

ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING

\_\_\_\_\_, a minor, by and through )  
his parent, \_\_\_\_\_<sup>1</sup>, )  
 )  
Petitioners, )  
 )  
- v - )  
 )  
\_\_\_\_\_ CUSD \_\_\_\_\_, )  
 )  
Respondent. )

Case No. 2018-0391

Alan G. Schuster  
Hearing Officer

**DECISION AND ORDER**

**I. JURISDICTION:**

Jurisdiction to adjudicate the issues raised in Petitioner’s, \_\_\_\_\_, (“\_\_\_\_\_” or “\_\_\_\_\_” or “Student” or “Petitioner”) Complaint is afforded under the Individuals with Disability Act (IDEA), 20 USC §1400, *et seq.* and the Illinois School Code, 105 ILCS 5/14-8.02a, *et seq.*

**II. PROCEDURAL HISTORY:**

On April 9, 2018 the Petitioner served \_\_\_\_\_ CUSD \_\_\_\_\_ (“District” or “Respondent”) his Due Process Complaint Notice (“DPCN”) requesting the appointment of an impartial due process hearing officer (“IHO”) to determine whether or not the District has failed to provide him a Free Appropriate Public Education (“FAPE”) for the District’s purported failure to provide the Student accommodations to allow him to participate in the District’s “Out Of School Care” program commonly known as the “\_\_\_\_\_” program.

This Hearing Officer was appointed to hear this matter on April 24, 2018. The Student is represented by Ms. Brandy Mutehart, Esq. and Mr. David Wolowitz, Esq. of Prairie States Legal

<sup>1</sup> Personal identifying information is provided in Appendix A.

Services and the District is represented by its counsel, Ms. Laura Sinars, Esq. and Mr. Jeremy Duffy, Esq. of Robbins, Schwartz, Nicholas, Lifton & Taylor.

On April 26, 2018, the District filed its Response to the Petitioner's DPCN which effectively denies all claims and the relief requested.

On May 15, 2018 and June 6, 2018, the parties participated in the Illinois State Board of Education (ISBE) state-sponsored mediation program to no avail.

On June 14, 2018, a Pre-hearing Conference (PHC) was conducted with the parties to, inter alia, identify the issue(s) to be heard by this IHO at hearing and to set hearing dates.

On June 21, 2018, an Amended PHC Report And Order was served the parties setting this matter for hearing on September 26-27, 2018 which was subsequently rescheduled to September 25-26, 2018, by agreement of the parties.

On September 11, 2018, the parties served a Joint Motion For Continuance which was granted which rescheduled the hearing of this matter to commence November 1, 2018 and which extended the 45-Day timeline to complete the hearing and render a Decision to November 16, 2018.

On November 1, 2018, hearing on the Petitioner's DPCN commenced<sup>2</sup>. Each party called a number of witnesses to testify who were cross-examined by the other party following the direct examination<sup>3</sup>. Witness testimony concluded on November 2, 2018. This IHO then ruled on objections to and the admissibility of the parties' respective documents being offered into evidence. The hearing was then closed.

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<sup>2</sup> The following person were present during each day of the hearing: ██████████ (Petitioner's parent), Brandy Mutehart and David Walowitz (Petitioner's counsel), ██████████ (District's Representative), Laura Sinars and Jeremy Duffy (District's counsel).

<sup>3</sup> In instances where both parties called the same witness to testify, both parties were permitted to conduct both their respective direct and cross-examinations without having to recall the witness to testify.

**III. ISSUE PRESENTED FOR ADJUDICATION:**

**1. WHETHER OR NOT THE STUDENT HAS BEEN DENIED A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) BY THE DISTRICT'S PURPORTED FAILURE TO PROVIDE STUDENT ACCOMMODATIONS TO ALLOW STUDENT TO PARTICIPATE IN THE DISTRICT'S BEFORE AND AFTER SCHOOL CARE PROGRAM, (██████████ PROGRAM), INCLUDING BEFORE SCHOOL, EARLY RELEASE AND FULL DAYS DURING SUMMER BREAK AND SCHOOL HOLIDAYS?**

**IV. REMEDIES REQUESTED BY PETITIONER:**

Petitioner requested this Hearing Officer to find that the District has denied Student a FAPE and requests this IHO to order the Student's IEP to be revised to provide for necessary accommodations to facilitate Student's full participation in the ██████████ program.

