

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

█.,		
Student,		
		CASE NO. 2020-DP-0171
v.		
		MARY SCHWARTZ
█ ELEMENTARY		Impartial Hearing Officer
SCHOOL DISTRICT █		
Local School District.		

DECISION AND ORDER

JURISDICTION

This matter is before the undersigned hearing officer on the parent’s request for a due process hearing. This hearing officer has jurisdiction pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. § 1400 *et. seq.*, 105 ILCS 5/14-8.02a *et. seq.*, and 23 Il. Adm. Code § 226.600 *et. seq.* The parties have been fully advised of their rights pursuant to these statutes and regulations.

PROCEDURAL BACKGROUND

The student’s mother filed a due process complaint, which the district received on March 16, 2020. The Illinois State Board of Education (ISBE) appointed the undersigned as hearing officer in this matter on March 20, 2020. The undersigned hearing officer issued several preliminary Orders on March 23rd, including a statement of the parties’ rights in these proceedings. District’s counsel filed his appearance and the district’s response on March 23rd and also provided the parent with a list of low cost legal aid and advocacy organizations. The mother was unable to obtain legal assistance and has represented herself and the student throughout these proceedings. The parties held a resolution meeting on March 27th and also participated in a telephonic mediation. They were not able to resolve the parent’s concerns.

The undersigned held a telephonic prehearing conference with the parties on May 13th. During the prehearing, the mother raised an issue that was not in her March 16th complaint. The district agreed that the mother could amend her complaint to

include the new issue. Although the district received the amended complaint on May 22nd, the hearing officer did not receive it until May 26th. On May 30th, the undersigned issued an Order restarting the IDEA timelines as of May 26th. The district filed a timely response to the amended complaint on June 1st. The prehearing conference was held on July 9th by telephone conference call, and the Prehearing Conference Report was issued on July 11th.

Due to COVID-19 restrictions put in place by the ISBE, the format of the hearing was altered. The parties, court reporter, and each witness were stationed in a district school, and the hearing officer appeared virtually via zoom. The hearing was held on September 23, 24, and 25, 2020. In rendering this decision, the undersigned has considered all documents entered into evidence, testimony by the parties' witnesses, the parties' closing arguments and proposed case law, and the hearing officer's independent research. This decision is issued within ten business days after the close of the record in this case on September 23, 2020. 105 ILCS 5/14-8.02b(k).

ISSUES PRESENTED AND REMEDIES SOUGHT

The following issues, as raised in the parent's amended complaint and agreed to during the final prehearing conference, were heard during the due process hearing:

1. Whether the student was bullied at school in kindergarten and first grade and if so, whether that denied the student a FAPE;
2. Whether the student's current placement in the [REDACTED] program, which is run by the special education cooperative, offers the student a FAPE in his LRE.
3. Whether the district's proposed change of placement for the student, from the [REDACTED] program at [REDACTED] School in [REDACTED] to a program for students with emotional disabilities in [REDACTED], would deny the student a free appropriate public education (FAPE) in his least restrictive environment (LRE);

The parent requests an Order maintaining the student's placement in the ██████ program at ██████ School. The parent's amended request includes two additional remedies: 1) that the district place the student at ██████ Preparatory School, which is a therapeutic school, when he is in 6th grade and 2) that the student remain IDEA eligible until he is an adult. The undersigned struck the foregoing compensatory education requests at the prehearing conference, finding that there is no legal basis for the requests. Prehearing Conference Report, July 11, 2020

BURDEN OF PROOF

In an administrative hearing, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 126 S. Ct. 528, 539 (2005). Therefore, in this matter the parent has the burden of proof as she filed the due process complaint. Under Illinois law, the school district must provide evidence that it has appropriately identified the student's educational needs and that the proposed special education and related services are adequate, appropriate, and available. 105 ILCS §14-8.02a(g). This statutory provision requires the district to produce evidence but does not shift the burden of proof to the district. *Kerry M. v. Manhattan Sch. Dist. #14*, 106 LRP 5847 (N.D. Ill. 2006).

FINDINGS OF FACT

This hearing officer did not have the benefit of a transcript of the hearing testimony when this decision was rendered. Therefore, the following is based on this hearing officer's personal notes and recollection of the testimony and evidence entered into the record. The testimony presented and documents entered into evidence have been carefully considered, whether or not specifically referenced or cited in this final determination.

1. The student was enrolled in District ██████'s pre-kindergarten in March 2017 after he and his mother moved from Chicago to ██████. SD 1, pp. 1, 2; Testimony, Mother. The district held an initial IEP meeting on March 20th, which the mother attended by telephone. SD 1, p. 3. The student was performing below grade level in all subjects: he could sing the alphabet song but could not identify the letters,

and he could rote count to 14 but was unable to perform basic math problems. SD 1, pp. 4, 6. His verbal skills “were emerging,” and he did not use language to make his needs known. *Id.*; SD 1, p. 7. He had difficulty with transitions, both within the classroom and in the hallway. *Id.* The IEP requires placement in a pre-kindergarten program with the following services in the general education classroom: special education for 60 minutes/week, speech/language services for 30 minutes/week, and social work services for 15 minutes/week. SD 1, pp. 12, 13.

