



On October 13, 2016, the Illinois State Board of Education (“ISBE”) assigned the case to the undersigned IHO.

IHO issued an introductory letter and preliminary order, including a statement of the parties’ rights, on October 16, 2016. The District filed a Response to the Complaint on October 18, 2016. On October 19, 2016, the parties waived the resolution meeting. At the initial telephone status conference on October 19, 2016, the parties acknowledged that they understood that by waiving the resolution proceeding, the 45-day decision timeline begins. The parties advised IHO that Student was scheduled to receive evaluations during the month of November 2016, and that an eligibility meeting was scheduled for December 16, 2016. If Student was found eligible, an IEP meeting would be scheduled. The parties requested the prehearing conference (“PHC”) be scheduled to allow for completion of the IEP meeting. The PHC was scheduled for January 24, 2016 and the parties jointly requested a continuance of the 45-day decision timeline to accommodate these dates. By order of October 19, 2016, the 45-day decision timeline was continued to February 28, 2017.

On January 19, 2017, the parties jointly requested a continuance of the PHC. On January 24, 2017, a telephone status conference was held and the PHC was rescheduled for February 22, 2017.

On February 22, 2017, a recorded prehearing conference was held by telephone. IHO requested a discussion of a possible Statute of Limitations issue, which was first raised in the District’s PHC disclosure statement. Parents were given leave to file a motion for summary judgment. Hearing dates were scheduled for June 19, 20, 21, and 23, 2017. The PHC was continued to April 12, 2017 and the parties jointly requested a continuance of the 45-day decision

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timeline to July 3, 2017 to accommodate the hearing dates. This request was granted on March 5, 2017.

On March 10, 2017, Parents filed a Motion for Partial Summary Judgment and Extension of the Statute of Limitations. On March 17, 2017, the District filed a Response, and on March 21, 2017, Parents filed their Reply. On April 5, 2017, IHO entered an order denying Parents' motion for partial summary judgment and finding that there was insufficient factual information on which to resolve the statute of limitations issue raised in Parents' motion. Due to an emergency, IHO rescheduled the PHC to June 1, 2017.

The June 1, 2017, the PHC was not held and instead a status conference was held to discuss witness availability for the June hearing dates. Parents requested a continuance of the scheduled hearing dates to allow Parents to execute and enforce a subpoena for one of the witnesses. Parents argued that the failure to grant this continuance would be detrimental to Parents' case. The parties agreed to bifurcate the hearing and hold a statute of limitations hearing on September 6 and 7, 2017 and a hearing on the remaining issues on September 18 and 19, 2017. The motion to bifurcate was granted on June 16, 2017. The PHC was continued to August 9, 2017. The parties jointly requested that the 45-day decision date be extended to September 30, 2017 to accommodate the hearing dates. This request was granted on June 16, 2017.

On August 9, 2017, a recorded PHC was held by telephone. At the PHC, over the objection of Parents' Attorney, IHO determined that the testimony of [REDACTED], ("Case manager"), District case manager, would be taken by teleconference, due to District's representations that Case manager was on extended family leave and currently living out of state.

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A closed hearing was held on September 6, 2017 from 9:30 a.m. to 5:00 p.m. at the School on the Statute of Limitations Issue only. The hearing was completed on September 6, 2017. An official court reporter was provided by the District for the hearing.

On September 13, 2017, IHO issued a Final Determination (“Determination”) on the issue of the Statute of Limitations. The Determination was entered in favor of the District and found that the District met its burden of proof on the affirmative defense that the procedural safeguards had been provided to Parents and that Parents knew or should have known about their right to seek a due process hearing on or about August 20, 2013. Consequently, the Statute of limitations applies in this case. The Complaint was filed on October 10, 2016, and all remaining issues will proceed forward using the start date of October 10, 2014.

On September 14, 2017, Parents, by email, requested to withdraw, consolidate and modify the issues and remedies without prejudice (“motion”). The motion was heard, on the record, prior to the start of the hearing on September 18, 2017. The District had no objection and IHO verbally granted the motion. For clarity of the record, IHO requested that Parents file a written motion specifying which issue Parents were requesting to withdraw and which issues Parents were requesting be consolidated. The amended motion was filed on September 19, 2017 and the IHO entered a written order on September 19, 2017 granting the withdrawal of issue 4,<sup>1</sup> consolidating issues 2 and 3,<sup>2</sup> and modifying Parents’ requested relief, *nunc pro tunc* to September 18, 2017.

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<sup>1</sup> Whether the district failed to conduct an appropriate set of evaluations from October 10, 2014 through the present, thus denying him a FAPE.

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At the start of the hearing, the District made a verbal motion for summary judgment on the consolidated issue, based on the allegation that free appropriate public education (“FAPE”) was no longer at issue due to the IHO’s previous ruling on the Statute of Limitations and the fact that Student was privately placed by Parents at PDS. District further argued that the due process provisions in 34 CFR §§300.504 through 300.519 do not apply to issues regarding the provision of services to a parentally placed private school child. District argued that this was a matter for a state complaint not a due process complaint. Parent’s argued that the provision of FAPE to this Student beginning in October 2014 and continuing to February 8, 2017 was still an issue, that the IHO has authority to hear the issue, and that the District’s motion should be denied. Parent offered case law in support of its position. After a review of the case law and statutes, the IHO made a verbal ruling that she did have jurisdiction over the consolidated issue. IHO advised the District that they could renew their motion during the closing argument and the IHO would issue a written decision as part of the Final Determination.

The closed hearing on the remaining issue was held on September 18, 2017 from 8:15 a.m. to 4:30 p.m. at the School. The hearing was completed on September 18, 2017. An official court reporter was provided by the District for the hearing.