**V. REMEDIES REQUESTED BY THE RESPONDENT:**

Respondent request this IHO to deny the Petitioner's claims and to find the Student has been provided a FAPE.

**VI. WITNESS PRESENTED FOR TESTIMONY AT HEARING:**

**On Behalf of Petitioner:**

██████████ - Student's mother (PG)

██████████ - ██████████<sup>4</sup> Caseworker (KL)

██████████ - Special Education teacher ██████████ CUSD ██████████ (MG)

██████████ - ██████████<sup>5</sup> Coordinator ██████████ CUSD ██████████ (CW)

██████████ - Director of Special Education ██████████ CUSD ██████████ (LR)

**On Behalf Of Respondent:**

██████████ - Special Education teacher ██████████ CUSD ██████████ (MG)

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<sup>4</sup> Acronym for ██████████

<sup>5</sup> Acronym for Out of School Care

██████████ - ██████████ Coordinator ██████████ CUSD ██████ (CW)

██████████ - Director of Special Education ██████████ CUSD ██████ (LR)

██████████ - Psychologist ██████████ CUSD ██████ (TF)

██████████ - Speech-Language Pathologist ██████████ CUSD ██████ (CE)

Dr. ██████████ - Private Evaluator (SJ)

**VII. DOCUMENTS OFFERED AND RECEIVED INTO EVIDENCE:**

Student's Exhibits<sup>6</sup>: 1, 2, 3, 4, 5, 6, 8, 9

District's Exhibits<sup>7</sup>: 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 16, 20, 21, 22, 23, 24, 25<sup>8</sup>, 29<sup>9</sup>, 32<sup>10</sup>

Hearing Officer's Exhibits: IHO-1 (Joint Stipulations Of Fact); IHO-2 (District's Witness List)

**VIII. BURDEN OF PERSUASION:**

With respect to the Petitioner's request for a due process hearing the Student has the burden of persuasion as the petitioning party, *Schaffer v. Weast*, 546 U.S. 49, 56-62; 126 S.Ct. 528 (2005); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167, 1169 (7th Cir. 1994); 105 ILCS 5/14. Additionally, under Illinois law, the District must provide evidence that it has appropriately identified the Student's educational needs and that the special education and related services are adequate, appropriate, and available, however this does not shift the burden of proof to the

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<sup>6</sup> Each of the Student's Exhibit are denoted with a "P" followed by the exhibit number.

<sup>7</sup> Each of the District's Exhibits are denoted with an "R" followed by the exhibit number.

<sup>8</sup> Only page 1 of Ex. 25 was offered and admitted. Pages 2-7 of Exhibit 25 were withdrawn by stipulation between counsel made on the record that pages 2-7 are attachments transmitted to and received by Petitioner's counsel per the District's email.

<sup>9</sup> Only page 1-2 of Ex. 29 were offered and admitted. Pages 3-8 of Exhibit 29 were withdrawn by stipulation between counsel made on the record that pages 3-8 are attachments transmitted to and received by Petitioner's counsel per the District's email.

<sup>10</sup> Only page 1 of Ex. 32 was offered and admitted. Pages 2-42 of Exhibit 32 were withdrawn by stipulation between counsel made on the record that pages 2-42 are attachments transmitted to and received by Petitioner's counsel per the District's email.

District, *Kerry M. v. Manhattan Sch. Dist. #14*, 106 LRP 5847 (N.D. IL. 2006); 105 ILCS § 14-8.02a(g).

### **IX. FINDINGS OF FACT:**

This Hearing Officer did not have the benefit of a transcript with respect to the testimony heard when writing this decision. Therefore, the following is based upon this Hearing Officer's personal notes, audio recording of the hearing, and recollection. This Hearing Officer carefully considered the testimony of all witnesses presented and all documents introduced and admitted into evidence whether or not specifically referred to or cited when making this final determination. After considering all the evidence, as well as the arguments of both the Petitioner's counsel and the District's counsel, this Hearing Officer's Findings of Fact are as follows:

1. ■■■ is an eight-year-old third grade student at ■■■ Elementary School (■■■), a District school located in ■■■, Illinois, (Test. PG, P9, R11, IHO 1).

