

DC Office of the State Superintendent of Education

Office of Review & Compliance

Student Hearing Office

1150 5th Street, S.E.

Washington, D.C. 20003

CONFIDENTIAL

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| <p>STUDENT¹, by and through Student's Parent</p> <p>Petitioners,</p> <p>v.</p> <p>DCPS</p> <p>Respondent.</p> | <p>2012 JUN 29 AM 9:00</p> <p>DSSE STUDENT HEARING OFFICE</p> <p>HEARING OFFICER'S DETERMINATION</p> <p><u>Impartial Hearing Officer:</u> Joseph Selbka</p> |
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

to provide regular behavioral support inside and outside the classroom with a social worker and frequent communication between home and school for consistency between environments; failed to provide occupational therapy services; failed to implement Student's behavioral intervention plan; and failure to provide a qualified substitute teacher; failed to restrict Student's use of the internet including access to inappropriate websites; failed to use effective therapeutic modalities to change Student's emotional response to redirection and delay of gratification; failed to properly represent classwork and homework so as to properly document progress for Student; failed to implement the BIP properly by giving Student candy as a reward.

Issue #2- Whether the Student's IEP has reasonably been designed to provide Student with an educational benefit as: (1) the IEP does not contain a requirement for art therapy; and (2) the IEP does not provide Student with sufficient speech and language related services.

Issue #3- Whether the District: (a) failed to develop a functional behavioral analysis and failed to develop a BIP as required by law and/or (b) failed to revise a functional behavioral analysis and BIP as required by law.

Issue #4- Whether the District refused to allow parent and parent attorney observations of Student in the classroom and whether this refusal is a procedural violation of IDEA.

Issue #5- Whether the District refused to allow parent and parent attorney observations of Student in the classroom without notice and whether this refusal is a procedural violation of IDEA.

Issue #6- Whether the District has failed to provide Parent with a way to determine whether Student's teachers are properly credentialed and whether this is a procedural violation of IDEA.

Issue #7- Whether the District created documents regarding an IEP/MDT meeting which never occurred and whether this is a procedural violation of IDEA. Whether the District continued in referencing the disputed IEP/MDT meeting and the results thereof and whether these continued references constitute a procedural violation of IDEA.

Issue #8- Whether the District held an IEP/MDT meeting concerning eligibility without inviting Parent to the meeting and whether this is a procedural violation of IDEA.

Issue #9- Whether the District indicated in paperwork that Parent was invited to an IEP/MDT meeting and declined to attend while Parent was not actually invited to the meeting and whether this is a procedural violation of IDEA.

Issue #10- Whether the District misrepresented the credentials of Student's teacher to the Parent and whether this is a procedural violation of IDEA.

Issue #11- Whether the District has misrepresented the academic and social-emotional progress of Student and whether this is a procedural violation of IDEA.

Issue #12- Whether the District finalized Student's 2012 IEP without input from the Parent after Parent terminated an IEP meeting and whether this is a procedural violation of IDEA.

III. Findings of Fact

10. Student is a _____ year old currently in _____ grade at _____. For the 2011-2012 school year, he has been in a self-contained classroom with between five and seven other students. Over the course of the school year, the classroom has had between zero and two aides in addition to a special education teacher.
11. Student has multiple, severe disabilities. Student has multiple learning disabilities (expressive language disorder, disorder of written expression, mixed expressive/receptive language disorder) post traumatic stress disorder ("PTSD"), and attention deficit hyperactivity disorder _____ Testimony) (P-30, pg. 12).
12. Student's disabilities manifest themselves in the form of anxiousness and hyper-arousal, self-stimulation through humming and noise; impulsivity; a difficulty to remain seated and attentive; he has anxiety and fear of his surroundings; Student has problems processing verbal language and putting his thoughts into words; problems with fine motor skills (especially writing ability); understanding directions, language, and questions delivered verbally; formulating good written statements and written responses; problems with executive functioning _____ Testimony, _____ Testimony).
13. _____ was the first professional to diagnose Student with a mixed expressive receptive language disorder which, according to SWH, requires a need for speech and language services. This diagnosis occurred in March, 2012 (SWH Testimony).
14. Because of Student's multiple disabilities, he requires multisensory and multimodal instruction wherein learning is experiential and delivered in multiple ways rather than having information delivered mainly verbally _____ Testimony). Student needs instructions broken down in small pieces and supported by visual cues or written cues _____ Testimony). Student's instruction in written language must be broken down in very small steps because writing is very difficult for Student _____ Testimony). Student should also be taught math in very small groups _____ Testimony).
15. _____ admitted in testimony that previous evaluations and mental health professionals have provided different medical and psychological diagnoses than the diagnoses SWH ultimately came to in her evaluation _____ Testimony). _____ also admitted that the modalities for educating Student would be different in light of the various diagnoses _____ Testimony).
16. _____ observed Student in the classroom in January, 2012, and was able to observe Student for approximately one hour _____ Testimony). _____ was denied the right to further observations in March, 2012 _____ Testimony). In his observation, _____ noted that _____ ignored several outbursts from Student and observed that Student rarely paid attention in class while observing Student _____ Testimony). _____ also observed Student harassing other students with a ruler _____ Testimony). According to _____ failed to redirect Student and failed to intervene when Student harassed other students and failed to

pay attention in class (Testimony). According to (Testimony) also failed to intervene when Student put his head down on his desk (Testimony).

17. (Testimony) testified that ignoring is sometimes an appropriate strategy for dealing with disabled students like Student. (Testimony) also testified that putting his head down in class could have been a form of self-regulation.

18. (Testimony) finally opined that Student needs a clinical presence in the school who is able to address his needs on a rapid basis because of the severity and nature of Student's disabilities. According to (Testimony) Student needs a licensed social worker or psychologist in or near Student's classroom. Also, according to (Testimony) Student needs two experienced educators (either two special education teachers or a designated aide and a special education teacher) in a classroom of 4-5 students with similar disabilities. Specifically, Student needs more interventions and more redirection in order to obtain a reasonable educational benefit (Testimony). SWH, on the other hand, opined that Student only needs a 4:1 ratio of students (with similar disabilities) to each teacher (P. Ex. 30, pg. 12). Neither (Testimony) nor SWH are school psychologists, however, both have significant experience in evaluating students and recommending educational placements for students with disabilities and (Testimony) has also tutored and worked with teachers for intervention plans and academic plans for disabled students (Testimony).

19. (Testimony) also opined that it would require between 48 and 72 hours of tutoring to give Student the necessary educational benefit which he missed in academic work as a result of the lack of an appropriate classroom environment.