2. An IEP meeting was held on May 11, 2017 to discuss the student’s transition to kindergarten. SD 2, p. 2. The mother attended the IEP meeting. *Id.* The student had learned to transition independently to and from centers in the classroom and could communicate with staff to make his needs known. SD 2, pp. 4, 5. The IEP team developed goals to help the student learn to write his name, identify letters, and count to answer “how many.” SD 2, pp. 6, 7. A social work goal was added to help him learn to resolve conflicts with peers. SD 2, p. 8. His “verbal and receptive skills were still emerging” . SD 2, p. 4. His fine and gross motor skills were age appropriate. *Id.* The IEP requires special education in the regular education classroom for reading and math, with 150 minutes/week for each subject and social work services for 15 minutes/week outside of the general education classroom. SD 2, p. 9.
3. On September 11, 2017, the IEP team met again to discuss re-evaluating the student. SD 5, p.1. The mother attended the meeting and provided written consent for the re-evaluation. SD 5, p. 3. The school psychologist, Ms. A., reported that the student was performing below age level and had speech/language delays. SD 5, p. 4. He had difficulty transitioning within the classroom and in the hallway. *Id.* He could follow one-step directions with support, and his “verbal and receptive skills were still emerging and have not fully generalized to the classroom setting.” SD 5, p. 17. The IEP requires special education instruction in the regular classroom for 150 minutes/week for reading and for math and social work services for 20 minutes/week outside the classroom. SD 5, p.12.

4. The student's kindergarten teacher, Ms. W., has taught kindergarten for nine years. Testimony, Ms. W. She also worked with the student in first grade, when he went to her room to calm down. *Id.* The student struggled academically, particularly with math. *Id.* Ms. W. taught him to write his name and letters. *Id.* The student had a small group of friends and showed "no behaviors out of the ordinary." *Id.* Ms. W. never saw the student being bullied nor did he ever tell her that he was. *Is.* The student did, however, have problems with attendance. *Id.* He checked in late 41 days out of 174 days and was absent 39 days. SD 4, pp. 1, 2.

5. The IEP team, including the mother, reconvened on April 9, 2018. SD 6, p. 2. The student had delays in communication and pre-academic skills, which could "impede his success in the general education classroom." SD 6, p. 3. His "verbal and receptive skills" were still emerging and had not "fully generalized to the classroom setting." SD 6, p. 14. He could answer basic who/what/where questions and group like items into broad categories. *Id.* He needed adult support to follow one-step directions. *Id.* He participated in a weekly social skills group and, over the year, was able to show age-appropriate social skills. SD 6, p. 15. However, he frequently missed the group because of his poor attendance or late arrival to school. *Id.* Outside of school, he was receiving bi-weekly therapy at a local counseling agency. SD 6, p. 4. He also was taking prescription medication for ADHD. *Id.* The IEP requires placement in the regular education classroom with special education math and language arts instruction provided in regular education classroom for 150 minutes/week for each subject. SD 6, p. 8. The IEP also includes for social work services for 30 minutes/week, provided outside of the classroom. *Id.*

6. The student was placed in a co-taught classroom. Testimony, Ms. G. Ms. G. has a B.A. in special education and a M.A. in reading, with endorsements in language arts. *Id.* She worked with the student on reading and writing. *Id.* He did not know his letters or sounds, and despite Ms. G.'s efforts to get him to grade level, he did not do so. *Id.* He was very aggressive and angry the last two months of first grade, including being verbally aggressive with other children. *Id.* He was absent 39 days during his first grade year and checked in late at school 45 days.

SD 7, p. 2.