2. ■■■ has been in the full-time care of his paternal grandmother, Peggy G. (Parent) since the age of 2 ½ as a result of his biological parents difficulty in caring for him due to purported drug and alcohol addictions. PG formally adopted ■■■ at age 3 ½. PG is employed as a Certified Nurse Assistant (CNA) at a memory care facility (Lincolnshire Place) located in ■■■, Illinois. She works 4 days a week from 6:30 am to 2:30 pm. PG receives no support or assistance from others in the care of ■■■ financially or otherwise. The care PG provides for ■■■ includes assistance with dressing<sup>11</sup>, feeding<sup>12</sup>, changing his diaper, preparing lunch for

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<sup>11</sup> ■■■ is unable to dress himself but he is able to undress himself. He is unable to button buttons or manage zippers.

<sup>12</sup> Hand-over-hand feeding assistance is utilized whereby PG uses her hand to guide ■■■'s hand for feeding.

him<sup>13</sup> , playing with him, taking him for trips to the park, to shop<sup>14</sup>, to swim, or for bowling, (Test. PG, R7).

3. He was born with and has been formally diagnosed with Down Syndrome, (IHO 1). ■■■ is non-verbal. He communicates through the use of a communication board which is a board with a number of symbols or icons placed on it, some of which ■■■ is able to point to in order to communicate his wants<sup>15</sup>. ■■■ often does not respond to verbal commands such as “stop” or “no”, often has to be physically redirected, and at times does not understand that he is being scolded. ■■■ is incontinent which requires him to wear diapers on a daily basis. He is not yet able to report when his diaper is soiled and when soiled, adult assistance is required for his diaper change, (Test. PG, MD, TF, IHO 1).

4. ■■■ also suffers from vision impairments involving both pendular nystagmus (involuntary oscillation of the eyes) and myopia (nearsightedness). He wears glasses and has difficulty with depth perception and at times the inability to discern changes in surface structure, such as when walking from grass onto a concrete or wood chip surface, sometimes causing him to trip, ( P9, R11, IHO 1).

5. ■■■ is a loving child with a generally quiet and calm demeanor. At times he becomes very energetic and engaged when presented with certain sensory stimuli such as when introduced to objects that light up or make sounds such as toys or the sounds made from rustling garbage bags. He also enjoys climbing on objects such as tables, book shelves, and at times even his teaching instructors, (Test. PG, MG, TF, IHO 1).

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<sup>13</sup> PG prepares all of ■■■ lunches because his food must be pureed due his difficulty eating foods of different textures to avoid him gagging when he eats.

<sup>14</sup> PG holds ■■■ hand at all times in public settings generally for safety reasons due to elopement concerns, (Test. PG, R7).

<sup>15</sup> The communication board has 10 words. ■■■ is able to use 3 of the words, namely “go,” “drink,” and “eat,” albeit not consistently, (Test. MG).

6. [REDACTED] is eligible for special education and related services under eligibility classifications of Intellectual Disability and Visual Impairment. He has been receiving speech and language special education services through the District since before the age of three through the District's early childhood program, (P9, R11).

7. He presently receives special education and related services under an Individualized Education Plan (IEP) which includes adaptive physical education, social work, occupational therapy, speech and language therapy, physical therapy and support from a vision itinerant teacher. During the school day [REDACTED] receives full-time one-to-one support from a special education teacher and/or aide due to the severity of [REDACTED] disabilities and limitations in his functioning, both intellectually and physically, (Test. MG, LR, TF)

8. [REDACTED] educational program is taught within a self-contained classroom for the majority of his school day with general education participation for lunch, recess and certain specials (music and art) with the assistance of a full-time aide. [REDACTED] IEP was last reviewed on October 17, 2018, which was a triennial reevaluation, (P9, R11).