At the conclusion of the September 18, 2017 hearing, documents offered into evidence by either Party, which were not objected to or which were admitted over objection, were admitted into evidence. IHO admitted the following

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<sup>2</sup> The consolidated issue is listed at PAGE 4 *infra*.

exhibits:<sup>3</sup> P1; P2; P3; P4. Joint Exhibits: JE-1-; JE-30; JE-41; JE-42; JE-44; JE-47; JE-53; JE-64. Additionally, all exhibits previously admitted into evidence during the Statute of Limitations hearing were admitted as evidence for this hearing. PD 0001, 0002, 0020A, 0021, 0022, 0023, 0024, 0025, 0026, 0027, 0031,0032, 0033, 0034, 0035, 0036, 0045, 0046, 0054, 0055, 0081, 0082, 0108-0117, 0124, 0126, 0148-0306; SD1,<sup>4</sup> SD2. Proposed exhibits submitted at the five-day disclosure deadline but not expressly enumerated above were not admitted into evidence and were not considered in the preparation of this Final Determination and Order.

The School District called two witnesses: 1. [REDACTED] (“[REDACTED] CPS manager of procedures and standards; and 2. [REDACTED] Parents called three witnesses: 1. [REDACTED]”), Parents’ expert; 2. Dr. [REDACTED] (“Director”), executive director of PDS ; and [REDACTED] (“Mother”). After the completion of all parties’ testimony, admission of evidence, and closing arguments, the hearing was concluded.

No written transcript has been provided and this decision is based on the IHO’s copious personal notes and recollection. In rendering this decision, the IHO has considered all documents admitted into evidence, testimony by the parties’ witnesses, the parties’ opening and closing arguments, the parties’ suggested case law, as well as independent research. This decision is issued within ten (10) days after the hearing’s conclusion, as required by Illinois law.<sup>5</sup>

### **ISSUES AND REMEDIES REQUESTED**

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<sup>3</sup> Each exhibit is identified by: “PD” for Parents, with corresponding page numbers, specific exhibits were not isolated; “SD” for District, and includes the exhibit number and specific page in the exhibit.

<sup>4</sup> This document is the same documents as P 0148-036.

<sup>5</sup> 105 ILCS 5/14-8.02a(g55)(5)

This IHO certified issues at the PHC for adjudication during the FAPE portion of the hearing. As stated above, those issues were modified at Parents' request.

The remaining issue presented at hearing was: 1) Whether the District failed to conduct the IDEA required triennial evaluation for the Student in a timely manner, and failed to review Student's needs, placement and provide a written offer of FAPE annually from October 10, 2014 through February 8, 2017.

The District alleged that the Student was privately placed, without any notice, by the Parents at PDS, thus denying the District the opportunity to consider or address any of the Parents' concerns about the District's proposed placement. District alleges it was not provided notice by the Parents until school year 2016-2017.

District asserts that IDEA states that the cost of parent reimbursement may be denied if the parent fails to give timely notice of the parent's intention of enrolling the student in a private school at public expense. Failure to provide such notice can limit a parent's right to seek reimbursement for such unilateral placement. Additionally, the parent can be limited from receiving this remedy upon a judicial finding of unreasonableness with respect to actions taken by the parent.<sup>6</sup>

The modified remedy sought by Parents is reimbursement for tuition and transportation costs expended by Parents for the period of October 14, 2014 through February 8, 2017 at PDS.

#### **BURDEN OF PROOF**

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<sup>6</sup> 34 C.F.R. §300.148 (d).

In 2005, the U.S. Supreme Court held that, because federal law was silent on the question of burden of proof in IDEA cases, the plaintiffs bear the burden of proving their claims. The Court ruled that “the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 446 U.S. 49, (2005). Since FAPE is reliant on an IEP, this standard is applicable and Parents have the burden of proof on the issue presented.

### **STIPULATIONS OF FACT**

On September 13, 2017, the Parties entered into stipulations of fact, which were entered into the record during the FAPE portion of the due process hearing. The stipulated facts are:

1. CPS did not hold an annual review IEP meeting during the 2013-2014 school year;
2. During the school year 2014-2015 no IEP meetings were held and no annual review meeting was held for this period of time;
3. During the school year 2015-2016 no IEP meetings were held and no annual review meeting was held for this period of time;
4. The District did not hold a triennial review between June 4, 2013 and June 4, 2016. The next triennial review after June 4, 2013 was December 12, 2016;
5. From June 4, 2013 until December 16, 2016, CPS did not hold an eligibility meeting to consider or review evaluations to re-determine eligibility for an IEP;

6. On February 8, 2017, CPS finalized Student's first IEP from CPS since June 4, 2013.

### **FINDINGS OF FACT**

After considering all the evidence, as well as the arguments of counsel, the IHO's Findings of Fact for the FAPE hearing are as follows:

1. Student was enrolled in the District School for half-day kindergarten in September 2012. Student attended the District grade school along with his older sister. Student's sister still attends the School as of the date of the hearing.<sup>7</sup> Student's residence did not change from June of 2013 to July of 2016.
2. On June 4, 2013, the District held an IEP meeting. Mother was present.<sup>8</sup> At the IEP meeting, Mother voiced her concerns about what she perceived as the gap widening academically for Student, and that she specifically felt Student would require an aide to succeed with the first grade.<sup>9</sup> These concerns were documented within the IEP.<sup>10</sup> At the IEP meeting, Mother did not inform the IEP team that she was rejecting the placement proposed and did not voice her intent to unilaterally place Student.<sup>11</sup> The IEP was not finalized until Friday, 6/21/13, which was not a student day of attendance. The last day of school was Monday, 6/24/13.<sup>12</sup> The IEP was not implemented during the 2012-2013 school year.<sup>13</sup>

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<sup>7</sup> Mother testimony

<sup>8</sup> Mother testimony

<sup>9</sup> Mother testimony, Case manager testimony.

<sup>10</sup> Mother testimony, Case manager testimony, JE 21-4.