20. Student was placed in (Testimony) after a settlement agreement was executed on March 3, 2011. Student's guardian ad litem signed the agreement on his behalf (P Ex. 12). Pursuant to the settlement agreement, Student's IEP for the 2011-2012 school year was created and signed, again by Student's guardian ad litem (P Ex. 12; P. Ex. 5, pg. 1; P. Ex. 6, pg. 1). Neither the settlement agreement nor any IEP mentions art therapy as a requirement for Student (P. Ex. 5, P. Ex. 6, P. Ex. 12).

21. Student's guardian ad litem is a practicing attorney (JK Testimony) .

22. At hearing, Student's expert witnesses, testified that art therapy was not the sole reasonable methodology for addressing Student's social and emotional needs (Testimony, SHW testimony). (Testimony) testified that the District's therapy regime appeared reasonable. DHW testified that play therapy was an acceptable methodology for providing Student with the social and emotional services required by the IEP (SHW Testimony).

23. Prior to the 2011-2012 school year, Student was screened for a need for speech and language services and was found not to need said services by the District (LB Testimony). The Parent presented no evidence at the hearing challenging that screening evaluation. Parent also did not request the appropriateness of that screening evaluation as an issue for hearing (Prehearing Order). Parents' own witness, CDM, testified that it would be difficult for teachers to discern the need for speech and language services given the nature of Student's disabilities, and that a formal evaluation would be the

only way to definitively determine the need for speech and language services in Student's case (CDM testimony).

24. At IEP meetings in April, May, and November, 2011, the Parent never presented the need for speech and language services (LB Testimony).

25. In March, 2012, Parents had independent evaluations completed. Parents' independent evaluators concluded that Student needed speech and language related services. On April 30, 2012, Parents, through counsel, affirmatively refused to turn over the independent evaluations to the District prior to the mandatory disclosure date in this due process litigation (District Ex. 20).

26. Student is entitled to occupational therapy pursuant to his IEP. During the course of the 2011-2012 school year, Student often had emotional meltdowns as a result of his disabilities. Student would often refuse to leave the classroom rather than leave to receive occupational therapy. Some occupational therapy services sessions had to be cancelled and rescheduled because of this (DS testimony). The District occupational therapist also would provide occupational therapy services in the classroom and/or with other related services providers in order to accommodate the above stated manifestations of Student's disabilities (Testimony).

27. Student is provided play therapy by the District's social worker assigned to (Testimony).

28. Student is provided frequent breaks, 1:1 assistance; tasks are broken down for Student; and there is a cool-down area in the classroom if Student needs it (Testimony).

29. There was no evidence or need for time outs for Student by (Testimony).

30. is assigned to the school and available for interventions should Student have an immediate need for a social worker due to an emotional crisis (Testimony).

31. is Student's current teacher. is certified to teach special education and is "highly qualified" in the area of elementary education (Testimony). While the Parents challenge these facts, they presented no evidence to the contrary other than a letter mistakenly sent by the District stating that is not highly qualified. The District quickly informed all parties that this letter was sent in error (LB Testimony). Given that this is the only evidence of a lack of qualifications, and the District's overwhelming evidence that is certified as a special education teacher, the undersigned makes a credibility finding in favor of the District that is certified to teach special education.

32. The Parents claim that they were unable to obtain information as to the certification status of. However, Parents' counsel was able to obtain a computer printout of qualifications and certifications and attached it as an exhibit for hearing (P Ex. 10, Parent Counsel admission)

33. Student has an outside social worker, SA, appointed by the District of Columbia. The District only allowed the social worker to visit Student at school once, and thereafter the District refused to allow SA to observe Student (SA Testimony). The District has allowed one observation by but the District

has not allowed additional observations by _____ whenever requested. The District has not allowed the Student's independent evaluator, _____ to observe Student _____ testimony). The District does not allow the Parents to observe Student in the classroom (Parents' Testimony, _____ Testimony, District Response). The District also has not allowed observations without notice (Parents' Testimony, _____ Testimony, _____ Testimony, District Response).

34. The Student has a behavior intervention plan (D Ex. 5) which was completed on or about November 4, 2011, and then reviewed on or about November 15, 2011 (P2, pg. 26-28). The BIP encouraged the District staff to emphasize rewards over punishments (P2, pg. 27). The BIP also allowed for District personnel to change the rewards to obtain behavioral change in Student (P2, pg. 28).

35. The behavior intervention plan gives the District personnel a number of options when Student fails to behave properly at school (P2, pp. 26-28; D-5, pg 5-2). One of the consequences is/was reduction of independent computer time and/or personal time (*id.*). The websites available to students during their personal computer time contain primarily educational games and violent games are not allowed _____ Testimony).

36. The District has implemented a point system wherein Student has points deducted from his total whenever Student exhibits unacceptable behaviors _____ Testimony). High point totals result in rewards to Student including candy or extra computer time _____ Testimony). _____ is responsible for awarding or deducting points under most circumstances during the school day _____ Testimony). A review of the points sheets indicate that _____ has generally awarded Student high scores for his behavioral points over the course of the year _____ tetimony). This has occurred despite several circumstances where Student refused to leave class to obtain related services. _____ admitted that his philosophy is to use positive reinforcement and redirection extensively prior to using negative consequences to obtain compliance from Student _____ Testimony). The Parents strenuously disagree with this approach and believe that _____ should be more proactive with negative consequences when Student acts out in the classroom _____ Testimony).

37. There was a qualified substitute teacher for two days in January, 2012, in Student's class (D. Ex. #1, pg. 1-2). Parents presented no evidence to the contrary during the hearing.

38. The Parents consented to a second functional behavioral assessment in December, 2011 (LB testimony). The District desired to conduct a new functional behavior assessment because the old BIP needed to be updated _____ Testimony). A second functional behavioral assessment and revised behavioral intervention plan was completed on or about March 21, 2012 (Dist. Ex. 3). The District conducted further functional behavior assessments in April, 2012 (Dist. Ex. 4) so as to better measure Student's progress _____ Testimony). After the due process complaint was filed, the Parents never consented to any amendments to any behavioral intervention plan _____ Testimony).

39. In implementing the requirements of Student's IEP, _____ has used rewards such as allowing computer time as to approved websites (including game websites) and given candy to Student _____ testimony).

40. is aware of the behavioral intervention plan in its various iterations and the November, 2011 IEP Testimony). He has implemented the behavior intervention plan, and when the revised behavior intervention plan was completed with input, he implemented the revised BIP Testimony).

41. Student's IEP at the time of the filing of the due process complaint ("The November, 2011 IEP") contained a requirement for a 1:1 designated aide (District Ex. 7, pg. 7-8). The District contends this is/was an error on the IEP (LB Testimony). However, the District never corrected the IEP or attempted to correct the "error" in the IEP which listed a 1:1 designated aide as a required accommodation for Student Testimony).