9. Due to his present levels of functioning, [REDACTED] requires full-time adult supervision at all times, whether in a private, public or classroom setting, (Test. PG, KL<sup>16</sup>, MG<sup>17</sup>, CW<sup>18</sup>, LR<sup>19</sup>, TF<sup>20</sup>, CE<sup>21</sup>).

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<sup>16</sup> KM has been employed with RAMP since 2014 as a manager of its two offices. She also serves as an independent living advocate for adults with disabilities and as a youth education advocate for children with disabilities. KM attended Northern Illinois University for three years studying anthropology and biology. She did not graduate college. Her education and training as an advocate for individuals with disabilities was provided through RAMP.

<sup>17</sup> MG has been employed with the District as a Special Education teacher for the past ten years. He has a bachelor's degree in high incident disabilities from Northern Illinois University, a masters degree in adaptive physical activity from Northern Illinois University and a master's degree in educational administration from the American College of Education. He has worked with [REDACTED] in a special education setting since the first grade.

<sup>18</sup> Since July 2015, CW has been employed by the District as the administrator of the District's [REDACTED] program. CW has both a bachelor and masters degree in Family and Child Studies from Northern Illinois University.

<sup>19</sup> LR has been employed with the District as its Director of Student Services for the past four years. She has a bachelor's degree from Northeastern University in Special Education and Elementary Education, a master's degree from Benedictine College in School Administration and a Director of Special Education endorsement. She has held a Special Education Teacher license from the Illinois State Board of Education (ISBE) since 1979 or 1980.

10. The private day care center [REDACTED] had been attending became unavailable to PG on September 22, 2017 because the District discontinued its service of busing students to and from private day care facilities. PG was unable to find alternate day care because none of the day care providers would accept [REDACTED]. On August 3, 2017, PG submitted an application to the District for [REDACTED] to participate in its [REDACTED]<sup>22</sup> program, which was initially declined, (Test. PG, KL. CW, P6, R12, IHO 1).

11. The [REDACTED] program offers any student enrolled in the District “ a safe, quality programming experience with an emphasis on academics, health and wellness, community service and fun,” (P1, R13). The [REDACTED] program is offered before school (6:00 am to 8:20 am), after school (3:00 pm. to 6:00 pm), on student early release school days, on school breaks (spring and winter), on certain school holidays, and during the summer school break. Fees are charged to the parent in an amount dependent on which component parts of the [REDACTED] program the student registers for, (Test. CW, P1, R12, R13).

12. The [REDACTED] Program Parent Handbook provides a section caption “Inclusion,” which states:

“Parents of students with special needs should contact the [REDACTED] coordinator **prior to** registering for the program. [REDACTED] programming is not part of a student’s Individual Education Plan (IEP) or an extension of the academic day. The same support available to a student during the academic day is **not** available during [REDACTED].”

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<sup>20</sup> TF has been employed with the District as a School Psychologist for the past nine years. In 2002 he received a BS degree in Psychology and Sociology from Iowa State University. In 2007 he received his MS degree in Industrial Organization Psychology from Kansas State University. In 2013 he received his PhD degree in School Psychology from Northern Illinois University. He has held a School Psychologist license issued by the Illinois State Board of Education (“ISBE”) since 2010.

<sup>21</sup> CE has been employed by the District as a Speech/Language Pathologist since July 2011. She received a BS degree from Northern Illinois University in 2008. In 2010 she received a MA degree in Speech/Language Pathology from Northern Illinois University. She holds an ISBE issued Speech/Language Pathology license.

<sup>22</sup> [REDACTED] is an acronym for the District’s [REDACTED] program, (P1, R13), which the District considers a day care program, (Test. CW).

13. The before school [REDACTED] morning program provides for a free time period, structured time activity (games, crafts, science experiments and breakfast. The after school [REDACTED] program provides for recess or snack, homework and academic time, structured activity (indoor/outdoor game, craft, science experiments, etc. and freeplay/game time). The typical full day [REDACTED] program provides similar programming and includes Community Partnership Presentations and STEM (science, technology engineering and mathematics) activities. The summer [REDACTED] program has similar programming and includes a three hour period where the students are transported from the school premises to the [REDACTED] Park District to participate in its programming, swimming, sports and environmental education, (Test. CW, KL, P1, P13).