<sup>11</sup> Mother testimony, Case manager testimony.

<sup>12</sup> Case manager testimony. JE64-1

<sup>13</sup> Case manager testimony.

3. On August 20, 2013, Mother requested that Student's academic records be sent to PDS.<sup>14</sup> The CPS form "request for transfer" authorizes the release of Student's academic and health records, Mother clearly specified the records should be sent to PDS, an address was provided.<sup>15</sup> Student did not return to the District grade school for the 2013-2014 school year.<sup>16</sup>
4. Case manager stated that her relationship with Mother was "great" and that Student's sister was one of her students. Mother told Case manager about Student's transfer in an informal conversation which took place on a landing on the steps of the School, the date of the conversation was not established.<sup>17</sup> During the conversation, Mother did not indicate to Case manager that she was dissatisfied with the proposed IEP placement,<sup>18</sup> but stated she was concerned that Student would not survive in a class of 30 students.<sup>19</sup> Mother felt bad about the transfer from School because she recognized all the work that went into drafting Student's IEP<sup>20</sup>. Mother did not voice any concern about Student's IEP or the IEP process.<sup>21</sup> Case manager did not interpret the Student's transfer to PDS as the Parents' disagreement with the IEP.<sup>22</sup> Case manager did not verbally advise the Parents that they could seek

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<sup>14</sup> PD0124.

<sup>15</sup> Id.

<sup>16</sup> Mother, Case manager testimony.

<sup>17</sup> Mother testimony.

<sup>18</sup> Mother and Case manager testimony.

<sup>19</sup> Mother testimony.

<sup>20</sup> Case manager testimony.

<sup>21</sup> Case manager testimony.

<sup>22</sup> Case manager testimony.

reimbursement for the private day school tuition from the District.<sup>23</sup> Although Case manager continued to see the Mother at School, at no point after September 2013 did Case manager inquire about Student's academic performance at PDS. IHO determined in the Statute of Limitations hearing that the Parents did receive the Procedural Safeguards notice on April 4, 2013.

5. No evidence was presented that a formal 10 business day notice of intent to transfer student to PDS was ever presented to the District.
6. Sarudi, the manager of CPS procedures and standards, testified that once a student transfers out of a District school, the District has no further obligation to the student.<sup>24</sup> Services will be offered to a student if the District is aware that a parent is seeking or requesting services for a District student.<sup>25</sup> Parents did not seek services from CPS until July 2016, and services were provided.<sup>26</sup> When a student is outplaced by a parent, the student's status with CPS is changed to inactive. The student's case manager is responsible for changing the status.<sup>27</sup>
7. Director credibly testified that PDS is a therapeutic day school for bright students with learning disabilities where ninety-percent of students have language based learning disabilities.<sup>28</sup> PDS has no neurotypical peers. PDS is an approved school and District places 10-15 students per year at PDS. Director is familiar with Student, seeing

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<sup>23</sup> Case manager testimony. When asked if she provided information to Mother regarding reimbursement for private school, Case manager testified "of course not".

<sup>24</sup> ██████ testimony.

<sup>25</sup> ██████ testimony.

<sup>26</sup> Mother testimony.

<sup>27</sup> ██████ testimony.

<sup>28</sup> Director testimony.

Student, on average, approximately three times per week. Director was involved in Student's educational testing. PDS has a rigorous application process, which includes a psychiatric evaluation, speech and occupational therapy reports, a review of the student's IEP, obtaining parental release to speak to current teachers and other staff who interact with the student, and a student trial day-in-school program. Although Director spoke to Student's private providers, he received no response to his emails to the District concerning Student.<sup>29</sup> Director did not believe that he had any contact with anyone from the District regarding Student, from Student's initial application through June/July of 2016. Any communication received from the District about Student would be brought to his attention, since this was part of his supervisory duties at PDS.

8. Director described the basis for Student's reading disability as orthographic<sup>30</sup> and indicated that there was a nexus between orthography and phonology.<sup>31</sup> Student does not have the ability to correctly process the written word, which affects fluent reading and the ability to gain information from the text. He described Student's ability prior to enrollment at PDS as significantly lower than normative students of the same age,<sup>32</sup> and lower than most students accepted into PDS. Director testified that Student benefits from PDS's use of the

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<sup>29</sup> Id.

<sup>30</sup> The conventional spelling system of a language.

<sup>31</sup> System of relationships among the speech sounds that constitute the fundamental components of a language.

<sup>32</sup> Director provided results for a battery of entrance tests which showed Student did poorly in identifying sight words (0 of 99); encoding (he was able to identify the letter "a"); sight words (could not read any of the sight words); DIBELS (Student identified 15 letters correctly in a one minute period, which norms to below the 5<sup>th</sup> percentile).

Wilson reading program,<sup>33</sup> a research based program which focuses on phonological skills. Student works with this program one hour daily individually and in a small group. Student also benefits from additional reading interventions, and weekly the speech pathologist works with Student using Visualization and Verbalizing program.<sup>34</sup> This intervention is then used in the classroom, along with morphology,<sup>35</sup> which is also implemented in the classroom. Director testified that without these interventions, Student would not be a reader at this point. These interventions have been effective and Student is showing success using these interventions.<sup>36</sup> ████████ agreed with the Director, stating his neuropsychological evaluation found that the Wilson Method of reading remediation has made a significant difference in Student's reading ability.<sup>37</sup> ████████ testified that the District did have Wilson reading programs available during the 2013-2017 school years.

9. Additionally, PDS provides Student interventions in writing,<sup>38</sup> speech language therapy, and occupational therapy for writing skills. Director testified that these programs have been effective for Student and meet Student's needs. The totality of success for PDS's interventions can be

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<sup>33</sup> Wilson is an Orton-Gillingham research based reading program for students who have not learned to receive the basics of reading naturally. The Wilson program is implemented by a certified Level 1 Wilson teacher.