42. Student has never been provided with a designated 1:1 aide while at Testimony). For several periods during the 2011-2012 school year, there was no aide for Student's class Testimony; Testimony).

43. Student receives nondirective and directive play therapy in either group or individual milieus testimony). The play therapy uses multiple modalities within the play therapy auspices which moves from developmental to gestalt testimony). determines the modalities to be used based upon constant ongoing assessment of Student Testimony).

44. Student has been making progress on his IEP goals in social emotional development (D. Ex. #12, pg. 3). Progress is measured through observations by feedback from staff, the behavior point system, and formal assessment Testimony). Student has been able to increase prosocial interaction with his peers and with adults; makes eye contact more regularly with others; Student's impulsivity has decreased; Student can remain seated for a longer period of time Testimony). Student is now generally following the rules and behavioral system put in place by the classroom teacher Testimony).

45. Parents claim that a questionnaire filled out by and indicate a lack of progress and that Student has serious emotional issues. The undersigned disagrees. The District has never claimed that Student is "fine" or does not need special education Testimony). testified the nature of Student's disability will mean he will always need extensive supports to receive a benefit from school. Rather, the District is claiming that Student is making progress in social and emotional development Testimony).

46. had difficulties in providing social and emotional services to Student because of the nature of his disabilities Testimony). Much of time with Student early in the school year was devoted to developing a rapport with Student Testimony). Moreover, sensory issues were very problematic given the manifestations of Student's disabilities Testimony). Specifically, Student is often overstimulated.

47. Student's IEP requires a "therapeutic setting." The Parents' expert witnesses and testified that this meant a setting with significant support and redirection and a psychologist or social worker on site in order to intervene when Student has an emotional outburst and testimony). In order to implement this therapeutic setting in a class with 5-7 students, Student needs

either a dedicated aide or a small class with two special education teachers testimony). admitted that there is no accepted definition of a therapeutic environment and a therapeutic environment depends on a student's unique needs and strengths and weaknesses Testimony). The District provided no definition of a therapeutic environment.

48. Student's has made some academic progress at Testimony). Towards the end of the school year, a District standardized math test (A Net) showed significant improvement in the latter part of the school year Testimony, Dist. Ex. Pg. 10-3). Student has also showed improvement in oral fluency reading Testimony Dist. Ex. Pg. 10-4, Testimony). also testified that Student is making progress on nearly all of his academic IEP goals Testimony).

49. Student is slightly below grade level in reading (Dist. Ex. Pg. 10-4; P-30, pg. 9), and significantly below grade level in math (equivalent to Grade 1.7) and writing (equivalent to Grade 1.3) (P-30, pp. 9-10). However, by March, 2012, Student has made significant academic progress since October, 2010 (P32 pp. 1-5). In October, 2010, Student was below Kindergarten level in math and at kindergarten level in reading (P-32, pg. 4). Moreover, in October, 2010, Student's behaviors interfered so much with the test taking that the October, 2010, evaluator could not even evaluate Student in broad writing skills (P-32, pg. 4). Parents' contention in their closing argument that the recent independent evaluations when compared to previous evaluations show "virtually no academic progress" (Petitioner's closing argument, pg. 1) is untrue. testified that acceptable progress would be approximately one school's year grade level for every school year Student attended school (SWH Testimony).

50. The Parents also provided testimony of their subjective belief that Student was not obtaining an educational benefit at Bruce Monroe. However, as discussed in this section, Parents' beliefs are not supported by objective evidence (other than a short observation by The District and the Parents presented significant objective evidence that Student is progressing academically and behaviorally.

51. Parent's own expert, testified that Student could not be at grade level given the number and severity of Student's disabilities Testimony).

52. The Parents also contend that the Student has not made behavioral and therapeutic progress, specifically, a failure to implement the behavioral intervention plan.

53. In April, 2012, the District attempted to revise Student's IEP (D. Ex. #10). The Parents never agreed to the changes in the IEP (AD Testimony). has implemented the April, 2012 IEP despite the fact that this matter is in litigation (SC Testimony). The April, 2012, is very similar to the November, 2011, IEP (Compare D. Ex. 7 and 8 with D. Ex. 10).

54. Several District documents contain a reference to an eligibility meeting on February 2, 2012. There is no evidence other than the documents that such a meeting ever occurred. The District stated in its response that the documents were sent in error (D. Ex. 1, pg. 3). CR testified that he knew that the meeting had not gone forward despite the District documents to the contrary (CR Testimony).

55. Parents and the District have not communicated regularly since this litigation began (CR Testimony; DM Testimony; SC Testimony; LB Testimony). Parents have not attended teacher-parent consultations (CR Testimony; SC Testimony). Prior to the litigation, Parents communicated with SC and DM fairly often. Parents have received Student's point sheet on a regular basis (CR Testimony).

IV. Conclusions of Law

Conclusions Related to the Burden of Proof and the Authority of the Hearing Officer

56. The Federal and State Special Education Laws are set out in the Individual with Disabilities Education Act, 20 U.S.C.A. 1400 *et seq.* ("IDEA") and in the District of Columbia Municipal Code. In enacting IDEA, Congress intended to establish a "cooperative federalism." *Evans v. Evans*, 818 F.Supp.1215, 1223 (N.D. Ind. 1993). Compliance with minimum standards set out by the federal act is necessary, but IDEA does not impose a nationally uniform approach to the education of children with a given disability. *Id.* Thus IDEA does not preempt state law if the state standards are more stringent than the federal minimums set by IDEA. *Id.*

57. In regard to the burden of proof in a special education proceeding, the Supreme Court has held that the ultimate burden of persuasion lies with the party filing the due process complaint. *Schaffer v. Weast* 546 U.S. 49 (2005). The parents must prove their case by a preponderance of the evidence.

58. In determining whether a placement is proper under IDEA, the hearing officer does not need to defer to the school district witnesses. *School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002); *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167 (7th Cir. 1994)(hearing officer characterized as expert witness in determining whether placement is proper).

This power is important because a clinical psychologist expert witness cannot prescribe educational placements (while wearing his/her hat as a clinical psychologist) (See *e.g. Marshall Joint School District No. 2. v. C.D. ex rel Brian D.*, 616 F.3d 632, 638-642 (7th Cir. 2010) (medical doctors not entitled to prescribe special education), and *M.B. v. Hamilton Southeastern Schools*, 58 IDELR 92, 668 F.3d 851 (7th Cir. 2011)(psychologist opinions, while important are not equal to that of teachers or other professional educators as psychologists are generally not trained educational professionals). However, a hearing officer can override a school district's proposed placement after receiving pertinent psychologist testimony. Specifically, a hearing officer can use his/her special expertise regarding special education and special education law to draw inferences as to the appropriate placement under the law—after taking into account the physical and psychological manifestations and symptoms of any given disability as testified to by a psychologist expert. *School District of the Wisconsin Dells v. Z.S.*, *supra*; *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, *supra*. See also *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1053-1054 (7th Cir. 1997)(hearing officer characterized as having special expertise in special education law). See also *Marshall Joint School District No. 2. v. C.D. ex rel Brian D.*, 616 F.3d 632, 640 (7th Cir. 2010) (a medical expert's diagnosis is important evidence and should be considered by the IEP Team and, by extension, hearing officers, in determining a student's special education placement).

