Case Number: 2013-0515
[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

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District Name [redacted] **Phone: 847-731-3085**
Superintendent
Address
Represented by

Parent Name [redacted] **Phone:** [redacted]
Address
Represented by Pro Se

Date and Timelines
Date of Written Request: 06/14/2013
Date of Pre-hearing Conf: 07/15/2013
Date of Hearing: 09/12/2013 to 09/12/2013
Date of Decision: 9/23/2013

Summary of Decision: The Parent claimed that, as a result of a proposed transfer, Student's placement would be inappropriate. The IHO found for the Parent. The Parent proceeded pro se. The District was represented by Darcy Proctor.

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF [redacted]	)	
	)	**ISBE CASE NO. 2013-0515**
v.	)	**Joseph P. Selbka**
[redacted]	)	Impartial Due Process
	)	Hearing Officer

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SPECIAL EDUCATION SERVICES

FINAL HEARING OFFICER DETERMINATION AND ORDER

I. Introduction and Procedural History

1. This matter arose when the District proposed to transfer [redacted] ("Student") from a location of services at the [redacted] to a program within one of the District's schools. The District is a member of [redacted] ("Parent") brought this due process proceeding in order to prevent the transfer of Student from the [redacted] location of services to the District's proposed location of services.

2. The evidentiary portion of the hearing occurred on September 3, 2013. The parties submitted closing briefs on September 12, 2013. At the hearing, six district documents were admitted into evidence without objection (SD Ex. 1-6). One hearing officer exhibit (IHO Ex 1) was admitted without objection. At the hearing, the following witnesses testified: Parent; [redacted] ("District Superintendent"); [redacted] ("District Special Education Director"); [redacted] ("SEDOL Occupational Therapist"); [redacted] ("SEDOL Social Worker"); [redacted] ("SEDOL SLP"); [redacted] ("SEDOL Principal"); [redacted] ("SEDOL Teacher"); [redacted] ("District Assistant Special Education Director").

II. Issues for Hearing

3. The only issues to be decided are:

a) Whether [redacted] is an appropriate of location of services for Student; and

b) Whether a transfer from [redacted] to [redacted] would render Student's placement, and IEP inappropriate; or would otherwise lead to a loss of FAPE;

III. Findings of Fact

Aspects of Student's Disability

4. Student is a high-functioning child on the autism spectrum (District Closing Brief, pg. 2, Tr. 53-54, 144). Student has significant problems reading social cues (Tr. 53-54). Student has problems with understanding the perspective of others (Tr. 29). Student's

disability manifests in an inability to understand personal space and (inadvertently) intimidate other children (Tr. 38-39). Student constantly has issues over the entire school day with his demeanor (Tr. 39).

5. Children on the autism spectrum have problems modeling appropriate behaviors from nondisabled peers (Tr.173-174).

[redacted] and the District's Provision of Services (Including) The Various IEP and other Meetings

6. Student has been attending the [redacted] location of services for two years prior to this school year (Dist. Closing Brief, pg. 2-3). Student was placed in the [redacted] location of services because District locations could not provide Student with FAPE (Tr. 183-185).

7. In October, 2012, there was an IEP meeting wherein Student was placed at the [redacted] (the [redacted] location of services) (Tr. 51).

8. In June, 2013, there was a second IEP meeting wherein the District proposed a transfer to [redacted] (the District location of services) (SD Ex. 2).

9. In August, 2013, there was an informational meeting between [redacted] staff and District staff wherein District representatives (District Superintendent, District Special Education Director, and District Assistant Special Education Director) explained the program available for Student at the [redacted] (Tr.83-84, 85-86).

Miscellaneous Aspects of the Proposed Location of Services

10. At the hearing, Parent initially objected to the proposed transfer on two grounds: (1) that Student would be subject to bullying at [redacted] and that (2) Student is not fenced in at [redacted] thus creating the possibility that Student could run off of the campus or leave the campus with a dangerous person (Tr. 8, 11). Parent did not offer any factual evidence of widespread bullying at [redacted]

11. Parent admitted that most of the safety concerns listed above would be alleviated by supervision of Student (Tr. 12-13). The District offered uncontradicted testimony that Student would be supervised at all times if Student attended [redacted] (Tr. 187, 290-291). Moreover, the building is locked down at all times while Student would be attending the school (Tr. 290-291). The District has also instituted programs and policies to ensure that bullying is addressed at [redacted] (Tr. 284-287, SD Ex. 3, 5, 6). In light of the District's uncontradicted testimony, the undersigned makes an inference that bullying would not lead to a denial of FAPE at [redacted] The undersigned makes a further inference that the District can ensure Student's safety through supervision despite the fact that the campus is not fenced in.