7. At the beginning of first grade year, the student was injured on the playground during recess when another boy punched him and knocked him down. Testimony, Ms. G.; SD 8, p. 1; PD 1. Ms. G. described the other boy as “hyperactive.” SD 26, p. 1. The school nurse assessed the student and reported that he had a “horizontal mark appx. 1.5 inches long that is raised on the upper right side of forehead. No bleeding or bruising noted at this time. Head eval wnl.” SD 8, p. 1. She put an ice-pack on his injury. *Id.*
8. The assistant principal, Ms. M., called the mother and informed her of the incident and injury. Testimony, Ms. M.; SD 9, p. 1. The mother requested a meeting with the other parent and asked that the student stay inside for recess. *Id.* Ms. M. met with the boys’ mothers and also arranged for the student to stay inside during recess. Testimony, Ms. M. Ms. M., who has been the assistant principal for five years, stated that safety is her “main duty.” *Id.* She has a B.A. in psychology and sociology, a M.A. in public health, and a Ph.D. in health education. *Id.* She watched the student closely because of his mother’s concerns. *Id.*
9. The district’s bullying policy defines bullying as “severe or pervasive physical or verbal act or conduct.” SD 28, p. 1. The playground incident was an isolated incident between two boys, and there were no other reports of bullying by the student. Testimony, Ms. M.; SD 26, p. 1. Additionally, the boys “played well with one another” after the incident. SD 26, p. 1. The student’s behavior did not change after the incident. Testimony, Ms. G.
10. However, the student’s behavior did change after spring break: although he had been quiet and did not speak or raise his hand before the break, he was not compliant, called names at the other students, and was aggressive and angry after the break. Testimony, Ms. G. When the teacher asked him why he had changed, he responded “I don’t know.” *Id.*

11. An IEP meeting was held on March 4, 2019 to review the student's progress and plan for his second grade year. SD 10, p. 2. The student's home school would change beginning in second grade. *Id.* The mother attended the meeting. SD 10, p. 20. The team recommended placement in a general education classroom for all academics and electives and special education instruction within the regular education classroom for 30 minutes/day for reading and for math. SD 10, p. 15. The IEP also requires 30 minutes/week of counseling. *Id.*
12. In second grade, Ms. R. was the student's special education teacher, and Ms. J. was his regular education teacher. Testimony, Ms. R. and Ms. J. Ms. R. has a master's degree in special education and training in behavioral analysis. Testimony, Ms. R. Ms. J. has been teaching second grade in the district for four years. Testimony, Ms. J. She has a master's degree in elementary education and in curriculum and instruction. *Id.* The second grade classroom had 18 students and two aides, one for the classroom and the other for an individual child. *Id.*
13. The student was aware of his academic delays and did not like to work in small groups. Testimony, Ms. R. Although he did better with 1:1 help, he still had difficulties, particularly when he had to sit for a long time or do an unpreferred activity. *Id.* In those situations, the student disrupted the class by making vocalizations, getting out of his seat, and talking with peers. *Id.* Ms. R. implemented several strategies to address his behaviors: redirection with little eye contact and few words, setting a timer and giving him a token when he did his tasks on time, and "planned ignoring." *Id.* The interventions were successful "at times." *Id.*
14. At the beginning of the school year, on August 29th, the student had difficulty coming in from recess: he refused to follow directions, threw objects, and bit Ms. J. in the arm when she tried to stop an object from hitting another student. SD 12, p. 29. Ms. J. described him as "totally out of control." *Id.* He had 11 disciplinary referrals between August 28 and September 26, 2019 for behaviors including rocking students' desks to tip them over, clawing the teacher's hand, throwing objects, biting the teacher's arm, calling the other students "bitches", making

screeching noises, kicking another student in the head when she bent down, and throwing a rock, which hit a student in the back of her head. SD 12, pp. 29, 30.

15. Mr. S., who was the principal at the start of that school year, saw the student on a “daily basis.” Testimony, Mr. S.; SD 12, pp. 29, 30. The student’s behaviors “interrupted his ability to function.” Testimony, Mr. S. He received several out-of-school suspensions for his behaviors. SD 11.

16. Because of the student’s numerous behavioral incidents at the start of the 2019-20 school year, the district decided that an evaluation was necessary. The IEP team, including the mother, met on October 8, 2019. SD 12, p. 1. The student’s grade equivalent in reading was 0.0. SD 12, p. 4. He knew 16/27 lower-case letters and 17/27 upper-case letters. *Id.* He had not made sufficient progress on any of his IEP goals. SD 12, pp. 7, 8, 10. He was receiving 150 minutes/week of special education instruction in reading and in math, delivered in his regular education classroom, and counseling for 30 minutes/week. SD 12, p. 15. He was able to follow simple directions in the classroom but needed redirection to stay on task during the school day. *Id.* Although he had friends and interacted “pretty well” with his peers, “at times” he acted like he was going to fight with them. *Id.* He was able to express his thoughts and ask appropriate questions. *Id.* His fine and gross motor skills were age appropriate. *Id.* The IEP team agreed that a functional behavioral assessment (FBA) would be conducted, and the parent gave written consent for the FBA. SD 12-1; SD 13, p. 1.