<sup>34</sup> Visualization and Verbalizing Program for Cognitive Development® a Lindamood-Bell learning programs used to increase comprehensive expression.

<sup>35</sup> Breaking down the components of a work to understand its meaning.

<sup>36</sup> The testimony continued with a detailed analysis of Student testing throughout the years, showing a slow but steady progress in Student's reading ability and concluding with the findings at JE 53-4 (ILP from 2016-2017).

<sup>37</sup> JE41-3.

<sup>38</sup> Step up to writing program, which is a multi-sensory, research based writing program studied by the University of Colorado.

seen in the comparison between the 2013 ILP,<sup>39</sup> 2014 ILP,<sup>40</sup> 2015 ILP,<sup>41</sup> and the 2016 ILP.<sup>42</sup> The 2016 ILP shows Student in May 2017 has mastered many of his goals and is progressing.<sup>43</sup>

10. The Director credibly testified that, in his opinion, if Student was in a less restrictive day school setting, he would not have been able to achieve the educational progress shown at PDS. Student's progress as tested by PDS was significant between 2013 and 2017. Student's progress is directly attributable to the interventions implemented with Student at PDS. He concluded that Student's educational progress would stop if Student left HPS.
11. In her position at CPS, ██████ attends more than one hundred IEP meetings each year and reviews approximately five hundred IEPs. Part of her job is to insure compliance. ██████ crafts IEP goals for CPS. ██████ reviewed the Student's Fall 2013 ILP from PDS.<sup>44</sup> She had several issues with Student's Fall 2013 ILP, noting the ILP did not list deficits to be addressed, did not specify Student's current functional performance levels,<sup>45</sup> did not address the least restrictive environment, and did not appear to be designed to meet Student's unique educational needs.

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<sup>39</sup> JE-42.

<sup>40</sup> JE-44.

<sup>41</sup> JE-47.

<sup>42</sup> JE-53.

<sup>43</sup> Id. Director testimony.

<sup>44</sup> ██████ testimony and JE42.

<sup>45</sup> ██████ testimony and JE42-3.

12. Director testified that Student's goal is to transition back to the least restrictive environment, and it is anticipated that this transition could occur within one or two years.
13. ██████ testified on behalf of Parents and his neuropsychological evaluation was admitted into evidence.<sup>46</sup> ██████ evaluated Student during the period March to May 2016. ██████ was credible when addressing his diagnostic summary, finding that Student made significant progress over Student's initial evaluation in 2013.<sup>47</sup> Student's test scores in multiple areas had improved, some significantly. ██████ pointed out that in 2013 Student was determined to be significantly below average and very impaired.<sup>48</sup> In assessing Student's progress from 2013 to 2016, ██████ determined that Student went from below to above average in a three-year period. ██████ found that there was a nexus between Student's 2016 scores and Student's education at PDS. The full PDS program addressed Student's needs. ██████ recommended that Student continue at PDS, testifying that without the intensive remediation of PDS, Student might never have progressed.<sup>49</sup> His report indicates that Parents made the decision not to seek funding or placement though the District because they wanted to focus their time and energy on getting Student the schooling he needed and were concerned that engaging the District

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<sup>46</sup> JE41.

<sup>47</sup> ██████ compared his finding with the findings from the April 2013 psychoeducational evaluation completed by Learning Diagnostics, which was given to ██████ by the Parents.

<sup>48</sup> P4-34.

<sup>49</sup> On redirect, ██████ testified that he did not see any evidence that Student had received effective reading instruction, word attack, decoding or writing remediation at District School.

in the IEP and placement process could be more problematic than helpful.<sup>50</sup>

14. Parents' requested an evaluation of Student on July 13, 2016.<sup>51</sup> The evaluation was completed and an eligibility meeting was held on December 12, 2016.<sup>52</sup> An IEP was developed on February 8, 2017.<sup>53</sup> Parents have not challenged the District's evaluations or the February 2017 IEP in this hearing.
15. Parents' location was known by the District during the 2014-15 and 2015-16 school years.<sup>54</sup> Mother was cooperative with the District.<sup>55</sup>
16. Parents paid tuition directly to PDS for school years 2014-2015, 2015-2016 and 2016-2017<sup>56</sup>. These payments were presented on a credible receipt for payment of tuition.<sup>57</sup> Parents paid for shared bus transportation to transport Student to school.<sup>58</sup> Mother could not locate the receipt for the 2014-15 school year, but presented credible evidence of payment for the 2016-2017 school year<sup>59</sup>.

### **DISCUSSION AND CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

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<sup>50</sup> JE41-1.

<sup>51</sup> Findings of Fact 14.

<sup>52</sup> Stipulation of fact 5.

<sup>53</sup> Stipulation of fact 6.

<sup>54</sup> Mother and Case Manager testimony.

<sup>55</sup> Id.

<sup>56</sup> Mother testimony.

<sup>57</sup> P2-1.

<sup>58</sup> Mother testimony.

<sup>59</sup> P3-1.

## **I. District's Motion for Summary Judgment based on Lack of IHO Jurisdiction**

At the start of the hearing, the District made a verbal motion for summary judgment, arguing that FAPE was no longer at issue. Further, the District argued that the IHO did not have jurisdiction. At hearing, the District alleged that the modified issue disputes equitable services, which were more properly the subject of State complaint provisions provided in 34 CFR §300.140(c). The District argued that, according to the IDEA, the parents of a privately placed student do not have the right to file a due process complaint solely on the grounds of the remaining FAPE issue. As previously stated, IHO verbally found that FAPE was an appropriate issue in this hearing, IHO did have jurisdiction over the FAPE issue, and IHO ruled that the hearing would move forward.