The [redacted] Program when Compared to the District's Proposed Program

12. If Student transferred to [redacted], he would be in the District's [redacted] ("[redacted] Program") (Dist. Closing Brief, pg. 3, Tr. 206-207).

13. At [redacted] Student is in the [redacted] "[redacted] Program", which is an immersion program designed to teach students social skills (Dist. Closing Brief, pg. 1-2, IHO Ex #1, Tr. 53-58, 84-85). The [redacted] Program is designed to teach feelings and social skills in all aspects of the Program (Tr. 55-57). The [redacted] Program is completely designed around teaching Student social skills (Tr.53-58). The [redacted] Program is an "immersion" program" wherein all the teachers and related services providers are constantly intervening to provide Student with social skills in a coordinated manner (Tr. 66).

14. While at the [redacted] Program, Student works on issues of how to interact with peers (including avoiding intimidating other peers) (Tr. 24). Student is taught social skills through social stories and role playing (Tr. 24). Student is taught self-regulation and self-monitoring (Tr. 24). Student learns tools to calm himself when he becomes agitated (Tr. 24).

15. Several [redacted] witnesses testified that Student requires a program with the intensity and frequency of interventions of the [redacted] Program in order for Student to obtain FAPE (Tr. 37-38, 57-58, 86).

16. Moreover, at the August, 2013, several [redacted] representatives testified that the District representatives described the [redacted] Program (Tr. 25, 29, 31). These [redacted] representatives ([redacted] Occupational Therapist, [redacted] SLP) testified that the District representatives made admissions regarding the structure of the [redacted] Program (Tr. 31, 87). These [redacted] representatives testified that the [redacted] Program does not provide the type of immersion methodology which the [redacted] Program provides (Tr. 31, 33-35, 42-44, 87-89). These [redacted] representatives also contend that Student's IEP Team believes the [redacted] Program is necessary for Student to receive FAPE (Tr. 37-38, 57-58, 87-89).

17. Some of the [redacted] representatives who believe the [redacted] Program is necessary for Student know Student the best of all witnesses who testified at hearing (Tr. 97).

18. An [redacted] Program is generally focused on providing students with accommodations and services related to academic challenges (Tr. 37, 60-61, 87). The [redacted] Program has students with different disabilities and needs (Tr. 61, 87, 211). The [redacted] Program has a social skills component and the ability to provide extensive social skills training (Tr. 207, 213-228). The teacher in the [redacted] Program provides specific instruction in socially correct behavior and role modeling (Tr. 208).

19. At the informational meeting in August, 2013, District representatives admitted that they did not have an equivalent to the [redacted] Program in place (Tr. 98). Rather, according to the District, the District was going to attempt to create a program to meet Student's individual needs (Tr. 98).

20. The District Representatives contend that the [redacted] Program at [redacted] can be modified to meet Student's needs (Tr. 100, 101). District representatives

contend that the District has all necessary personnel to meet Student's needs in his IEP (Tr. 147-149, 153). The District contends that it has a system in place able to modify Student's behaviors (Tr. 150-151, 177, 182-183). However, the District personnel also stated that they believe their [redacted] Program is an immersion program (Tr. 172-173).

21. The undersigned makes a credibility finding (based upon the admissions[1] of District personnel at the August, 2013, informational meeting set out above), that the District does not have in place a program similar to the [redacted] Program at [redacted]

22. The undersigned further adopts the opinions some of Student's educators at [redacted] ([redacted] Social Worker, [redacted] Occupational Therapis[redacted] SLP); and makes a credibility finding as to their testimony and further makes an inference that Student requires an immersion program similar to the [redacted] Program in order to receive FAPE. Specifically, Student needs a program with the constancy and intensity of interventions offered by the [redacted] Program in order for Student to have a chance of making educational progress in the area of social skills. In making this inference, the undersigned takes into account Student's unique needs (especially his primary need to receive constant feedback regarding socially appropriate behavior); the structure of the [redacted] Program which is designed to provide instant and constant feedback regarding social skills; the fact that Student had failed in a [redacted] Program in the past; and the fact that the [redacted] representatives whose testimony I have accepted know Student best as they are the persons who educate Student on a day-to-day basis.