14. At no time prior to August 3, 2017, the time PG submitted an application to the District for [REDACTED] to participate in the District's [REDACTED] out of school care program, did PG ever question or formally contest the appropriateness of [REDACTED] IEP.

15. On September 13, 2017, PG, through her legal counsel, made a demand on the District to reconsider allowing [REDACTED] to participate in its [REDACTED] programs, (P6, P7).

16. The District reconsidered the request and agreed to permit [REDACTED] to participate in the before school, after school and early release [REDACTED] programs, once the District was able to hire a full-time aide for [REDACTED]. Since November 2017, [REDACTED] has been participating in the before school [REDACTED] program. He has elected not to participate in the after school and early release [REDACTED] programs, (R23, IHO 1).

17. The District has not allowed [REDACTED] to participate in any of the full day [REDACTED] programming (school holidays, spring, summer and winter breaks), because of accommodations

required (specialty equipment) and safety concerns<sup>23</sup> relating to times when █████ would be engaged in trips or activities off the school building premises<sup>24</sup>, (Test. LR, P2, P4, R24, IHO 1).

18. On October 18, 2017, the parties convened for an IEP meeting for an annual review of █████ IEP. At that time PG delivered a hand-written letter to the District requesting that “█████ be allowed to attend any non-academic programs of his choice” and requested that this be put into his IEP, (Test. KL, P4, R3, P8, R20).

16. On February 28, 2018, the parties and their attorneys met for an IEP meeting with the District’s IEP team to discuss adding accommodations and the █████ program to █████ IEP, (IHO 1, P2, R4, R24).

17. Immediately following the IEP meeting, a second meeting was held to discuss █████ participation in █████ and consider whether █████ could participate in additional █████ programming with reasonable accommodations in accordance with the provisions of Section 504 of the Rehabilitation Act and the American with Disabilities Act, (R24, IHO 1).

18. On March 16, 2018, the District’s counsel communicated to PG’s counsel indicating the District agreed to permit █████ to participate in the before school and early release █████ programming only<sup>25</sup>, and advised the █████ program would not be added to █████ IEP, (R24, IHO 1).

19. On April 9, 2018, PG, through her counsel, served the District Petitioner’s DPCN, (R26).

20. On October 17, 2018, an IEP meeting was convened for █████ triennial IEP review. The persons in attendance at this IEP included PG-parent; █████-classroom teacher; MG-

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<sup>23</sup> District’s concerns included elopement when in a public setting and when around a swimming pool. █████ diaper changing is another concern because it requires a private setting and a cot he can lay on.

<sup>24</sup> No evidence was adduced at the hearing to show █████ has, in fact, caused injury to himself or others while under care or control of the District in either a classroom or public setting.

<sup>25</sup> At this time PG was not requesting District permission for █████ to participate in the █████ after school program.

special education teacher and case manager; ██████████-Principal; TF-school psychologist; ██████████ ██████████-social worker; CE-speech-language pathologist; ██████████ ██████████-occupational therapist; ██████████-physical therapist; ██████████-vision specialist; ██████████-vision itinerant; Mr. ██████████-outside psychologist; KL-██████████ advocate; Laura Sinars-██████████ legal representative; Jeremy Duffy-██████████ legal representative; Brandy Mutehart-██████████ PG's legal representative. At this meeting an IEP was developed for ██████████ and offered to PG which was declined, (Test. PG, MG, TF, KL, CE, P9, R11).

## **X. 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:

### **A. APPLICABLE LEGAL PRINCIPALS:**

21. The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected, (20 U.S.C. § 1400(d)(1)).

22. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP, (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17). Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. §1401(29); 34 C.F.R. § 300.39). Related services are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34).

23. In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A)).

24. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511).

**B. DOES THE OCTOBER 17, 2018 IEP  
THE DISTRICT OFFERED THE STUDENT PROVIDE A FAPE?**

25. At hearing the parties presented a number of witnesses in order for this IHO to determine whether or not the ██████ program constitutes a “nonacademic” or “extracurricular” service or activity as defined under IDEA (34 CFR 300.107) or whether the ██████ program is simply a day care program thereby falling outside IDEA’s definition of “nonacademic” or “extracurricular” services or activities.