17. Ms. M., who is a board certified behavior analyst (BCBA), conducted the evaluation. Testimony, Ms. M. She has been a full-time BCBA for the special education cooperative since August, and before that she was with [REDACTED] Elementary school. *Id.* Ms. M. received her master’s degree in 2015 and passed her national BCBA exam in 2016. *Id.* She observed the student school to determine what happened before his behaviors, what was going on in the classroom at those times, and what the consequences were of his behaviors. *Id.*; SD 14. She observed the student on November 1, 2019 from 8:18 a.m. to 12:40 p.m., at which time he had to be taken home because of the severity of his

behaviors. Testimony, Ms. M. His behaviors included hitting, punching, spitting, property destruction, and elopement. *Id.* She organized the data into 15 minute intervals to determine what happened before the behavior, what was going on in the classroom, and what the consequences were of the behavior. *Id.* The evaluation also included a questionnaire for the student's teachers to complete. SD 14, p. 3.

18. Based on her observations and data from the student's teachers, Ms. M. developed a behavior intervention plan (BIP) for the student. SD 15. His behaviors "serve both attention and escape functions in different conditions." SD 15, p. 1. When the student was not provided attention during individual/group work times, he showed non-compliant and aggressive behaviors. *Id.* However, he received attention in the form of prompts and reprimands and escape from the task that he should have been doing. *Id.* When the task was changed to an easier task, he went to the task and completed it. *Id.* Ms. M. also observed the student's physical aggression, property destruction, non-compliance, and other off-task behaviors. *Id.* The reprimands he received for those behaviors provided attention. SD 15, p. 2. The BIP includes techniques for staff to implement to address the student's challenging behaviors, including: contingency specifying statements, e.g., when you (do this) you will get (a reward), and an external cue to indicate to the student when his verbalizations or requests would be reinforced or rewarded. *Id.* The staff would reinforce the student's pro-social behaviors and appropriate communications by providing him an item or activity of his choice. SD 15, p. 3. He also would be allowed to request brief breaks, but only after demonstrating appropriate behavior. *Id.* The report recommends that staff implement a token system to be used during longer work periods. *Id.* The BIP must be implemented consistently throughout the school day. SD 15, p. 4. The attention the student received from engaging in the behaviors noted in the report maintained his behavior. Testimony, Ms. M. Ms. M. recommended placement in a small classroom (i.e., not many students) that is not a general education classroom and that he have an individual aide. *Id.*

19. Dr. A. is the district's school psychologist. Testimony, Dr. A. She has been a

school psychologist for 11 years and has worked with the district for three years. *Id.* She has a Ph.D. and is licensed as a school psychologist. *Id.* Dr. A's evaluation included: a review of the student's academic records; assessments of his academic achievement, functional performance and cognitive functioning; and, an observation of the student. SD 16, p. 31; Testimony, Dr. A. The student's grade equivalent in reading was 0.0 in September 2019. *Id.* He struggled academically and was on a pre-primer level while his classmates were doing second grade work. *Id.* He was unable to identify any words on the Ohio word test. *Id.* When reading, he created "his own story without looking at all the words." *Id.* He was unable to complete the Star Math pre-test in September 2019. *Id.* Dr. A. had the student's mother and teacher complete the Adaptive Behavior Assessment System, 3rd Ed. (ABAS-3) to evaluate the student's adaptive skills in the home and school settings. SD 16, p. 31. The ABAS-3 scoring system is: 120 and above, very high; 110-119 high; 90-109 average; 80-89 below average; 71-79 low; and, 70 and below, extremely low. *Id.* The majority of the mother's ratings were in the low and extremely low range, with one score in the below average range. *Id.* All of the teacher's scores were in the extremely low range. *Id.*

20. Dr. A. administered the Differential Ability Scales, Second Edition (DAS-II) to assess the student's cognitive ability. Testimony, Dr. A.; SD 16, p. 32. The student's General Cognitive Ability (GCA) score was 61, which is very low. Testimony, Dr. A.; SD 16, pp. 32, 33. On the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV), his full scale score was 69, which is in the extremely low range. Testimony, Dr. A.; SD 16, p. 33. Dr. A. noted that because the student was three months too old for the test's normative scales, his scores "might be an over-representation" of his actual levels. Testimony, Dr. A.; SD 16, p. 34. Based on her evaluation, Dr. A. found that the student "should be considered a student with an intellectual disability." SD 16, p. 34. She recommended using a functional curriculum "since he was not accessing the 2nd grade curriculum even with the accommodations and modifications in place." *Id.* He was in the school's most restrictive placement and was still not making academic progress. Testimony, Dr. A.