23. The undersigned further adopts the opinions some of Student's educators at [redacted] ([redacted] Social Worker, [redacted] Occupational Therapist, [redacted] SLP); and makes a credibility finding as to their testimony and the undersigned further makes an inference that the District cannot replicate a [redacted] Program at [redacted] within the District's [redacted] Program. In support of my credibility finding and inference, the undersigned relies upon the fact that the structure of the [redacted] Program makes it unlikely that the instructional staff can concentrate on immediate interventions to correct social skills. The [redacted] Program caters to students with multiple disabilities and must therefore, by necessity, be designed to meet diverse and multiple needs of children with widely varying disabilities. Because of these unalterable characteristics of the [redacted] Program, the District cannot replicate the necessary frequency and intensity of interventions of the [redacted] Program in the [redacted] Program.

24. Moreover, while the District claims that Student will benefit in social skills development from interaction with and modeling of nondisabled peers, the undersigned rejects this contention because children on the autism are generally unable to independently model behaviors of nondisabled peers.

25. In light of the above stated credibility findings and inferences, the undersigned finds that the proposed transfer from the [redacted] Program at the [redacted] Location of Services ([redacted]) to the [redacted] Program at [redacted] would lead to a denial of FAPE to Student. In light of the credibility findings and inferences the

[1] Admissions of agents of party-opponents are generally admissible. *Werner v. Botti, Marinacco & DeSalvo,* 205 Ill.App.3d 673, 679 (1990).

undersigned has made above, the undersigned makes an inference that the [redacted] Program is not a program reasonably designed to provide Student with a substantial educational benefit in the area of social and emotional development.

Student's IEP and It's Relation to the Location of Services where Student Attends School

26. Student's IEP does not have any explicit requirement for a "[redacted] Program." (Tr. 171). However, some [redacted] Representatives testified that the [redacted] Program was an implicit term of Student's IEP (Tr. 36, 63, 85-86). Specifically, according to some [redacted] Representatives, the IEP Team believed Student needed a program like the [redacted] Program in order to receive FAPE (*Id.*). It is uncontradicted that Student had failed in a program similar to the [redacted] Program at a previous district, and thus, the IEP Team decided on a transfer to the [redacted] Program (Tr. 36, 172). Therefore, in light of the testimony of the [redacted] Representatives cited above and the fact that Student failed in an [redacted] Program in the past, the undersigned makes a credibility finding and draws an inference that an immersion program like the [redacted] Program is an implied term of Student's IEP.

27. Student's IEP does not contain a transition plan for Student to move from one physical location to another (Tr. 102-103). The District admits a transition program is necessary for Student (Tr. 107-108).

28. Parent will have problems transporting Student to school if a transfer occurs in the morning (Tr. 190-191). The District offers a voluntary daycare program to watch students in the morning and afternoon for parents who have problems transporting their children to school in the morning (Tr. 297-298). There is no evidence that the IEP Team ever considered how to accommodate Student during the daycare program(s).

IV. Conclusions of Law

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

29. 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.*

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

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

31. 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).

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

33. 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 proferring 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).

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

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

35. 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).

36. 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).

37. 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)

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

In administrative litigation, the hearing officer must be concerned with not only ensuring a fair process wherein the parties can present evidence, but also a proper result under the law because there is a significant public interest in properly having the law carried out. Landis, John, "*The Administrative Process*," Yale University Press (1938) excerpted in Foundations of Administrative Law, Schuck, Peter (ed.) Foundation Press (2004), pp. 13-14. For this reason, administrative hearing officers are constitutionally

permitted to depart from the adversarial model and independently obtain evidence and develop an administrative record while remaining a neutral and impartial decision maker. *Sims v. Apfel,* 530 U.S. 103, 110-11 (2000); *Richardson v. Perales,* 402 U.S. 389, 400-401 (1971) (social security administrative law judges constitutionally permitted to develop the record to determine all facts necessary whether benefits should be granted under law).

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

39. A hearing officer can place a child for more than one year if it will eliminate the further need of litigation between the parties. *Holmes v. District of Columbia,* 680 F.Supp. 40 (D.D.C. 1988).

Conclusions of Law Related to the Definition of FAPE

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

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

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

standards are enforceable through IDEA. *CJN v. Minneapolis Public Schools, Special School District No. 1,* 323 F.3d 630 (8th Cir. 2003).