Due process is appropriate for matters concerning the identification, evaluation, placement, or provision of FAPE to a student with a disability. 34 CFR 300.507 (a).<sup>60</sup> Additionally, the IDEA's "child find" mandate requires that a school district seek out students who are potentially IDEA-eligible and refer those students for an evaluation. 34 CFR 300.111. Students unilaterally placed by parents in a private school do not have an individual right to special education and related services under the IDEA. However, the IDEA requires that districts allow parentally placed private school students to participate equitably in the IDEA programs, and that districts spend a proportionate share of funding on parentally placed private school students. *Letter to Hobson*, 33 IDELR 64 (OSERS 2000). Parents in this matter are not alleging that Student did not

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<sup>60</sup> § 300.507 Filing a due process complaint. (a) *General*. (1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

receive equitable services. The Parents are alleging that Student was a student with a disability residing in the District, that the District had an obligation to complete a triennial evaluation, and to provide an Student an offer of FAPE, that the District knew where Student was being educated, and the District failed to identify Student, complete the triennial evaluation, or make any offers of FAPE to the Student. The decision on the Statute of Limitations determined that Parents had received their procedural rights and that they knew or should have known that they had a right to seek reimbursement from the District beginning in August 2013. That decision did not foreclose the Parents' opportunity to argue that the District's alleged failure to meet its child find requirement denied FAPE to a student the District had already identified.

The Court in *R.M.M. v. Minneapolis Pub. Schs.*, 861 F.3d 769, 70 IDELR 58 (8<sup>th</sup> Cir. 2017) acknowledges that under the IDEA, due process hearings are not available for complaints from private school students concerning the inadequacy of the proportional funding of services or the provision of specific services to such students. See 34 C.F.R. §300.140(a)(1). However, the Court determined that the parent was challenging the district's provision of FAPE and concluded that "Federal law offers an impartial due process hearing to settle this [FAPE] dispute" (citing 20 U.S.C. §1415(b)(6)(A)), and holding that the student and her parents have a right to an impartial due process hearing to dispute the provision of FAPE. *R.M.M.*, 70 IDELR at p. 9. Similarly, the IHO finds Student and his Parents have the right to an impartial due process hearing in this case.

**II. Whether the District failed to conduct the IDEA required triennial evaluation for the Student in a timely manner, and failed to review Student's needs, placement and provide a written offer of FAPE annually from October 10, 2014 through February 8, 2017**

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The Individuals with Disabilities Education Act (“IDEA”) “requires States receiving federal funds to make a free appropriate public education (FAPE) available to all children with disabilities residing in the State. *Forest Grove School District v. T.A.*, 557 U.S. 317, 230, 238, 129 S.Ct. 2484, 174 L. Ed.2d. 168 (2009) “A free appropriate public education is one ‘specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.’” *Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. Of Educ.*, 41 F.3d 1162, 1166 (7th Cir. 1994) (quoting *Bd. Of Educ. v. Rowley*, 458 U.S. 176,206, 102 S.Ct 3034, 73 L.Ed.2d 690 (1982)). In order for a school district to meet its FAPE obligation under the IDEA, it must “offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County Sch. Dist.* RE-1, 137 S.Ct. 988, 69 IDELR 174, p.11 (2017). “The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.*

The IDEA imposes both procedural and substantive obligations on the State to insure compliance with IDEA requirements. *Rowley*, 458 U.S. at 207-208. *Andrew* expanded on *Rowley*, directly addressing the substantive requirement of IDEA. To comply with the IDEA’s procedural component, a school district must follow all the “guaranteed procedural safeguards” set forth in the Act. 20 U.S.C. Sec. 1415(a); See *Bd. of Educ. v. Ross*, 486 F.3d 267, 273-74 (7th Cir. 2007). One of the IDEA ‘s procedural requirements is that a school district must assess each disabled child identified by the district for their educational needs, develop an Individualized Education Plan (“IEP”) according to that assessment, and review and revise the plan pursuant to the requirements

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of the Act. 20 U.S.C. Secs. 1401(14) & 1414(a-d); *Ross, Id.* “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ a particular child.” *Endrew*, 137 S.Ct. at 989. (quoting *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 181 (1982)).

The IDEA contemplates that a FAPE will be provided to handicapped students in most instances in “regular public schools, with the children participating as much as possible in the same activities as nonhandicapped children, but... also provides for placement in private schools at public expense where this is not possible.”

*Burlington*

*School Comm. v. Mass. Dept. of Educ.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L. Ed.2d.

385 (1985). See 20 U.S.C. Sec. 1412(a)(10)(A). The IDEA “authorizes courts to reimburse parents for the costs of private school tuition when a school district fails to provide a child a FAPE and a private-school placement is appropriate.”

*Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 52 IDELR 151 ,p.2 (2009) (citing *School Comm. Of Burlington v. Dept of Ed. Of Mass*, 471 U.S. 359, 556 IDELR 389 (1985), *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993).

“When a student with disabilities is parentally placed in a private school, the LEA responsible for the district in which the student resides must continue to periodically evaluate the student’s special education needs, either on its own initiative are at the request of the student’s parents or teacher... As a result, the

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LEA has a continuing responsibility to offer a FAPE to a student with disabilities that resides within its district regardless of whether the student is currently enrolled in a private school.” *District of Columbia v. Wolfire*, 62 IDELR 198, p. 2 (D.D.C. 2014) (citing 20 U.S.C. Sec. 1412(a)(3)(A) (“child find” provision<sup>61</sup>), and *District of Columbia v. Vinyard*, 971 Supp.2d 103 (D.D.C. 2013)). Additionally, “as there is no requirement that a child be a currently enrolled in a public school to be entitled to a FAPE offer, similarly there is no requirement that a child be currently enrolled in a public school in order to trigger the LEA’s obligation to develop an IEP for that child.” *Wolfire*, 62 IDELR at p. 4.