26. Witnesses were also called by the parties to offer testimony for this IHO to consider to determine whether or not ██████ would gain an educational benefit if permitted to participate in the ██████ program.

27. Both of the above noted issues are collateral to the primary issue which needs to be addressed first, which is whether or not the 12/17/18 IEP, as written, offers the Student a FAPE.

If the answer is affirmative, the collateral issues noted above do not need a determination by this IHO.

28. A FAPE required by the IDEA must be tailored to the unique needs of a particular child, *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 553 IDELR 656 (U.S. 1982).

29. Further, a district must offer an IEP that is 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 (U.S. 2017).

30. In order to determine whether or not the special education and related services offered under the IEP provides █████ a FAPE, an understanding of █████ present level of academic and functional performance is important to understand.

31. █████ present level of academic and functional performance as reported by the District and noted in the body of the written IEP<sup>26</sup> was derived from assessment data which included input from PG, █████ teachers, observations of █████ in both a classroom and non-classroom setting, records review and testing. The testing included:

a) The administration of the ABAS-3, (“Adaptive Behavioral Assessment System,” used to assess adaptive behavior skills) administered by Christie Miklas, the school social worker;

b) A Speech And Language Evaluation administered by CE whose evaluation included a review of █████ school records, administration of the Peabody Picture Vocabulary Test-2 to assess █████ receptive vocabulary skills and administration of the Early Functional Communication Profile used to assess █████ joint attention, social interaction and communicative intent;

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<sup>26</sup> The validity of evaluative information as reported in the IEP was not contested by the Petitioner at hearing.

c) An Occupational Re-Evaluation administered by Megan Hart, MOT (Masters Of Occupational Therapy) , who administered the Sensory Processing Measure used to assess and identify difficulties █████ may experience with processing sensory information in the visual, auditory, tactile, proprioceptive, vestibular, social participation and praxis domains;

d) A Functional Vision Evaluation administered by Danna Brosso, TSVI (Teacher Of Students with Visual Impairments), to assess █████ visual strengths and weaknesses;

e) A Case Report prepared by TF to report on █████ functional and adaptive performance in both his special education classroom setting and when in the before school █████ program setting;

f) A cognitive and academic evaluation performed by N. Scott Johnson<sup>27</sup> .

32. The results of the evaluation, which were validated by the testimony of witnesses<sup>28</sup> who either administered the assessments, interpreted the assessments and/or who participated in the IEP meeting, reveals █████ present level of academic performance to be equivalent to that expected of an 18 month old child. He is currently working on basic pre-academic skills of matching, sorting and tracing. He is able to match items based on color given a field of two with an accuracy of 50%, an improvement from the hand-over-hand support █████ required previously to complete this task. He is also able to match the letters of his name with 50% accuracy. █████ is also working on sorting the colors of yellow, green, red and blue into a matching bowl which he

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<sup>27</sup> The testimony of N. Scott Johnson, his opinions, and the report he prepared (marked as R11-011-024) are given no weight by this IHO for lack of credibility. Mr. Johnson, after having first been sworn to tell the truth under oath , testified that he completed his doctoral training in an APA accredited clinical psychology program. When this IHO made inquiry whether his clinical psychology degree was a PsyD or a PhD degree he answered “PhD.” Upon further questioning to learn when did he receive that PhD degree, Mr. Johnson then first admitted he had not completed the requirements to receive a doctoral degree and in fact does not have a doctoral degree. The false and deceptive statements Mr. Johnson made under oath concerning his credentials to this IHO, and possibly to the District ( the District, in its 5-Day Witness List disclosure, listed Mr. Johnson as “Dr. Scott Johnson,” IHO 2 ) which this IHO views as not being at all unintentional, raises serious questions about Mr. Johnson’s integrity and credibility. Accordingly, Mr. Johnson’s testimony, his opinions, and his report have being disregarded and given no weight by this IHO in the preparation of this Decision.