21. Ms. J., the speech-language pathologist, evaluated the student's communication skills. Testimony, Ms. J. Ms. J. has been a speech/language pathologist for over 27 years. *Id.* She evaluated the student and has had no other contact with him. *Id.* On the Peabody Picture Vocabulary Test, 4th Edition (Peabody), the student scored "just under average" in receptive and expressive language processing. Testimony, Ms. J; SD 16, p. 34. His articulation did not impact his intelligibility. *Id.*
22. The student's behavioral problems continued in November. On November 1st, he was given an in-school suspension for threatening and swinging at his peers. SD 11, p. 1, 2. Three days later, on November 4th, Ms. R. entered the classroom and saw her co-teacher against the wall. *Id.*; SD 11, p. 1; Testimony, Ms. R. The student had knocked the co-teacher to the floor and hit her in the back. *Id.* The student's behavior impacted his ability to learn and thus, he did not make much progress. *Id.* Things were harder for him when he came in late to the classroom, and in Fall 2019, he was late twelve times. SD 18, p. 1. He also was absent 22 days between the start of school in the fall and November 22nd. *Id.* The student received three out-of-school suspensions for physical aggression towards his peers and one in-school suspension in November 2019. SD 11, p. 3.
23. On November 19, 2019, the IEP team met to review evaluation results and discuss the student's progress and placement. SD 16, p. 1. The mother attended the meeting. *Id.* The student had difficulties in all academic areas: on the Star Early Literature assessment, his grade equivalent score was 0.0; he knew 16/27 lower case letters and 17/27 upper case letters; he created his own story when reading, without looking at the words; he had difficulty writing; and, he was unable to complete the Star Math pre-test. SD 16, p. 4. He could follow simple directions and ask for help when needed. *Id.* He had friends but sometimes acted like he was going to fight them. *Id.* He needed redirection to stay on tasks but did not always accept it. *Id.* His fine and gross motor skills were age-appropriate. *Id.*
24. Ms. R., the student's special education teacher, attended the November IEP

meeting. Testimony, Ms. R. She has a master's degree in special education. *Id.* Ms. R. reported that the student is aware of his academic delays and shuts down in small groups. *Id.* He does better in 1:1 instruction. *Id.* His behaviors escalate when he is required to do an unpreferred activity or sit for a long time. *Id.* The student's behaviors changed after the first month of school, and he became physically aggressive towards his teacher and had to be removed from the classroom. *Id.* His behaviors resumed when he returned to the classroom, including running at the other students and swinging at Ms. R. *Id.* He also had other disciplinary referrals. SD 11, pp. 2, 3; SD 12, p. 30. Ms. R. shared her concerns with the student's mother and testified that the mother said that "he has similar behaviors at home." Testimony, Ms. R. The student's behavior impacts his ability to learn. *Id.* He needs a small class that moves at a slower pace and has an individualized curriculum. *Id.* After reviewing the evaluation results, the district determined that the student has an intellectual disability and "would benefit from a functional curriculum" in the [REDACTED] program. SD 16, p. 30.

25. The student's behavioral problems escalated in [REDACTED] resulting in numerous restraints. On December 3, 2019, he hit staff "multiple times", kicked and scratched the teacher's arm, and then bolted out of the room. SD 17, p. 1. He was restrained on and off during the incident. *Id.* The parent was notified by telephone and in writing. SD 17, p. 2. He was restrained again on January 28, 2020. SD 17, p. 7. Before the restraint, he had thrown chairs and a desk at his classmates. *Id.* The classroom was evacuated because he "continued to throw furniture at staff." *Id.* The mother was notified by telephone. SD 17, p. 8. On January 30th, he did not want to leave the room and started throwing chairs. SD 17, p. 12. He was restrained for less than five minutes. *Id.* The mother was informed by telephone, and a written notice was sent. SD 17, p. 13. Other restraints occurred on February 5th, 6th, and 27th. SD 17, pp. 18-20; SD 17, pp. 24-26; SD 17, pp. 29-31.

26. The [REDACTED] social worker, Ms. T., observed the student in January 2019. Testimony, Ms. T. Ms. T. has a B.A. in social work, a M.A. in school social work and is also a licensed clinical social worker. *Id.* She began working with the

student in late January and saw him twice in the [REDACTED] program. *Id.* The first time, he was asleep in the classroom, and the second time he was in time-out, following a behavioral episode in the classroom. *Id.* The student did not want anything to do with her and would not talk about his behavior. *Id.* Ms. T. stated that the students in [REDACTED] have low cognitive skills, are non-verbal, and/or have autism. *Id.*

27. The IEP team, including the mother, met again on February 4, 2020. SD 20. The district reviewed the student's aggressive behaviors, which were impacting his educational progress. SD 20, pp. 6-11. The district also reviewed three programs: [REDACTED] School, which had been his prior placement; [REDACTED] his then current program; and the ED program at [REDACTED] School. SD 20, p. 28. All district staff supported the change to the ED program. *Id.* The proposed placement focuses on teaching students social/emotional and behavioral skills. *Id.* Each teacher has three aides, and the social worker works with the students individually and in social skills groups. *Id.* The mother did not want him to move to another program. *Id.* The district agreed to provide a 1:1 aide for the student, refer him to the social worker, and too meet again in two weeks. SD 25.