The parties have stipulated that the District did not hold an IEP meeting between June 4, 2013 and February 8, 2017.<sup>62</sup> The parties have also stipulated that the triennial review did not take place prior to June 4, 2016.<sup>63</sup> Parents argue that although they chose to privately place Student at PDS, under IDEA, the District still had a legal obligation to provide Student with an offer of FAPE. Conversely, the District argues that the Parents did not provide proper notification of their disagreement with the 2013 IEP and their intent to transfer Student, and that the Parent’s failure to provide notification ended the District’s obligation to Student.

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<sup>61</sup> The IDEA requires school districts to have in effect policies and procedures to ensure that all children with disabilities who reside in their district “who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.” 20 USC Sec. 1412(a)(3)(A); 34 CFR 300.311(a)(1)(i-ii). Procedures developed in Illinois to fulfill the State’s “child find” responsibilities require districts to perform “on-going review[s] of each child’s performance and progress by teachers and other professional personnel, in order to refer those children who exhibit problems that interfere with their educational progress” for possible special education and related services. 23 Ill..Admin. Code Sec. 226.100(a)(2).

<sup>62</sup> Stipulation of Facts, 1,2,3,4.

<sup>63</sup> Stipulation of Facts 5.

Clearly, the District knew that this Student was a child with a disability<sup>64</sup>, and District knew Student was being transferred to PDS.<sup>65</sup> PDS is a school where the District places children on an ongoing basis,<sup>66</sup> and District knew that PDS was a private therapeutic day school exclusively for children with disabilities.<sup>67</sup> Although District policy is to merely mark a student as “inactive” upon leaving the CPS school system,<sup>68</sup> this is not an ordinary student - this Student has a known, identified disability who was determined to be eligible to receive services under IDEA. The District has an ongoing obligation to monitor the Student as long as the Student continues to be educated in the District. The child find provision under 34 CFR §300.131(a)<sup>69</sup> addresses the responsibility of an LEA where a private school is located to conduct “child find” for all children with disabilities who are enrolled by their parents in the private school and are eligible to receive services under IDEA. The Illinois Administrative Code<sup>70</sup> specifically places the burden of complying with the requirements of 34 CFR §300.131 on an individual school district. The fact that the District’s policy is to mark a Student as inactive on the record does not negate the District’s ongoing obligation to comply with federal and state law. The evidence did not show any lack of parental cooperation which could mitigate the District’s ongoing obligation. Parents did not seclude themselves or Student from the District, and Mother was present at the District School on numerous occasions throughout the

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<sup>64</sup> Fof-2.

<sup>65</sup> Fof-3 and Fof-4. PD0124.

<sup>66</sup> Fof-7.

<sup>67</sup> Fof-7.

<sup>68</sup> Fof-6.

<sup>69</sup> Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA.

<sup>70</sup> 23 IL Ad. 226.350 states “School districts shall conduct child find for parentally-placed private school students in conformance with the requirements of 34 CFR §§ 300.132 through 300.144.

years because of her other daughter's continuing attendance at the School -in fact dealing with the same case manager for the sister as Student.<sup>71</sup> After considering the totality of the evidence and law, I find by a preponderance of the evidence, and as the *Wolfire* court found, that the District's responsibilities did not end when Student left the District School.

The District had an ongoing legal responsibility to continue to identify and offer FAPE to this Student and failed from October, 14, 2014 to February 8, 2017 to make an offer of FAPE. In the event the IHO ruled in favor of Parents for a FAPE violation, the only remedies Parents are seeking are tuition reimbursement and transportation reimbursement.

### **Reimbursement Under IDEA**

Under the IDEA's grant of equitable authority, a court may order school authorities to reimburse parents for the unilateral placement of their child in a private school if the court ultimately determines that the private placement, rather than a proposed IEP, is proper under the Act. *Florence Co. Sch. Dist. Four v. Carter*, 510 U.S.7 at 12, 20 IDELR 532 (1993) (citing *School Comm. of Burlington v. Dept. of Ed. Of Mass*, 471 U.S. 359 at 369). The IDEA "authorizes courts to reimburse parents for the costs of private school tuition when a school district fails to provide a child a FAPE and a private-school placement is appropriate." *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 52 IDELR 151, p. 2 (2009) (citing *Burlington* and *Carter*). The District has alleged that Parents are not entitled to any reimbursement because they failed to comply with the procedural requirements of IDEA prior to making the private placement without authorization from the District. "When a court or hearing officer concludes that a

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<sup>71</sup> Fof-4.

school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted." *Forest Grove*, 52 IDELR 151, p. 9 (2009).

The hearing officer has discretion whether to order reimbursement, and whether that reimbursement should be awarded in whole or in part. 20 U.S.C. §1412(a)(10)(C)(iii). "That Congress left some discretion to the decision maker is understandable, given the remedial purpose of the IDEA and myriad of factual circumstances that arise under the IDEA." *Erin K. v. Naperville School Dist. No. 203*, 53 IDELR 144, p. 4, As here, where procedural violations relating to private school placement are alleged, such as notice requirements, a hearing officer may fashion an equitable result after considering all the circumstances." *Id.*

Section 1412 (a)(10)(C)(iii) provides that the cost of reimbursement may be reduced or denied if certain specified events occur (or do not occur). The controlling analysis on the question of whether a parent is entitled to a tuition reimbursement when a student is enrolled in private school without consent or a referral by the district has come to be known as the *Burlington/Carter* Test. *Burlington/Carter* sets out a two-part test looking at the appropriateness of the district's FAPE proposal, the parent's unilateral placement, and then adding an equities step.