<sup>28</sup> This IHO finds all witnesses who testified at the hearing, (other than N. Scott Johnson), to be properly qualified, experienced, knowledgeable about █████ and otherwise credible in the testimony and opinions given.

is able to achieve with a accuracy of 50% to 100% of the time. ■■■ is now beginning to scribble lines, albeit he is not yet able to trace a line.

33. ■■■ is also shown to be quite limited in his functional performance. He presently drinks from a “sippy cup.” He is able to hold the cup most of the time and place the cup back down on the table when finished drinking. He can feed himself using a modified spoon unless the food cannot be easily scooped in which case he requires assistance and hand-over-hand guidance. He has not yet exhibited an ability to notify others when his diaper is soiled. He requires hand-over-hand guidance in the removal of his pants, in diaper removal and in cleaning. He is able to pull up his pants if his hand is placed on the front of his pants and prompted. He is not yet able to pull up the back of his pants. ■■■ is not yet able to consistently respond when called by name or respond to the word “No.” When he is engaged in inappropriate activity, such as climbing or banging on objects, he must be redirected physically or with hand-over-hand support.

34. ■■■ is non-verbal. He is able to make coughing sounds, but he is unable to produce any true speech. He communicates using a communication board which has pictures he points to in order to convey his wants. His communication development and progress has been slow. Over the past three years the words on this board has increased from six to ten. The words on his board now include “eat, drink, more, all done, help, go, yes, no, book, and iPad.” He is not yet able to use all of the words with consistency. In the communication areas involving language comprehension, language expression and pragmatics, ■■■ is presently functioning at or below the twelve month age.

35. In terms of motor skills, ■■■ ambulates independently when in a classroom environment. He requires hand held assist when outside the classroom for purposeful direction

otherwise he tends to wander toward sensory stimuli without much awareness for his surroundings. He requires hand held assist when ascending and descending stairs in an upright position otherwise he drops and crawls the stairs. He is not entirely aware of changes in ground surface textures (eg. moving from a sidewalk to grass or woodchips), which sometimes causes him to trip. ■■■ enjoys swinging but avoids most other playground equipment and because of his decreased muscle tone and weakness, he tends to avoid activities involving gross motor play.

36. ■■■ has overall significant delays in sensory modulation, fine, gross and visual-motor skills which limits his ability to attend, engage and participate in functional activities throughout his daily routine including engagement with peers.

37. ■■■ IEP provides seven goals focused on working on skills in the areas of pre-academic skills, functional independence skills, physical therapy, social language skills, functional receptive skills, and functional expressive language skills.

38. In reviewing the specifics of these goals, this IHO finds the goals are appropriate given ■■■ present needs.

39. ■■■ IEP provides him with full-time one-on-one support throughout his school day. He is educated in a special education setting for 99% of the day and he is provided an opportunity to engage with his non-disabled peers during recess, art & music with the assistance of an aide. ■■■ has not yet developed the skills to engage with his peers in any meaningful manner when the opportunity is provided, even with prompting.

40. The special education and related service minutes offered ■■■ weekly under his current IEP includes 1350 minutes in the District's self-contained ABLE program; 60 minutes in the Community Experience program; 30 minutes in Adapted PE; 20 minutes with a Vision Itinerant; 40 minutes with the Speech/Language special education teacher; 10 minutes with the

Speech/Language consultant; 30 minutes Social Work; 15 minutes Occupational Therapy (OT) with the special education teacher; 5 minutes Occupational Therapy with the OT consultant; and 5 minutes Physical Therapy. The IEP also offers █████ Extended School Year Services to help reinforce appropriate pre-academic skills and social behaviors during the summer school break.

41. In considering █████ needs and the IEP being offered, this IHO finds the IEP is appropriately tailored to meet █████ needs and that it is reasonably calculated to enable █████ to make progress appropriate in light of his circumstances<sup>29</sup>. Petitioner has failed to meet its burden to show the IEP offered by the District does not provide █████ a FAPE<sup>30</sup>.