59. In administrative proceedings, hearsay is admissible as long as it is relevant and material. *Otto v. Securities and Exchange Commission*, 253 F.3d 960, 966 (7th Cir. 2001). To the extent hearsay is admitted without objection, the evidence can be given its natural weight. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 Ill.App.(2d) 100,610 (2nd Dist. 2011); *Sykes v. District of Columbia*, 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

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

61. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Smith v. Tri-R Vending*, 249 Ill.App.3d 654, 661 (1993). Hearing officers can make reasonable inferences from the evidence adduced at hearing. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Moreover, any inference a hearing officer makes must be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support his/her conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

62. Expert opinions are admissible if the experts are considered qualified under a relaxed standard similar to the *Daubert* standard used in the federal courts. *Pasha v. Gonzalez*, 433 F.3d 530, 535 (7th Cir. 2005). To the extent the hearing officer relies upon expert opinions, the expert opinions must be inferred ultimately from facts in the record, and the inferential process by which an expert reaches his/her conclusions must be fully explained. *Zamecnik v. Indian Prairie School District No. 204*, ___F.3d___, 2011 WL 692059 (2011) (expert testimony must be grounded by material facts in the record and the inferential process by which an expert reaches his/her conclusions must be fully explained in the record); *Mid- State Fertilizer Co. v. Exchange National Bank of Chicago*, 833 F.2d 1333, 1339-1340 (7th Cir. 1989)(in litigation, expert opinions must be grounded in facts and inferred from a process of logical reasoning).

63. In determining whether an expert is qualified on a specific subject matter, education, experience, or other training can provide the appropriate qualifications for an expert. See *Fox v. Dannenberg*, 906 F.2d 1253, 1255 (8th Cir. 1990) and *United States v. Briscoe*, 896 F.2d 1476, 1498-1497 (7th Cir. 1990). The test to determine whether expert testimony should be admissible is whether the expert has specialized knowledge and expertise in the area where the expert expresses his/her opinion. *Id.*

64. Hearing officers are entitled to and often need to make credibility findings. However, in such cases, hearing officers should provide reasons for why they found testimony credible or not credible. *Marshall*

Joint School District No. 2. v. C.D. ex rel Brian D., 616 F.3d 632, 638 (7th Cir. 2010). This is especially true where testimony is uncontradicted.

65. The IDEA also requires a decision based upon substantive grounds based on whether a child received FAPE. 20 U.S.C.A. 1415(f)(3)(i); *A.G. v. District of Columbia*. 57 IDELR 9, 794 F.Supp.2d 133 (D.D.C. 2011). This requirement imposes upon all administrative hearing officers the obligation to structure the hearing so as to properly make an administrative record. *Id.* As in most state administrative proceedings, District of Columbia impartial hearing officers have the power not only to listen to evidence presented by the parties, but to affirmatively find facts necessary to properly to determine which party should prevail under the law. *A.G., supra, Gill v. District of Columbia*, 751 F.Supp.2d 104 (D.D.C. 2010) (the educational needs of a special needs child cannot be forfeited by poor lawyering and an incomplete record); *See also*, Frank Cooper, State Administrative Law, Vol. 1, Bobbs-Merrill Company, Inc. (1965), pg. 336 .

In administrative litigation, the hearing officer must be concerned with not only ensuring a fair process wherein the parties can present evidence, but also a proper result under the law because there is a significant public interest in properly having the law carried out. Landis, John, "*The Administrative Process*," Yale University Press (1938) excerpted in Foundations of Administrative Law, Schuck, Peter (ed.) Foundation Press (2004), pp. 13-14. For this reason, administrative hearing officers are constitutionally permitted to depart from the adversarial model and independently obtain evidence and develop an administrative record while remaining a neutral and impartial decision maker. *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000); *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971) (social security administrative law judges constitutionally permitted to develop the record to determine all facts necessary whether benefits should be granted under law). . Hearing officers have authority to review and construe settlement agreements to the extent necessary to determine whether a student is being provided with FAPE and/or when construing a settlement agreement is inextricably linked with the issues presented for hearing in a due process hearing. *Springfield Local District Board of Education v. Jeffrey B.*, 55 IDELR 158 (N.D. Oh. 2010); *State of Missouri ex rel St. Joseph School District v. Missouri Department of Elementary and Secondary Education* 54 IDELR 124 (Mo. Ct. App. 2010); *Linda P. v. State of Hawaii, Department of Education*, 46 IDELR 73 (D.Hi. 2006).

Conclusions of Law Related to Design of IEPs

66. Student is entitled to an IEP designed to provide a Free Appropriate Public Education ("FAPE"). FAPE is defined as an educational placement reasonably calculated to provide Student with an educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The District need not provide a program designed to maximize Student's educational potential. *Id.* Rather, the District only needs to provide a program designed to produce substantial educational progress. *Id.*

67. An IEP team must thus develop an IEP which is reasonably calculated to provide the student with an educational benefit. *Board of Education of Henrik Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Alex R. v. Forrestville Community Unit School District No. 221*, 375 F.3d 603, 41 IDELR

146 (7th Cir. 2004). To do so, the IEP must be reasonably calculated to produce progress, not regression or trivial academic advancement. *M.B. v. Hamilton Southeastern Schools*, 668 F.3d 851 (7th Cir. 2011).

68. In determining whether IEP design is reasonable, a student's academic progress under the proposed IEP is evidence a hearing officer must consider. *T.H. v. District of Columbia*, 52 IDELR 216, 620 F.Supp.2d 86 (D.D.C. 2009). *Hunter v. District of Columbia*, 51 IDELR 34 (D.D.C. 2008). However, a lack of academic progress is not dispositive of whether the IEP has been reasonably designed to provide a student with FAPE. *Id.* See also *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18, 29 (1st Cir. 2008).

69. Specifically, when a hearing officer determines whether an IEP is reasonably designed to provide a student with FAPE, the hearing officer must judge the district based upon what the district knew or reasonably could have known at the time the IEP was drafted—not solely on whether academic progress occurred. *S.S. v. Howard Road Academy*, 51 IDELR 151, 585 F.Supp.2d 56 (D.D.C. 2008). See also *M.B. v. Hamilton Southeastern Schools*, 668 F.3d 851 (7th Cir. 2011); *Thompson RJ-J School District v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008); *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. East Hannover Board of Education*, 993 F.2d 1031, 1041 (3rd Cir. 1993); *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990).