The preliminary step is broken into two parts. Part one focuses on whether the parent provided timely notice to the district, either at the most recent IEP

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meeting or in writing at least 10 business days before the parents' removal of the child from the district. The notice must specify the parents are rejecting the proposed placement, their concerns, and their intent to enroll their child in a private school at public expense.<sup>72</sup> Part two focuses on whether, prior to the child's removal, the district duly requested to evaluate child, and, if so, did the parent refuse to make the child available for the evaluation.<sup>73</sup>

In analyzing part one, it is undisputed that Parents never provided the District notice indicating that they were rejecting Student's proposed placement at the last IEP meeting prior to Student's placement at PDS.<sup>74</sup> The Mother did voice concerns at the IEP meeting, but the concerns are not sufficient to constitute a rejection.<sup>75</sup> No evidence was presented whether the District did or attempted to address those concerns. It is also not disputed that Parents did not inform District of their intent to enroll Student in a private school at public expense.<sup>76</sup> Clearly, the Parents have failed to meet the technical notice requirement. However, in *Erin K*, the court acknowledged "a hearing officer is permitted to consider all of the circumstances and then fashion an equitable result based on his or her discretion." *Erin K.*, at 4.<sup>77</sup> In this matter, the uncontradicted testimony was that the District did not cooperate in Student's

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<sup>72</sup> 20 U.S.C. §1412 (a)(10)(C)(iii)(I); 34 CFR §300.148. There are two exceptions specified at 20 U.S.C. §1412 (a)(10)(C)(iv), which do not apply in this case and are not addressed in this decision.

<sup>73</sup> 20 U.S.C. §14112(a)(10)(C)(iii)(II); 34 CFR §300.148(d)(2).

<sup>74</sup> The last IEP meeting was June 4, 2013, the IEP was not finalized until June 21, 2013 (last day of school) and was never implemented by the District.

<sup>75</sup> FOF-2.

<sup>76</sup> The report by Parents' expert indicated that Parents made the decision not to seek funding or placement. Fof 13 and JE41-1.

<sup>77</sup> The *Erin K* court also gave recognition to the possibility of parents providing constructive notice to the district. In *Erin K*, the hearing officer denied a claim for parental reimbursement concluding that the parents' failure to provide prior written notice precludes the parents from seeking retroactive reimbursement, the court found that taken as a whole the parents' letter to the district could be construed as constructive notice sufficient to find in favor of the parents.

transfer to PDS.<sup>78</sup> When Mother inquired about Student's records, she was given a perfunctory District form to complete.<sup>79</sup> The completed form put the District on constructive notice that Student would be attending PDS, a known therapeutic day school serving only children with disabilities.

The missing critical component is the Parents' intent to enroll Student in PDS at public expense. During the statute of limitations portion of this case, it was determined that Parents did receive their procedural safeguards on April 4, 2013. Those safeguards include information regarding private school placements.<sup>80</sup> There was no direct testimony establishing a Parental request for tuition reimbursement from the time of Student's enrollment at PDS to the date of the filing of the complaint. Although there was testimony that Parent's were never advised by Case Manager of the right to seek reimbursement, the IDEA does not require verbal notification, and the procedural safeguards previously provided suffice. The experts report<sup>81</sup>, admitted into evidence, states the Parents were more concerned with providing Student with educational assistance than the cost, and appears to show that they perceived working with the District would be a deterrent to getting Student the help Student needed. In *Erin K*, the evidence, taken as a whole, appeared to show that the parent's intended to request reimbursement from the IDEA and, therefore, the request was considered to be retroactive. The retroactive analysis does not apply in this case.

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<sup>78</sup> Fof 7.

<sup>79</sup> Fof 3.

<sup>80</sup> Notice of Procedural Safeguards for Parents/Guardians of Students with Disabilities (as of October 2009), under the heading Private School Placements, PD0131, provides information to parents about private school placements when FAPE is not an issue and when FAPE is not an issue. This information includes the opportunity to obtain reimbursement for private school placement, under what circumstances the amount of the reimbursement made be reduced or denied, and the 10 business day notice requirement (PD0132).

<sup>81</sup> Fof- P40.

Looking at the totality of the evidence presented, I find that the preponderance of the evidence on this issue goes to the District. Even using the constructive notice analysis, it appears clear that Parents, at the time of the transfer, were properly informed of the notification requirement and their right to seek reimbursement, and made the conscious decision not to seek reimbursement from the District. There being no applicable exceptions, using the Burlington-Carter analysis, the IHO “may” reduce or deny reimbursement.<sup>82</sup>

The step one, part two evaluation analysis is clearly resolved in favor of Parents. There was no evidence presented that prior to Student’s removal from the District, the Parents refused to make the Student available for his evaluation. Any attempt that the District made to show a lack of cooperation in the 2016 evaluation process is not applicable to this analysis. The preponderance of the evidence on this issue goes to the Parents.

The second prong of Burlington/Carter is the appropriateness step: Was the District’s proposed placement appropriate and did it offer a FAPE to the Student in a timely manner prior to the Parent’s unilateral placement? The fact pattern in this case is unique. The IEP was not finalized until the last day of school in 2013. The District never had the opportunity to implement Student’s 2013 IEP prior to Student’s transfer. The only evidence offered by Parents was opinion testimony from the Director that Student would not be successful in a less restrictive setting than PDS. There was no evidence presented showing a direct comparison between the services proposed in the 2013 IEP and those provided by PDS and the ILP. Parents did not offer any evidence to show that

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<sup>82</sup> 20 U.S.C. §1412(a)(10)(D)(iii).

the IEP proposed by the District in 2013 was not appropriate and did not provide a FAPE to Student in a timely manner. The Parents have failed to establish that the District's proposed placement was not appropriate and that it did not offer a FAPE to Student. The preponderance of the evidence goes to District.