43. Illinois requires all school districts to teach students to manage emotions and behavior for both academic and life success. 405 ILCS 49/5, 15. Illinois social-emotional standards are available on the ISBE website and are made part of this administrative record as IHO Exhibit #2. Students must be taught: social and interaction skills; how to manage emotions and behavior; how to develop self-awareness and self-management skills; how to use social awareness and interpersonal skills to establish and maintain positive relationships; to develop skills to prevent, manage, and resolve conflicts in constructive ways; to consider ethical, safety, and societal factors in making decisions. *Id.* The standards specifically require school district to teach social and emotional skills and protocols for establishing positive peer, family and work relationships (See IHO Ex. #2).

44. Another factor in determining whether an IEP is reasonably calculated to provide an educational benefit is whether the IEP addresses the Student's unique needs. *Jaccari J v. Board of Education, Chicago Public School District No.299,* 690 F.Supp.2d 687, 702 (N.D.Ill. 2010). In determining whether the District considered a student's unique needs properly in developing an IEP, general principles of reviewing decision making in administrative law are helpful. Decisions are unreasonable if the IEP Team: has relied on factors Congress has not intended it to consider; has entirely failed to consider an important aspect of the problem; has offered an explanation for its decision counter to the evidence before the IEP Team; or is so implausible that the decision could not be ascribed to a difference in view or the product of IEP Team expertise. *See Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29 (1983) (determining when an agency's decision making is arbitrary and capricious in rulemaking which is roughly analogous to the task hearing officers have to judge the reasonableness of IEP Teams in making decisions regarding IEP design).

45. An Illinois school district must thus address all of a student's unique social-emotional needs like anxiety, aggression, inability to socially interact with peers and family with specific goals and short term objectives/benchmarks. *Sarah D. v. Board of Education of Aptakisic-Tripp Community Consolidated School District No. 102,* 642 F.Supp.2d 804, 52 IDELR 281 (N.D. Ill. 2009); *Los Angeles Unified School District,* 39 IDELR 257 (Cal. SEA 2003).

46. As part of the IEP Team's responsibilities, it must determine the safety and health needs of a child in order to provide accommodations designed to protect the child in his/her educational environment, and design an IEP which protects the safety needs of a child. *Lillbask v. State of Connecticut Department of Education,* 397 F.3d 77, 42 IDELR 230 (2nd Cir. 2005). To fail to protect a disabled child's physical and psychological safety when designing an IEP constitutes a denial of FAPE. *Id.* This requirement generally requires a district to protect a disabled child from a culture of bullying. *TK v. New York City Department of Education,* 779 F.Supp.2d 289 (E.D.N.Y. 2011) (culture of bullying in a physical school is a violation of FAPE and IDEA for which a hearing officer can provide a remedy).

47. Related services are developmental, corrective, and other supportive services necessary for a student with a disability to benefit from special education. 34 CFR 300.34(a).

48. Related services can include an environment and specific methodology necessary for a child to benefit from special education. *Richardson Independent School District v. Michael Z.*, 52 IDELR 277 (5th Cir. 2009) (residential environment necessary when a child needs such a restrictive setting to benefit from special education). For students on the autism spectrum, providing services through such a program may be necessary for students to benefit from special education. *T.H. v. Palatine School District, TH v. Board of Education of Palatine Community Consolidated School District 15,* 55 F.Supp.2d 830 (N.D.Ill. 1999); *M.H. v. New York City Department of Education,* 712 F.Supp.2d 125 (S.D.N.Y. 2010) (providing services through an ABA framework necessary to provide a child FAPE in some cases).

49. In determining whether an IEP is reasonably calculated to provide FAPE, the undersigned must defer to the District as to disputes among appropriate methodologies to educate the student. *Lachman v. Illinois State Board of Education,* 852 F.2d 290, 297 (7th Cir. 1988); *See also White v. Ascension Parish School Board,* 343 F.3d 373 (5th Cir. 2003); *G.D. v. Westmoreland School District,* 930 F.2d 942 (1st Cir. 1991). The District is entitled to choose among reasonable methodologies to provide a student FAPE, and the parent does not have the right to veto the district's reasonable methodological choices. *Id.* The reasonable choice of the school district as to methodology need not even need to be the best choice available. *G.D., supra.* However, less deference (or no deference) is necessary when the District fails to enunciate a specific methodology to educate a student. *T.H. v. Palatine School District, TH v. Board of Education of Palatine Community Consolidated School District 15,* 55 F.Supp.2d 830 (N.D.Ill. 1999).