70. Moreover, in determining whether an IEP is reasonably calculated to provide FAPE, the undersigned must defer to the District as to disputes among appropriate methodologies to educate the student. *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003); *G.D. v. Westmoreland School District*, 930 F.2d 942 (1st Cir. 1991); *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988). The District is entitled to choose among reasonable methodologies to provide a student FAPE, and the parent does not have the right to veto the district's reasonable methodological choices. *Id.* The reasonable choice of the school district as to methodology need not even need to be the best choice available. *G.D., supra*. Therefore, in this case, it is important to focus on the District's placement rather than on the placement at the Lourie Center which the Parents prefer (See *G.D., supra*, "The hearing officer was correct in focusing primarily on the District's placement, rather than on the alternative that the family prefers.").

71. Parents must participate in the IEP creation process in good faith and cooperate with District efforts to provide a student with FAPE. *Friedman v. Vance*, 24 IDELR 654 (D.MD. 1996). This duty to cooperate continues after the due process complaint has been filed. *Lesesne v. District of Columbia*, 44 IDELR 250 (D.D.C. 2005) *affirmed* 447 F.3d 828 (D.C. Cir. 2006). Thus, a district cannot be held responsible when it fails to include services and accommodations derived from evaluations which the parents intentionally withheld from the district. *Richardson v. District of Columbia*, 541 F.Supp.2d 346 (D.D.C. 2008).

72. A hearing officer need not accept school district claims as true regarding the reasonableness of IEP design, but neither should the hearing officer substitute his/her judgment for that of the school officials who have designed the IEP. *School District of the Wisconsin Dells v. Z.S.*, 295 F.3d 671, 37 IDELR

34 (7th Cir. 2002). The hearing officer determines reasonableness, not, what in a hearing officer's judgment, would be the best placement for a student. *Id.*

Conclusions of Law Related to Implementation of IEPS

73. Material violations of a student's IEP will be a denial of FAPE and a violation of IDEA for which a parent and student can obtain redress in a due process hearing. *Savoy v. District of Columbia*, 58 IDELR 129 (D.D.C. 2012); *See also Sumter County School District 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011); *Van Duyn v. Baker School District 5J*, 502 F.3d 811, 822 (9th Cir. 2007); *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1027, nt. 3 (8th Cir. 2003); *Houston Independent School District v. Bobby R*, 200 F.3d 341, 349 (5th Cir. 2000).

74. In determining whether there has been a material violation of the IEP, ". . .the focus is on the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld." *L.J. v. School Board of Broward County*, 58 IDELR 220 (S.D.FI. 2012), relying on and citing with approval, *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C. 2011).

75. A district must comply with the terms of the IEP to deliver FAPE *Board of Education of the City of Chicago v. Illinois State Board of Education*, 55 IDELR 133, 741 F.Supp.2d 920 (N.D. Ill. 2010). Therefore, ". . .The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail in an implementation failure claim, although the child's educational progress, or lack of if, may be probative of whether there has been more than a minor shortfall in the services provided." *L.J. v. School Board of Broward County, Supra, See also, Board of Education of the City of Chicago, supra.* The reason for this rule is to prevent a district from drafting an elegant IEP and then ignoring it until the parents can prove an educational harm. *Board of Education of the City of Chicago, supra.*

76. The District must implement the IEP as written, and cannot change the written requirements of the IEP without an amendment of the IEP by the IEP Team. *Independent School District No. 281 v. Minnesota Department of Education*, 48 IDELR 222, 107 LRP 56347 (M.Ct. App. 2007).

77. In considering whether an IEP is being implemented properly, the snapshot rule should not apply where a school district has discretion to change tactics and methodologies to provide a student with an educational benefit. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692 (10 Cir. 1998). An IEP is a program consisting of both the written IEP document and the subsequent implementation of that document. *Id.* The implementation of the IEP document is an on-going, dynamic activity, which must be evaluated as such. *Id.* Thus school districts cannot implement an IEP document in a way which is clearly failing. *Id.*

78.. However, just as the undersigned is required to defer to the District on reasonable methodological choices in creating an IEP, a District must be able to choose among different reasonable methodologies in making the day-to-day decisions on how to deliver the services and provide the accommodations listed in the student's IEP. *Independent School District No. 281, supra; Hiawatha School District No. 426*, 58 IDELR 269, #136 (Ill. SEA. 2012); *Belvidere Community Unit School District No.*

100, 108 LRP 42811 (Ill. SEA. 2008). A district is entitled to some flexibility in how to implement an IEP. *L.J. v. School Board of Broward County, Supra*

79.. Decisions on how and where to provide related services generally do not amount to material violations of an IEP. *Catalan v. District of Columbia*, 478 F.Supp.2d 73 (D.D.C. 2007). See also *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 348-349 (5th Cir. 2000). If there are good reasons for a violation of the technical terms of an IEP in providing accommodations and related services, this is not a material violation of the IEP. *Id.*

Conclusions of Law Related to Functional Behavior Assessments and Behavioral Intervention Plans

80. A functional behavior assessment, when not required by disciplinary removals, is an evaluation governed by the regulations and IDEA statutory sections on evaluations. 34 CFR 300.304(b)(1), 300.305(a)(2)(iv). Similarly, a behavioral intervention plan contains accommodations and/or related services which must be and are (whether the school district calls it such or not), part of the student's IEP. 34 CFR 300.324(a)(2).

81. Failure to design an IEP with an appropriate BIP can be a denial of FAPE like any other design failure in an IEP. *Neosho R-V School District v. Clark*, 38 IDELR 61, 315 F.3d 1022 (8th Cir. 2003). Similarly, failure to properly implement a BIP can be a denial of FAPE as any other failure to implement a section of an IEP. *Burke v. Amherst School District*, 51 IDELR 220 (D.N.H. 2008).

82. A District must reevaluate a child (including a functional behavior assessment) if the district determines that the child's educational needs warrant a reevaluation or if a parent or teacher requests a reevaluation. 34 CFR 300.303(a). Parents must generally consent to an evaluation or reevaluation. 34 CFR 300.300.

83. In the District of Columbia, a reevaluation must be completed within a reasonable time after the duty to reevaluate is triggered. *Herbin v. District of Columbia*, 362 F.Supp.2d 254, 43 IDELR 110 (D.D.C. 2005).

84. Although the School District must evaluate properly and according to the OSEP regulations, hearing officers are entitled to make a finding against the District only if the procedural inadequacies impeded the Student's right to a free appropriate public education or denied the student some educational benefit. 20 U.S.C.A. 1415(f)(E)(ii)(I-III); *Capistrano Unified School District*, 108 LRP 40490 at 29 (Cal. State Educational Agency, 2008).

