory award in this order follows the qualitative formula. The accompanying Order details the Parents' awarded relief and awarded compensatory education.

### **ORDER**

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

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<sup>67</sup> 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).

<sup>68</sup> See, e.g., *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005)

<sup>69</sup> See, *Garcia v. Board of Educ. of Albuquerque Pub. Schs.*, 49 IDELR 241 (10th Cir. 2008).

<sup>70</sup> See, e.g., *Draper v. Atlanta Indep. Sch. Sys.*, 49 IDELR 211 (11th Cir. 2008), *cert denied*, 110 LRP 57266, 131 S. Ct. 342 (2010).

<sup>71</sup> See, *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005).

<sup>72</sup> 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).

1. The IHO orders the District to convene an IEP team meeting no later than the last day before day one of the 2013-14 school year. The IEP team must review the evaluation completed by [REDACTED] and the recommendations of [REDACTED] and at a minimum, consider whether to include in the Student's IEP the eligibility categories of learning disability in math and PDD NOS as detailed by [REDACTED] evaluation, and major depressive disorder (MDD) as identified by [REDACTED].
2. The IHO orders the District to have the IEP team consider whether to include in the Student's IEP the recommendations set forth in [REDACTED]'s written evaluation as detailed on pp. P170-P173 and numbered 1-10 inclusive. No later than 5:00 PM on the first day of the District's 2013-14 school year, the District is to submit a copy of this completed IEP to Mr. Andrew Eulass, Esq., Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777.
3. As compensatory education for the loss of two years of a FAPE, the IHO orders the District to provide the Student an independent Master's level educated counselor (selected by the Parent from a list of three providers identified by the District). The counselor must provide the Student counseling sessions focused on the Student's depression. The IHO orders the District to provide 52 counseling sessions of 60 minutes in length. Sessions will be scheduled at the discretion of the Parent. Upon receipt of invoices from the Parent's selected counselor, the District shall pay the counselor [or facility providing the counseling] within 30 days of receipt of each invoice. Further, at the sole discretion of the identified counselor and the Parent, the District is to either pay for or provide the Student with a social skills group experience. The social skills group may be conducted at the school, if appropriate and available, to be conducted by a properly certified school staff person, provided the identified

independent counselor and Parent agree with the appointment of the properly certified staff member. Failure to reach such agreement will result in the District being required to pay for the Student's enrollment in a social skills group identified by the Parent's selected counselor for the Student. The District's obligation to pay for the individual counseling and participation in the social skills group shall include any costs related to the provision of the service including transportation of the Student. Determination of the best form of transportation shall be at the sole discretion of the Parent. If transportation is provided by the Parent, the District shall reimburse the Parent at the then IRS rate for mileage reimbursement. Such reimbursement shall be on a monthly basis after documentation is submitted by the Parent. Mileage shall be determined as the round trip distance calculated from either the Parent's home or the Student's school (the Parent must identify the starting point with each trip) and the location of the counseling and/or social skills group therapy as calculated by Mapquest.com. Documentation that the District made these required payments must be sent to Mr. Andrew Eulass, Esq., 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 counselor or counseling facility and the payment of any transportation or tuition related costs.

4. As compensatory education for the loss of a FAPE, the District is to provide the Student 80 hours of tutoring in mathematics on a one to one basis. The tutoring is to be conducted either before or after school and scheduled at the discretion of the Parent (but must be completed within 12 calendar months of the date of this order). Failure to schedule and complete the tutoring within the 12 month time period shall relieve the District of any further obligation to provide the mathematics tutoring, provided, however, the failure is not caused by circumstances beyond the Parent's control (e.g., school's lack of cooperation,

extended student or parent illness or hospitalization, availability of the tutor, etc.). The Parent must cooperate with the District to schedule at least two hours each week and may schedule up to four hours each week [if determined by both the Parent and school that four hours is indeed appropriate and workable]. The tutor must possess appropriate credentials to provide tutoring to a student who has a mathematics learning disability as identified for this Student in the evaluation completed by [REDACTED]. The District must file a monthly report with Mr. Andrew Eulass, Esq., Due Process Coordinator at the Illinois State Board of Education, 100 N. First Street, Springfield, IL, 62777 detailing the tutoring provided to the Student. Monthly reports are due by 5:00 PM on the 10<sup>th</sup> of each month, except when the 10<sup>th</sup> of the month may fall on a holiday or weekend, and then the report shall be due by 5:00 PM on the first day after the holiday or weekend date.

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

Pursuant to 105 ILSC 5/14-8.02a(h) either party may request clarification of this decision by submitting a written request to the Hearing Officer within five (5) days of receipt of the decision. The request for clarification shall specify the portions of the decision for which clarification is sought. A copy of the request shall be mailed to all other parties and the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, IL 62777. The right to request clarification does not 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: July 12, 2013**

A large black rectangular redaction covers the signature of the Impartial Hearing Officer.

Impartial Hearing Officer

[222 E Surrey Lane, East Peoria, IL 61611

309-694-4864 phone

309-694-2295 fax]

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the Final decision was sent via 1<sup>st</sup> Class USPS, certified and prepaid and electronic mail and directed to:

[REDACTED]

And

[REDACTED]

On July 12, 2013

[REDACTED]

D. MICHAEL RISEN, PH.D.  
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