42. Further, the evidence suggest that had PG found suitable day care services for █████ to replace the day care services lost in September of 2017, Petitioner's IDEA claims would not have likely been advanced through this proceeding. While this IHO is sympathetic to Parent's plight in finding competent day care willing to care for █████ given his severe disabilities, Petitioner's claims relating to a denial of access to the District's █████ program may be more properly advanced as an access claim arising under Section 504 of the Rehabilitation Act of 1973 or under Title II of the American with Disabilities Act, (ADA), as apparently the parties contemplated during their meeting held on February 28, 2018.

43. Finally, the parties are to take notice that nothing in this Decision And Order is to be interpreted or construed as an adjudication of any putative claim the Petitioner may have arising under either Section 504 of the Rehabilitation Act of 1973 or Title II of the ADA in that this IHO has no jurisdiction to adjudicate claims arising under either of these Acts<sup>31</sup>.

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<sup>29</sup> This IHO also finds the placement provisions of the IEP offered █████ is in the least restrictive environment given his present inability to engage with his peers in any meaningful manner.

<sup>30</sup> While the Petitioner argues █████ may receive some incremental benefit from participating in the █████ program and therefore should be included in his IEP, this proposition is not dispositive of the question whether or not the IEP, as offered, provides █████ a FAPE.

<sup>31</sup> In Illinois, an IHO's jurisdiction is limited to hearing issues relating to matters involving the identification, evaluation, educational placement or the provisions of a free appropriate public education, (FAPE), involving a

## **XI. ORDER:**

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

1. The special education and related services provided in the IEP offered the Student are adequate, appropriate, and available, and the IEP, as written, is reasonably calculated to enable the Student to make progress appropriate in light of his circumstances and therefore the IEP offered the Student does provide the Student a FAPE.

2. Petitioner's claims and the relief requested are hereby denied.

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

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

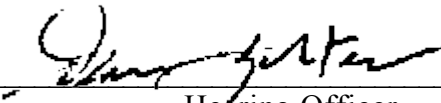
### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Pursuant to 105 ILCS 5/14-8.02a(i), any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within one hundred and twenty (120) days from the date the decision is mailed to the party.

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student with a "disability" as that term is defined under IDEA , (20 USC § 1400 et seq.), or the Illinois School Code (105 ILCS 5/14 et seq.), or the Illinois Administrative Code, (23 IAC 226.75 et seq.); *Chicago Public School District #299*, 105 LRP 2603 (2004); see also *Irvine Unified School District and California Depart. Of Education*, 111 LRP 6893 (2011).

Dated: November 13, 2018

  
Hearing Officer

Alan G. Schuster,  
1866 Sheridan Rd., Suite 208  
Highland Park, IL 60035  
Phone: (847) 266-1830  
Fax: (847) 266-1835  
Email: [LawOfficeAlanSchuster@gmail.com](mailto:LawOfficeAlanSchuster@gmail.com)

**APPENDIX A**

██████████ -v- ██████████ CUSD ██████████

Case No: 2018-0391

|            |                     |
|------------|---------------------|
| ██████████ | ██████████ -Student |
| ██████████ | ██████████ -Parent  |

**ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING**

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██████████, a minor, by and through )  
his parent, ██████████, )  
 )  
Petitioners, )  
 )  
- v - )  
 )  
██████████ CUSD ██████████, )  
 )  
Respondent. )

Case No. 2018-0391

Alan G. Schuster  
Hearing Officer

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**CERTIFICATE OF SERVICE**

I, Alan G. Schuster, certify that on November 13, 2018, a copy of my Decision And Order along with IHO Exhibit 2 were served upon the following persons in the manner indicated:

**Sent via Email and Certified Mail**

Ms. Brandy Mutehart, Esq.  
Prairie States Legal Services

██████████  
██████████  
██████████

**Sent via Email and Certified Mail**

Ms. Laura Sinars, Esq.  
Robbins, Schwartz, Nicholas, Lifton

██  
██  
██

**Sent via Email Only**

Illinois State Board Of Education

Andrew Eulass  
[aeulass@isbe.net](mailto:aeulass@isbe.net)

Wanda Schoneweis  
[wschonew@isbe.net](mailto:wschonew@isbe.net)

Dated: November 13, 2018

Alan G. Schuster

██  
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██  
Hearing Officer