Conclusions of Law Related to Procedural Violations of IDEA Alleged in the Complaint

85. Although the School District must comply with the procedural requirements of IDEA, hearing officers can only enter an order against the District if the procedural inadequacies: (1) impeded the Student's right to a free appropriate public education; or (2) denied the student some educational benefit; or (3) significantly impeded the parents' ability to participate in the decisionmaking process regarding the provision of a free appropriate public education. 20 U.S.C.A. 1415(f)(E)(ii)(I-III).

i. Conclusions Related to Observation of the Student

86. In general, whether observations in the classroom (by parents or their surrogates) are allowed are matters of state law and regulation. *Letter to Mamas*, 42 IDELR 10 (OSEP 2004); *School Board of Manatee County, Florida v. L.H.*, 666 F.Supp.2d 1285, 53 IDELR 149 (M.D. Fl. 2009).

87. However, the structure of IDEA requires that parents be able to have an independent evaluator determine whether a student requires different services than those offered by the school district. 34 CFR 300.502; *Forest Grove School District v. T.A.* 557 U.S. 230, 52 IDELR 151 (2009).

88. As such, a district is required under federal law to allow parents' independent evaluators to evaluate a student in his/her school environment. *School Board of Manatee County, Florida v. L.H.*, 666 F.Supp.2d 1285, 53 IDELR 149 (M.D. Fl. 2009).

ii. Conclusions Related to Implementing IEPs over a Parent's Objection

89.. Federal special education law requires that a student remain in the same placement during the pendency of a due process hearing request. 20 U.S.C.A. 1415(J). The purpose of the "stay put" provision is to remove schools of the unilateral authority that the districts originally had to exclude disabled students, particularly emotionally disturbed students from school. *Kevin T. v. EDMhurst Community School District No. 205*, 34 IDELR 202, (N.D. Ill. 2001).

90. When a District does not deliver FAPE because it is constrained by stay-put, the District does not violate IDEA. *M.M. v. Special School District No. 1*, 512 F.3d 455, 49 IDELR 61 (8th Cir. 2008).

iii. Conclusions Related to Notices to Parent

91. Parents are entitled to review all of a student's school records. 34 CFR 300.501. Parents are entitled to notices whenever there is an initiation, change, identification, evaluation, or change in placement of the child. 34 CFR 300.503.

92. Implicit in these regulations 34 CFR 300.501-300.504, is that the notices be accurate. A school district cannot continuously send out inaccurate information about the child and his/her placement and services and comply with the pertinent regulations.

iv. Conclusions Related to Certification of Employees

93. In order to provide a student FAPE, a school has to meet SEA standards (usually state educational standards, but, in this case, the educational standards set forth in the law of the District of Columbia by the Office of the State Superintendent of Education ("OSSE")). 20 U.S.C.A. 1401(9); *WinkeDMan v. Parma City School District*, 550 U.S. 516 (2007). See also *Rowley v. Board of Education of Hendrick Hudson Central School District, Westchester County*, 458 U.S. 176, 203 (1982).

94. OSEP requires the SEA to establish and maintain qualifications so as to ensure that all teachers providing instruction to children with disabilities are qualified and properly trained. 34 CFR 300.156(a).

95. OSSE has complied with the federal regulations, and requires DCPS to use certified special education teachers to teach all special education classes.

96. Although the IDEA requires special education teachers to be “highly qualified” within the meaning of federal law, parents have no private right of action for parents if a class is taught by a special education teacher who is not “highly qualified.” 34 CFR 300.156(e).

v. Conclusions Related to Parents’ Right to Progress Reports

97. Under IDEA, parents are entitled to progress reports, and the timely provision of progress reports must be a provision of every IEP. 34 CFR 300.320(a)(3)(ii). Implicit in this requirement is the need for accurate progress reports.

vi. Conclusions Related to Parents’ Remedies

98. If there is a violation of the law, the undersigned must provide declaratory relief and compensatory relief to make the child and the parents whole. *A.G. v. District of Columbia*, 57 IDELR 9 (D.D.C. 2011).

99. Compensatory education is an equitable remedy hearing officers can award to prevailing petitioners. *Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). Compensatory education should compensate a child for loss of educational opportunity caused by the District’s failures to provide FAPE. *Id.* In determining whether compensatory education, the award should be based upon the equitable factors present in each case (including the conduct of the parties). *Id.* A hearing officer’s decision should set forth a reasoned way in which the compensatory services will make the student whole for loss of FAPE. *Id.*

100. The undersigned is also entitled to place a student in a private placement as compensatory education or if a district consistently fails to provide a student with FAPE for long periods of time and the hearing officer makes a finding that the district cannot or will not offer the student FAPE. *Branham v. District of Columbia*, 44 IDELR 149, 427 F.3d 7 (D.C. Cir. 2005). See also *Draper v. Atlanta Independent School System*, 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008).

101. In making decisions to reward a prospective placement at a private school, the undersigned must weigh the equitable factors in each case including: whether a particular placement is appropriate for the student; the nature and severity of the student’s disability; the student’s specialized educational needs; the link between those needs and the services offered by the private school; the placement’s cost; and the extent to which the placement represents the least restrictive environment. *Branham, supra*. The conduct of the parties is also an equitable factor in determining whether a prospective placement is proper. *Id.*

IV. Discussion (Including Factual Inferences, Credibility Findings, and Application of Law to Fact)

Discussion related to the Issues of IEP Implementation

102. The undersigned makes an inference that Student is currently being provided with a therapeutic environment in that [redacted] is available for immediate interventions and Student is being provided with regular therapy under a reasonable methodology. The undersigned bases this inference on the testimony of [redacted] describing Student's environment and milieu at [redacted] and SWH's description of the type of environment needs to be in a therapeutic environment.

103. The undersigned makes a credibility finding that the IEP requires a dedicated aide based upon the clear language of the IEP and the fact that the District never amended the IEP. The undersigned rejects the District's claim that the clear language of the IEP requiring a dedicated aide was a mistake based upon the fact that the District went months without even attempting to amend the IEP.

104. The undersigned finds that the District never provided a dedicated aide based upon the uncontradicted testimony of LB. The undersigned finds that this is a material violation of the IEP given the nature of Student's disability (the need for redirection, aid with executive functioning, emotional support, the need for structure and rapid interventions) make an aide extremely helpful for Student's learning; and both [redacted] and [redacted] testified at length that Student needs a small student-teacher ration (between 4:1 and 2:1 to effectively learn).

105. The undersigned therefore finds that the failure to provide Student with a dedicated aide is a denial of FAPE for failing to properly implement the IEP in a material way.