28. As agreed, the IEP met again on February 18, 2020. SD 21, p. 1. The mother had visited [REDACTED] School and wanted the student to remain in his then-current [REDACTED] placement. *Id.* She was concerned that he was "missing many academics" and did not like his having "been moved so much." *Id.* The student's teacher did not think he was benefitting academically or socially from [REDACTED] because his academic and social needs were higher than his [REDACTED] peers, who were "functioning at the PREK level and non-verbal". *Id.* The district agreed to implement the IEP with an aide until spring break, after which they would meet again to review the student's needs. SD 21, p. 25.

29. The IEP team met again on March 6, 2020 to review the student's educational placement. SD 23, p. 1. The student had been placed in the [REDACTED] program due to his low testing scores and although he received functional academics in [REDACTED] his behaviors continued and were a priority. *Id.* The IEP team

reviewed the student's goals and determined that he was not making progress on his reading and social-emotional goals. SD 23, pp. 6, 12. The district proposed placing the student in the [REDACTED] Special Education Center's ED program. SD 23, p. 21. The proposed placement would include a classroom aide for the student, a BIP, counseling for 90 minutes/week, and special transportation. *Id.* The mother had visited the program and thought it was a good program; however, she did not want the student to switch in the middle of the school year. SD 23, p. 30.

30. Ms. G., the teacher for the proposed program, attended the March 6th IEP meeting and discussed her program. SD 23, p. 30. Ms. G. has a B.A. in special education and a LBS 2. Testimony, Ms. G. She also is CPI certified. *Id.* Ms. G. teaches all subjects, both academics and behavior/self-regulation skills. *Id.* Her classroom has three aides and eight students. *Id.* Although all the students in the class are in third grade, they are not all on a third grade academic level. *Id.* Ms. G. has a "proactive approach" to her classroom, which includes the use of positive incentives, social skills instruction, and a calming corner. *Id.* She provides her cell phone number to the parents of all of her students, and she speaks weekly with each of the parents. *Id.* The classroom day begins with a morning meeting, in which a student acts as the teacher, asking questions and being in charge of the classroom. *Id.* This gives the student control, and all the children enjoy it. *Id.* She uses zones of regulation to help the students learn about their emotions: green is ready to go; yellow is had a rough morning; and, red is off the deep end. *Id.* This helps the students understand themselves and learn self-regulation. *Id.* The students need to see school as a place of security and safety and know that they are cared about in the school environment. *Id.* The use of "I Can" statements, such as "...be a good person/friend/do anything I want/be successful" gives the students positive reinforcement. *Id.* A school social worker, Mr. T., is in the room on a daily basis and also delivers a weekly lesson, which Ms. G. reinforces. *Id.* Each child has a behavior chart, which is updated on a daily basis. *Id.* The children work in small groups, and 1:1 assistance is available when necessary. *Id.* The group work helps the students learn how to work in a group. *Id.* The student would have a 1:1 aide at the

beginning. *Id.* The classroom is “very structured and organized,” and a schedule is posted. *Id.* The students are told when something unusual, such as a fire drill, is going to happen so that they can prepare themselves. *Id.* Ms. G. has reviewed the student’s BIP and opined that the token system would not be needed for long in her classroom. *Id.*; SD 23, p. 19. Bullying is not a problem because there are always adults around the children, including in the bathroom. *Id.* If a student is out of compliance, Ms. G. puts the student at a desk near her. *Id.* She uses verbal positive reinforcement with her students. *Id.* All the staff are CPI trained. *Id.* New students frequently have a short period in which they try the staff until trust is built. *Id.* She expects that once the student’s behavior is under control, his academics will go up. *Id.*

31. The ██████████ program ED program is supervised by Ms. B. Testimony, Ms. B. Ms. B. has a M.A. in communication disorders and educational leadership and is working on her Ph.D. *Id.* She attended three of the student’s IEP meetings: November 19, 2019; February 2, 2020; and, March 6, 2020. *Id.* The student’s behaviors in the ██████████ program were “continuous” and “aggressive” and interfered with his ability to complete his academic work. *Id.* The student needs a program with structured social/emotional supports to address his “behavior deficit.” *Id.* The ED program recommended at the March 2020 IEP meeting is an academic-based program that would work on his “learning gaps”; thus, the program would meet both his emotional and cognitive needs *Id.* He must complete learning standards to progress to the next grade, which means that he must learn the academic skills that he is missing. *Id.*

32. The parent filed her due process complaint on March 12, 2020, six days after the IEP meeting.

33. The district’s COVID-19 remote learning plan was put into effect in April. SD 24. The district contacted the mother on April 7, 9, 14, 15, 16, and 20 and May 5, 12, 14, 18, and 26; however, the mother did not respond. *Id.* The mother did participate on April 2, 8, 20, 21, 27, 28, and May 4, 11, and 19. *Id.* The student participated on April 20 and 28, May 5, 11, and 19. SD 24- 2, 3. *Id.*

STATUTORY FRAMEWORK

The purpose of the IDEA is to ensure that all children with disabilities receive a free appropriate public education and related services “designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C. §1400(d)(1)(A). A district must comply with the IDEA’s procedural and substantive requirements in order to provide a free appropriate public education (FAPE) to a student. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176 (1982) (“Rowley”). To meet its substantive obligation, a district “must offer an IEP reasonably calculated to enable the student to make progress in light of the student’s circumstances.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001; 69 IDELR 174 (2017) (“Andrew F.”).