Was Parents' unilateral placement appropriate? There was considerable evidence presented testimonial and documentary that Student's placement at PDS was appropriate. PDS is a school concentrating in students with reading/language disabilities.<sup>83</sup> PDS uses research based methodologies to provide interventions to address student's unique needs.<sup>84</sup> PDS provided Student with an ILP each year, which provided Student with a statement of Student's present level of academic achievement and functional performance, a measurable annual goal which meets the Student's needs, a description of how the Student's progress to meet the annual goal will be measured, and a statement of the special education and related services to be provided to Student.<sup>85</sup> By a preponderance of the evidence it is determined that PDS was an appropriate placement for Student.

Finally, the IHO looks to the equities in the case. There is a unique fact pattern that must be weighed in this case. Parents did not follow the procedural notice requirement when the Student was removed from the District School, Parents did not notify the District that they were rejecting the proposed IEP, Parents did not give the District the opportunity to address their concerns, and Parents did not seek tuition reimbursement from July 2013<sup>86</sup> to July 2016.

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<sup>83</sup> Fof 11.

<sup>84</sup> Fof 8.

<sup>85</sup> JE44, JE47, JE53.

<sup>86</sup> P2-1.

Conversely, the District, fully aware Student was eligible for special education services and being aware that Student was placed in PDS, a school comprised completely of students with disabilities, did nothing to offer this Student an ongoing FAPE. The Court in *Forest Grove*, 52 IDELR at 6, opined that “when a child requires special education services, a school district’s failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.” In this case, the District presented a rather cavalier attitude about its responsibilities to continue to provide an offer of FAPE to Student, attempting to abdicate its responsibilities to “child find” Student and provide FAPE to the Parent.<sup>87</sup> The District’s actions are so egregious that to deny reimbursement to Parents amounts to rewarding the District for merely marking Student as “inactive,” and it would be inequitable to reward District for this dereliction. Accordingly, IHO finds, even considering the Parents’ failure to comply with the notice provisions of IDEA, that the equities favor the Parents.

### **REMEDY**

The Parents have requested reimbursement for the amount of money they have paid as tuition to PDS and for the cost of shared bus transportation to PDS. When a district deprives a child with a disability of FAPE in violation of the IDEA, a hearing officer may fashion appropriate relief.<sup>88</sup> A district may be required to reimburse parents for their tuition payments to a private school for the services obtained for the student by his parents, if the services offered by the district were inadequate or inappropriate, and the services selected by the

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<sup>87</sup> Fof- 6.

<sup>88</sup> See 20 U.S.C. 141(i)(2)©(iii); 34 CFR 300.516(c)(3) and *Burlington*.

parents were appropriate, and the equitable considerations support the parents' claim. *Florence County Sch. Dist four v. Carter*, 510 U.S. 7, 20 IDELR 532 (1993), *Sch Comm. Of Burlington v. Dept of Educ.*, 471 U.S. 359, 103. There are currently two prevailing approaches to compensatory education; the quantitative (i.e. one-for one) and the qualitative. The Seventh Circuit has not yet given any guidance as to how a compensatory education award should be calculated in Illinois. The Northern District of Illinois follows the District of Columbia and the Sixth, Ninth and Eleventh Circuits and has adopted the rule that "compensatory education should be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Petrina W. v. City of Chicago Pub. Sch. Dist. No. 299*, 53 IDELR 259 (N.D. Ill 2009). Parent's contend that any award in this case should use the qualitative approach, and argue that they should be reimbursed for tuition and transportation costs paid for the entirety of the Student's school year, rather than the portion of the school year that falls within the statute of limitations period up to February 8, 2017. Under the qualitative approach, Parents are requesting \$127,440 for tuition and transportation. Applying the quantitative approach, Parents request the sum of \$97,126 for tuition and transportation.

The Illinois Administrative Code, 23 IL Ad §226.310 provide that each school district shall ensure that related services are provided, if necessary, to assist an eligible child in benefiting from special education. Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special

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education.<sup>89</sup> In this case, IHO finds that in order to access PDS, the Student has been using a private bus service in conjunction with other similarly situated students.<sup>90</sup> Mother has credibly testified about the cost of bus service and has provided supporting evidence. IHO finds that an award of transportation, as a related service, is appropriate in this case.

As previously determined, there are equities on each side of this case. Parents committed significant procedural errors and did not timely request tuition reimbursement. The District failed to follow the IDEA mandate and provide Student an offer of FAPE and timely evaluations. IHO found in favor of Parents because she determined that the District's inaction outweighed the Parents' inaction, and further finding that rewarding the District for its failure to act would be improper. In considering the amount of the award, using the qualitative approach, however technically appropriate, would provide a windfall to Parents and reward them for their failure to timely provide notice and their failure to timely request reimbursement.

### **DECISION**

The District's motion for summary judgment is denied.

The undersigned, for the reasons specified above, determines Parents have successfully met their burden to prove, by a preponderance of the evidence, that the District failed to conduct the IDEA required triennial evaluation for Student in a timely manner and has failed to review Student needs, placement, and provide a written offer of FAPE annually from October 10, 2014 through February 8, 2017.

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<sup>89</sup> 34 CFT §300.34.

<sup>90</sup> FOF-15.

IHO used her discretion to apply the equities in this matter and determine that the District's failure to complete the triennial evaluation in a timely manner and failure to provide an offer of FAPE to Student, outweighed Parents' failure to provide notice to District and determined that an award of tuition reimbursement and related services in the form of transportation reimbursement was proper.

IHO used her discretion to determine that the qualitative approach to the award of tuition would result in a windfall to Parents.

### **ORDER**

The District is ordered to pay to the Parents, the sum of \$97,126.00 which represents tuition reimbursement and reimbursement of related services (transportation), during the period October 10, 2014 to February 8, 2017.

The District is given until November 15, 2017 at 5:00 p.m. to provide a check, made payable to Parents, to the Parents' Attorney at the Attorneys' address of record in this case.

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

Pursuant to 105 ILCS 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

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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.

Dated: September 28, 2017

/S/Mary Jo Strusz  
Mary Jo Strusz, Impartial Hearing Officer  
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