106. The undersigned makes a credibility finding that Student was provided with a daily point sheet, a cool down area; frequent breaks, and that tasks were broken down for Student. The undersigned bases this credibility finding on the uncontradicted testimony of [redacted]. The undersigned does not credit the testimony of [redacted] because he only viewed the classroom for approximately one hour- not enough to contradict the testimony of [redacted] over the course of nearly an entire school year. The undersigned therefore finds no violation of implementation of Student's IEP on these bases.

107. The undersigned finds that the District provided a qualified substitute teacher based upon the lack of evidence to the contrary and that this cannot therefore be the basis for a claim of failure to implement the IEP.

108. The undersigned makes a credibility finding that Student is provided effective therapeutic modalities designed to change Student's emotional response to redirection and delay of gratification and that [redacted] provided regular behavioral support inside and outside the classroom. The undersigned bases this credibility finding on the uncontradicted testimony of [redacted].

109. The undersigned makes an inference that the choice to impose consequences (or a lack thereof) are reasonable methodological choices. The BIP contains a great deal of discretion on whether to impose consequences on Student and what consequences to impose on Student. [redacted] has to make methodological choices as to what consequences to impose on Student on a day to day basis (or

whether to impose any consequences). The undersigned makes a further inference that choices are reasonable given Student's academic and social progress. is obtaining results.

110. The undersigned makes a credibility finding that Student is not able to access inappropriate websites at school based upon the uncontradicted testimony of The fact Student knows about inappropriate websites cannot, in itself, be attributable to school as there are many places Student can learn about inappropriate websites.

111. The undersigned makes an inference that and choices on how and where to provide OT and therapeutic services are reasonable methodological choices. Given Student's behaviors and manifestations of Student's emotional disabilities, and can and should adapt so as to limit Student's outbursts and provide services despite Student's outbursts. Therefore, the decision to give Student OT and therapeutic services in the classroom rather than in "pull out" are reasonable methodological choices and do not constitute a failure to implement the IEP. The undersigned finds the short gaps in providing OT were not material violations of the IEP. The undersigned finds that group therapy is a reasonable methodological choice in light of testimony and the lack of any testimony to the contrary by any expert witness.

112. The undersigned finds that the District and Parents have not been communicating properly as required by the IEP as admitted by and RB as well as the Parents. While the Parents and District have a fraught relationship due to the ongoing litigation, this is not an excuse to stop communicating. The undersigned finds that this is a material violation of the IEP given the nature of Student's disabilities and the need for structure at both home and school.

113. The undersigned finds that providing candy to Student is not unreasonable and is not a violation of implementation of the IEP given that the Parents have not provided a doctor's note that providing candy would be inappropriate.

114. The undersigned makes a credibility finding that Student is making academic and social and emotional progress based upon the objective assessments from 2010 to present, progress reports submitted by the District regarding Student's goals (which were not contradicted by any evidence by the Parents) the testimony of and and the lack of credible testimony from and who did not have the ability to view Student's progress over time.

Discussion related to the Issues of IEP Design

115. The undersigned makes an inference that play therapy as described by DM is a reasonable methodology for providing Student with social and emotional services. In making this inference, the undersigned relies upon the opinions and testimony of DM in describing the play therapy provided to Student; the opinion of SWH that play therapy would be an appropriate methodology to provide Student with the social and emotional and/or behavioral services required by the Student's IEP.

116. The undersigned finds that there was no requirement for art therapy in the settlement agreement based upon the plain language of the agreement and the IEPs signed by the Student's

guardian which did not contain a requirement for art therapy. Based upon the above stated inferences and findings, the undersigned finds that the decision not to provide art therapy but to provide play therapy instead was a reasonable methodological choice of the District. The undersigned therefore finds that the Student's IEP was designed to provide Student FAPE, and the Parents cannot compel the District to provide art therapy.

117. The undersigned makes an inference that the District could not reasonably have known that Student needed speech and language services at the time the IEPs at issue in this case were drafted. The undersigned bases this inference on the screening evaluation done by DCPS which showed no need for speech and language services; the Parents' withholding of the evaluation (and related evaluations); the admission by that Student had multiple diagnoses before her evaluation and that these multiple diagnoses would lead to different types of services; the lack of evidence that without evaluation, the District could have determined that Student needed speech and language services; and admission that it would be difficult in this case to determine whether Student needs speech and language services without a full evaluation.

118. The undersigned finds that Parents deliberately withheld evaluations from the District which prevented the District from determining whether Student needs speech and language services. The undersigned finds this to be bad faith by the Parents and finds the Parents to be responsible for the breakdown of communication between the Parents and the District in this area.

119. In light of the above stated inferences and findings, the undersigned finds that the District did not deny FAPE by failing to include speech and language services in Student's IEP.

120. Furthermore, taking into account what the District knew at the time of drafting the IEPs' for the above stated reasons, the undersigned finds the District IEPs to be reasonably calculated to provide Student with academic and social-emotional progress.

Discussion related to the Issues of the Functional Behavior Assessment and Behavioral Intervention Plan

121. The undersigned finds that a functional behavior assessment and behavioral intervention plan were in place by November, 2011. The undersigned bases this finding on the lack of any testimony to the contrary. The undersigned finds that completing a FBA and BIP by November, 2011, is a reasonable amount of time to determine whether such an assessment and BIP is needed and to complete said assessment and BIP—given that Student only began school in Fall, 2011.

122. The undersigned therefore finds that Student was not denied FAPE by the District's actions in creating an initial FBA and BIP.

123. The undersigned finds that the District acted reasonably in moving to revise the FBA and BIP after requests from the Parents and . The District completed a second functional behavior assessment and a revised behavioral intervention plan approximately ninety days after the Parents

consented to the second FBA. The undersigned finds this to be a reasonable time period for completing a revised Functional behavior assessment and revising Student's BIP.

124. The undersigned finds that, by the time the revised BIP was completed, the pending due process complaint had been filed. In light of the stay-put, the District had no authority to implement a revised BIP without Parents' consent. As such, the District could not have denied Student FAPE by failing to implement a revised BIP while constrained by the stay-put.

125. The undersigned finds that, in light of the Parents refusal to consent to the revised BIP, the District did not deny Student FAPE by failing to implement a revised IEP.

Discussion related to the Issues Associated with Observations of Student in the Classroom

126. The undersigned finds that IDEA does not require the District to provide for observations of Student in the classroom except for a Parents' independent evaluator(s). As such, denial of observation time by SA, the Parents, Parents' attorney, or CDM (who never evaluated Student) cannot be a violation of IDEA.

127. The undersigned finds that the District failed to provide access as requested by SWH, and makes a credibility finding to that effect in favor of SWH based upon the lack of any testimony to the contrary. The undersigned finds that this is a denial of Parents' rights to obtain an independent evaluation under IDEA.