Once a student is determined eligible for special education and related services, the school district must develop an individualized education program (IEP) for the student. 20 U.S.C. §1414(d). Special education is specially designed instruction to meet a student’s unique needs. 34 C.F.R. 300.39(a)(1). The IEP must include a statement of the student’s present level of academic achievement and functional performance (PLOP), measurable annual goals that will meet the student’s needs, a description of how the student’s progress toward meeting the annual goal will be measured, and a statement of the special education and related services that is to be provided to the student. 20 U.S.C. § 1414(d)(1)(A)(i)(I), (II), (III). If a student’s behavior impedes his learning or that of others, the IEP team must “consider the use of positive behavioral interventions and supports, and other strategies” to address the student’s behavior. 20 U.S.C. §1414(d)(3)(B)(i). A student’s IEP must be reviewed at least annually and revised as appropriate to address any lack of expected progress toward annual goals and in the general curriculum. 20 U.S.C. §1414(d)(4)(A).

CONCLUSIONS OF LAW

Based on the above factual findings, the parties’ arguments, and relevant case law, the hearing officer’s legal conclusions are as follows:

Whether the student's current placement in the [REDACTED] program, which is run by the special education cooperative, offers the student a free appropriate public education (FAPE) in his least restrictive environment (LRE):

The student began second grade in a general education classroom with special education instruction in reading and math provided in the classroom and counseling services. ¶ 11. He had difficulty with the academic work and then engaged in activities that disrupted the classroom and were, at times, aggressive. ¶13. The teacher's strategies that had been put in place were only successful "at times." *Id.* The chronic and severe nature of his behavioral incidents impacted his academic progress; therefore, the district conducted a comprehensive re-evaluation, including: a functional behavioral assessment, with observations of the student and questionnaires for his teacher to complete; assessments of the student's academic achievement, functional performance, and cognitive functioning; and, a speech-language assessment. ¶16-20. The evaluations were conducted by qualified, credentialed professionals. ¶16, 18, 20. The district reviewed the evaluation results with the mother on November 19, 2019. ¶ 22. The IEP team determined that he needed a functional, individualized curriculum and changed his placement to the [REDACTED] program. ¶ 23.

A child may only be segregated from his non-disabled peers when the "nature or severity of the handicap" is such that integration with the use of supplementary aids and services "cannot be achieved satisfactorily." 34 CFR 300.114(a)(2); *Beth B. v. Mark Van Clay and Lake Bluff School District #65*, 282 F. 3d 493, 498; 36 IDELR 121 (7th Cir. 2002). In *Beth B.*, the parents argued that any change in placement would violate the LRE requirement if the student was receiving "any benefit." *Beth B.*, 36 IDELR 121, p. 4.

The evidence shows that the student's behavioral problems continued in the [REDACTED] program and impacted his educational progress. ¶ 26, 27. He was restrained numerous times for aggressive behaviors directed at his teachers and peers. ¶ 24, 26. The district took reasonable measures to address the student's behavioral and emotional needs by adding a 1:1 aide and social work services to his IEP at the February 18, 2020 meeting. ¶27; *Davis v. District of Columbia*, 69 IDELR 218 (D.D.C. March 23, 2017). Despite these interventions and services, the student's behavioral problems

continued. Moreover, he was not benefitting academically in the program because his classmates were functioning at a lower academic level and were non-verbal. ¶ 28. The evidence supports a finding that the ██████████ was not providing the student a free appropriate public education in his least restrictive environment.

Whether the district's proposed change of placement for the student, from the ██████████ program at ██████████ School in ██████████ to a program for students with emotional disabilities (ED) in ██████████, would deny the student a free appropriate public education (FAPE) in his least restrictive environment (LRE):

The evidence clearly shows that the student's emotional and behavioral difficulties were impacting his academic progress. ¶ 13, 16. Despite the development and implementation of a BIP and numerous disciplinary measures taken by administration, the student's behavioral problems continued throughout the ██████████ program and impacted his ability to make academic progress. ¶ 24, 25, 27. Moreover, because of the numerous restraints the student had, the district was required to review the BIP and consider whether student needed a change in program. 23 IAC § 1.285(4); ¶ 25.