50. When a district offers a voluntary program of any kind, the District must provide special education and related services to allow disabled students to take part in the voluntary program. 34 CFR 300.107

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

51. In general, a school district has administrative discretion as to the location where children with disabilities will attend school. *Concerned Citizens and Parents for Continuing Education at Malcolm X School (PS 79) v. New York Board of Education,* 629 F.2d 751 (2nd Cir. 1980) *cert denied,* 449 U.S. 1078; *Tilton v. Jefferson County Board of Education,* 705 F.2d 800 (6th Cir. 1983). The physical location of services of special education is usually a matter of administrative discretion within the purview of the school district administration[3]. *White v. Ascension Parish School Board,* 343 F.3d 343, 39 IDELR 182 (5th Cir. 2003).

52. IDEA does not define the term placement. *Board of Education of Community High School District No. 218, Cook County v. Illinois State Board of Education,* 103 F.3d

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

545, 548-549 (7th Cir. 1996). Different courts and OSEP have adopted different meanings for the term over time and in different contexts. *Id.* For purposes of this decision, the most important aspect of placement is whether placement contains an element related to the physical location of services or is solely the program set forth in the IEP.

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

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

55. Moreover, because an IEP is often unclear and contains many gaps regarding a child's educational experience, the Seventh Circuit has held that there can be terms implicit in an IEP in determining the child's placement.. *John M. v. Board of Education of Evanston Township High School District 202,* 502 F.3d 708, 715 (7th Cir. 2007).

56. When a child needs a specific methodology or program, and the IEP Team agreed that this was necessary, such a vital component of the child's educational program can be an implied term of the IEP. *John M., supra.*

57. Many courts have held that when aspects of the physical location interact detrimentally with a student's disability, physical location must be considered part of the placement. *Carrie I. on behalf of Greg I, v. Department of Education, State of Hawaii,* 869 F.Supp.2d 1225(D.Hi. 2012); *Comb v. Benji's Special Educational Academy, Inc.*745 F.Supp.2d 755, 767 (S.D. Tx. 2010); *R.B. v. Mastery Charter School,* 762 F.Supp.2d 745, 763 (E.D. Pa. 2010).

58. The Seventh Circuit has indicated that placement should generally be the educational program unless there is a concern in regard to either: (1) discipline or suspensions are involved; or (2) if the child is going to be placed in an inappropriate school. *Board of*

Education of Community High School District No. 218, Cook County v. Illinois State Board of Education, 103 F.3d 545, 548-549 (7th Cir. 1996)[4]. If one of the two above stated concerns are at issue, then placement should include location as a component. *Id.*

59. Apart from placement, IDEA requires an IEP to contain a location of services as part of Student's placement. *See* 20 USCA 1414(d)(1)(A)(i)(VII). Moreover, to provide FAPE, the District must provide services to a disabled student in an appropriate school. 20 USCA 1401 (9). Some courts have interpreted that section of IDEA to require the IEP Team to collaboratively determine the physical location of services—and that the failure to make such a collaborative determination constitutes a denial of FAPE. *A.K. v. Alexandria City School Board,* 484 F.3d 672 (4th Cir. 2007); *Eley v. District of Columbia,* 59 IDELR 189 (D.D.C. 2012); *Madison Metropolitan School District v. P.R.,* 598 F.Supp.2d 938 (W.D.Wis. 2009). However, OSEP has interpreted that section of the law to mean not the physical location of services, but rather a more general statement of where a student will be placed (i.e. a resource room, a self-contained classroom etc.), *Brad K, supra.*