128. The undersigned finds this failure to interfere with the Parents' right to participate in the IEP decision making process by preventing the Parents from obtaining a complete, appropriate independent evaluation.

Discussion related to Documentation and Alleged Eligibility Meeting of February, 2012

129. The undersigned makes a credibility finding that no eligibility meeting occurred in February, 2012, based upon the fact that no witness had any personal knowledge of such meeting, and DCPS provided credible testimony that the incorrect documentation of this eligibility meeting arose from a computer mistake.

130. The undersigned makes a credibility finding that Student suffered no loss of educational benefit by the District's paperwork error based upon the admission of CR to that effect. The undersigned make a further credibility finding that the documentation errors listing the February, 2012, meeting did not interfere with the Parents' ability to make decisions regarding FAPE as CR admitted that he knew this was an error upon receiving the paperwork. Moreover, every party in this proceeding admits Student is eligible for special education. Parents are not even challenging the disability term designation for Student (and Student's disability term designation is irrelevant in any regard as Student's IEP must be based upon his unique needs, strengths and weaknesses). Thus an eligibility determination made without Parents' input is, at most, harmless error.

131. The undersigned therefore finds that all issues related to the alleged February, 2012, eligibility meeting cannot give rise to a remedy as there was no harm to Student and no interference with the Parents' decision making process.

Discussion related to the certification of District Teachers

132. The undersigned finds that the District made available certification status based upon the ability of Parents' counsel to obtain said status from a website and include it as an exhibit in this hearing. The undersigned finds that the substitute used by the District was certified based upon the lack of any evidence to the contrary.

133. The undersigned makes a credibility finding that is certified in special education and to teach Student based upon uncontradicted testimony of and the uncontradicted evidence presented by the District.

134. The undersigned finds that there was no intentional misrepresentation of certification, and even if there was, there was no harm to Student and no interference with the Parent's decision making process regarding the provision of FAPE. As such, this cannot be a violation of IDEA.

135. The undersigned finds that Parents have no individual right of action against the District as to whether is "highly qualified" under federal law.

136. In light of the above stated findings, the undersigned finds no procedural or substantive violation of IDEA based upon the District's alleged failure to disclose certification status or alleged failure to use noncertificated teachers.

Discussion related to the Progress Reports Provided to Parents

137. The undersigned finds that SC failed to turn over accurate progress reports (in the form of graded papers) regarding Student when asked by CR, and that this has had an effect on Parents' ability to track Student's progress. The undersigned makes a credibility finding in favor of CR and against in this regard based upon failure to provide a straight answer as to the contents and origins of the graded papers given to CR when requested.

138. The undersigned draws an inference that the inaccurate reports harmed Parents' ability to participate in the IEP decision making process by failing to give the Parents an accurate picture of Student's progress.

139. As such, the undersigned finds that the failure to provide Parents with accurate reports constitutes a denial of FAPE.

140. The undersigned finds that all other progress reports provided to Parents are accurate based upon the lack of any evidence to the contrary.

Discussion related to the Alleged Implementation of the April, 2012, IEP

141. Based upon the testimony of [redacted] and the admission of District Counsel, the undersigned makes a credibility finding that the District implemented the April, 2012 IEP despite the stay put requirement of IDEA.

142. The undersigned finds that this is a procedural violation of IDEA in that it interfered in the Parents' decision making process to provide Student with FAPE. While the stay put was in place, the Parents had authority to veto any change in placement. The District ignored this right and cut the Parents out of the decision making process by violating the stay put.

143. The undersigned finds that Student lost no educational benefit from [redacted] actions because the April, 2012, and November, 2011 IEPs are very similar.

Summary of Findings

144. On Issue #1, the undersigned finds a denial of FAPE based upon failure to provide a dedicated aide and a failure to regularly communicate with the Parent. The undersigned finds in favor of the District on all other claims of failure to implement the IEP.

145. On Issues #2, 3, 6, 7, 8, 9, and 10 the undersigned finds in favor of the District.

146. On Issue #4 and 5, the undersigned finds in favor of the District in part and in favor of the Parent in part. The Parents, Parental agents (other than an evaluator), and Parent attorney are not allowed to observe the Student and the District did not violate IDEA by not allowing observations. The undersigned finds that the District did violate IDEA by not allowing the Parent's evaluator to observe Student in the classroom.

147. On Issue #11, the undersigned finds that [redacted] did provide CR some faulty reports and that this did violate IDEA, but that otherwise, the progress reports provided were accurate.

148. On Issue #12, the undersigned finds that the District did violate the stay put by implementing the April, 2012, IEP without Parents' consent, and that this is a violation of IDEA.

Discussion Related to the Remedies Requested by Parents

149. The undersigned makes an inference that CDM, based upon his experience (as opposed to his credentials) in taking part in IEP meetings, evaluating disabled students, and educating disabled students, is an expert and able to provide an opinion as to the services necessary to compensate Student for lost educational opportunity.

150. The undersigned finds that 72 hours of tutoring will compensate Student for lost educational opportunity from not having a dedicated aide. In making this determination, the undersigned has considered the conduct of the District in not providing the aide, and the opinion of CDM as to the academic benefit Student lost from not having an aide (and thus not being redirected and not having interventions which the aide could have provided). The undersigned rejects any compensatory

education in occupational therapy or speech and language services as the District prevailed as to provision of OT and the need to provide speech and language services.

151. The undersigned finds that the District can implement the IEP at _____ and that there is no equitable reason to provide for a placement at the Lourie Center. The District generally implemented the IEP (with two exceptions) and with an aide and better communication, the District can provide Student with FAPE.

152. The undersigned finds that a District person shall verbally communicate with the Parents at least once per week in order to ensure structure across environments for Student and implement the IEP properly.

153. The undersigned finds that the District must conduct an IEP meeting and provide Parents with progress reports prior to the meeting before implementing any aspect of the April, 2012 IEP to cure the denial of FAPE arising from the loss of Parents' rights in the decision making process

154. The undersigned finds that the District must allow an independent evaluator to observe Student for a full school day in order to provide Student FAPE.

V. Order

155. By July 15, 2012, the District shall provide Student with 72 hours of tutoring as compensatory education. The District must schedule the tutoring so that it is completed by December 31, 2012.

156. The District shall not implement the April, 2012 IEP any longer. The District shall conduct an IEP meeting within thirty days of this order and give the Parents the right to participate in the meeting.

157. Within 15 days of this order, the District shall provide accurate progress reports of Student's academic progress, social emotional progress, and graded classwork and homework for the past semester (if any).

158. While the current IEP is in effect, the Parents must be given verbal reports by a District person at least once per week regarding Student's progress and behavior to ensure structure across environments.

Dated this 28th day of June, 2012.

/S Joseph P. Selbka

Joseph Selbka, Esq.

Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).