The parent has shown no evidence that the proposed placement would not meet the student's educational and emotional needs. While her concern about another change in her son's educational placement is understandable, it does not outweigh the district's obligation to provide a placement that is reasonably calculated to enable the make educational progress in light of his circumstance. The evidence shows that the ED program is fully equipped to meet the student's cognitive and emotional needs. ¶ 31. It is a program for students with social/emotional and behavioral problems. ¶ 27. The students in the program receive instruction in academics, social skills, and behavior/self-regulation skills. ¶ 29. The students work in small groups and also have 1:1 instruction, geared to their academic levels. *Id.* The student would have a 1:1 aide when he starts the program. *Id.* The IEP and placement therein is reasonably calculated to enable the student to make progress in light of his circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001; 69 IDELR 174 (2017).

Whether the student was bullied at school in kindergarten and first grade and if so, whether that denied the student a FAPE:

The parent's only specific allegation of bullying arises from one incident that occurred on September 17, 2018, when the student was in first grade. ¶ 7. Other references during the hearing to bullying were vague and not proved; thus, they are not considered in this decision. The district first raised a concern about the timeliness of this issue in its closing statement, asserting that the allegation is beyond the IDEA's two-year statute of limitations (SOL). The district did not file a motion prior to the hearing requesting that this issue be dismissed. The district's objection to the timeliness of this issue is overruled.

A bully-victim relationship exists when there is real or perceived imbalance of power and a variety of negative acts are carried out repeatedly over time. T.K. and S.K. ex rel L.K. v. New York City Dep't. of Educ., 779 F.Supp. 289, 299 (E.D.N.Y. 2011). The court's extensive and thoughtful analysis of bullying and its impact on students with disabilities provides a framework for analyzing allegations of bullying. Bullying, which is distinguished from horseplay by an "unequal and cohesive power," may be physical, verbal or psychological. *Id.* at 299. To be actionable, it must be "sufficiently severe, persistent, or pervasive so that it creates a hostile environment." *Id.*, p. 317. The court also looked at whether school staff were deliberately indifferent to the incidents or failed to take reasonable steps to prevent the bullying. *Id.* A school must take prompt and appropriate action, including investigation of the alleged incidents. *Id.*

Illinois courts have held that in the right situation, bullying is actionable and that "at least in principle relief is available under the IDEA." Kuhner and Estate of J.K. v. Highland Community Unit School District No. 5, 116 LRP 26033, p. 6 (S.D. Ill June 14, 2016); Charlie F. ex rel Neil v. Bd. of Educ., 98 F.3d 989, 993 (7th Cir. 1996). A parent must show that the bullying resulted in the child not receiving a meaningful educational benefit. Office of Special Education Programs, *Dear Colleague Letter*, 61 IDELR 263 (August 20, 2013).

The evidence shows that the September 7, 2018 incident in which the student was injured outside on the playground during recess was an isolated incident, and the parent has produced no evidence to the contrary. ¶ 7. Although the student did have a mark on his forehead, he did not have any bleeding or bruising. *Id.* The district tried to contact the mother and when it could not, it left her a telephone message, as required by its policy on bullying. *Id.*; ¶ 9. Pursuant to the mother's request, the district arranged a meeting between the mothers of the two boys and also arranged for the student to stay inside the school. *Id.* While the mother's concern about the injury is understandable, the evidence shows that this was an isolated incident and that school staff took reasonable steps to prevent another incident. Additionally, the parent has produced no evidence showing that the playground incident resulted in the student not receiving meaningful educational benefit or being denied a free appropriate public education. No evidence of bullying in kindergarten was offered. Based on the foregoing, the hearing officer finds that the student was not bullied at school in kindergarten or first grade.

IT IS ORDERED THAT: the district may proceed with the placement in the [REDACTED] ED Program and shall convene an IEP meeting to develop an IEP reflecting that placement and goals and services for the student in that program.

ORDER

Within forty-five (45) days of receipt of this Order, School District shall submit proof of compliance to:

Illinois State Board of Education
Program Compliance Division
100 North First Street
Springfield, Illinois 62777-0001

RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of

receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party(ies) and the Illinois State Board of Education. After a decision is issued, the hearing officer may not make substantive changes to the decision. The right to request such 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.

Right to File Civil Action

This decision is binding on the parties unless a civil action is timely commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

ISSUED: October 5, 2020

Mary Schwartz
Due Process Hearing Officer

CERTIFICATE OF DELIVERY BY CERTIFIED MAIL

The undersigned hereby certifies that a true and correct copy of the Decision and Order was sent by certified mail with return receipt from Chicago, Illinois, and directed to:

[REDACTED] 8
[REDACTED]

[REDACTED]

Mr. Andrew Eulass
Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

On October 5, 2020.

[REDACTED]

Mary Schwartz
Due Process Hearing Officer