60. In any regard, no matter the exact underpinnings for their decisions, courts have nearly always allowed for claims for denial of FAPE when a physical location of services interacted with a student's disability in a way which causes the educational benefit of the IEP to be diminished (although courts disagree on the exact legal theory to underpin such claims). Moreover, courts have rarely conditioned a denial of FAPE claim on the defects in the physical location of services violating the four corners of the IEP. *See Charlie F. v. Board of Education of Skokie School District 68,* 98 F.3d 989 (7th Cir. 1996) (malicious behavior by classroom teacher in a physical location can be a violation of FAPE); *Shore v. Regional High School Board of Education v. P.S.* 41 IDELR 234, 381 F.3d 194 (3rd Cir. 2004)(bullying by fellow students in a physical violation is a violation of FAPE which a hearing officer has jurisdiction to remedy); *A.K. v. Alexandria City School Board,* 484 F.3d 672 (4th Cir. 2007) (when physical location can cause a deprivation or dilution of educational benefit, an inappropriate physical location constitutes a denial of FAPE and inappropriate placement for which a hearing officer can provide a remedy); *Madison Metropolitan School District v. P.R.,* 598 F.Supp.2d 938 (W.D.Wis. 2009) (same); *Eley v. District of Columbia,* 59 IDELR 189 (D.D.C. 2012)(same); *TK v. New York City Department of Education,* 779 F.Supp.2d 289 (E.D.N.Y. 2011) (culture of bullying in a physical school is a violation of FAPE and IDEA for which a hearing officer can provide a remedy); *McKenzie v. Smith,* 771 F.2d 1527 (D.C. Cir. 1985) (changes of location to a student who may be harmed by a transfer from one physical location to another can be a denial of FAPE which a hearing officer can remedy); *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990) (same); *Holmes v. District of Columbia,* 680 F.Supp. 40 (D.D.C. 1988) (same); *Z.W. v. Smith,* 210 Fed.Appx. 282 (4th Cir. 2006). (district changes of physical location of services mid-year or in the final year of high school can be a denial of FAPE).

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

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

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

V. Application of Law to Fact

63. The undersigned finds that the District proposed an inappropriate placement when the District proposed to transfer Student from the [redacted] Program at the [redacted] to the [redacted] Program at North Prairie School. In making this finding, the undersigned finds that the [redacted] Program at [redacted] is not appropriate for implementation of a fundamental component of Student's IEP. To wit, at [redacted] the District cannot provide a sufficiently intense analog to the [redacted] Program, and thus cannot properly implement Student's IEP.

64. The undersigned finds that the District provided an inappropriate placement in that the IEP failed to include in the IEP, a transition plan for Student to safely transfer from the [redacted] to the [redacted] Program at [redacted] In so doing, the undersigned finds the District's actions unreasonable in that the District members of the IEP Team failed to properly consider the nature of Student's unique needs in transitioning from one physical location to another.

65. The undersigned finds that the IEP Team's failure to include a transition plan for transferring Student from one location to another rendered Student's program for special education services inappropriate.

66. The undersigned finds that the IEP Team's failure to consider whether and how Student needed to be accommodated at the voluntary daycare program (which would be made necessary as a result of the transfer) constituted another reason why Student's program (and thus placement) was made inappropriate as a result of the transfer.

67. To the extent placement has as one of its components the physical location where Student receives services, [redacted] is not an appropriate location thus rendering Student's placement inappropriate.

68. To the extent IDEA requires an appropriate physical location of services where Student receives services, [redacted] is an inappropriate physical location of services due to the lack of a [redacted] Program.

69. The undersigned therefore finds the Parent carried his burden on his inappropriate location of services and inappropriate placement claims. Moreover, the District failed to make its burden that it was meeting Student's special education needs.

VI. Order

70. Student shall remain at the [redacted] at [redacted] for the remainder of this school year.

71. If the IEP Team determines that, at the end of this school year, Student should be transferred, then the IEP Team must: (1) formulate a transition plan for transfer of Student from one location of services to another; and (2) determine whether and how Student can be accommodated for voluntary daycare programs before and after school if such programs are made available for nondisabled students.

72. The District shall demonstrate proof of compliance with this order to the Illinois State Board of Education, Compliance Division by February 1, 2014.

VII. Right to Request Clarification

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

VII. Finality of Decision

74. This decision shall be binding upon all parties.

IX. Right to File Civil Action

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

/S Joseph P. Selbka

Joseph P. Selbka Impartial Due Process Hearing Officer
Date: September 23, 2013

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

CERTIFICATE OF SERVICE

Joseph P. Selbka certifies under oath that on September 23, 2013, he served the following parties via certified mail, return receipt requested, the attached Impartial Due Process Hearing Decision, to the following parties at the following addresses:

1) [redacted]

2) Dr. Tom Moline
Director of Special Education, SEDOL
18160 Gages Lake Road
Gages Lake, IL 60030

3) Mary Long
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001

4) Darcy Proctor
Ancel, Glink, Diamond
DiCianni & Krafthefer, P.C.
175 E. Hawthorn Parkway, #145
Vernon Hills, IL 60061

5) Pat Goodwin
Winthrop Harbor District #1
500 North Avenue
Winthrop Harbor, IL 60096

/S Joseph P. Selbka
Joseph P. Selbka
The Hearing Officer