

Case Number: 2009-0040

[REDACTED] vs. City of Chicago SD 299

Hearing Officer: Harry A. Blackburn

Illinois State Board of Education  
Special Education Services  
100 North First Street  
Springfield, Illinois 62777

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## Impartial Due Process Hearing Decision Cover Page

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District Name  
Superintendent  
Address  
Represented by

[REDACTED]

Phone: (773) 553-1000

Parent Name  
Address

[REDACTED]

Phone:

Represented by

[REDACTED]

(773) 262-2199

### Date and Timelines

Date of Written Request: 08/07/2008

Date of Pre-hearing Conf: 09/23/2008

Dates of Hearing: 12/15, 16, 17 2008- and  
1/16, 17/2009

Date of Decision: March 2, 2009

### Summary of Decision

School District responsible for providing Compensatory Education for failure to provide FAPE.

ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

and

[REDACTED]

)  
) ISBE CASE NO. 2009-0040  
)  
) Harry A. Blackburn  
) Impartial Due Process  
) Hearing Officer

**Decision and Order**

**Jurisdiction**

This matter is before the undersigned-hearing officer for a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA 2004"). 20 U.S.C. 1400 et seq., 5/14-8.02a et seq., and 23 Il. Adm. Code 226.600 et seq.

The parent, through her attorney(s), filed a due process complaint on August 5, 2008. The District received the complaint on August 7, 2008, and forwarded it to the Illinois State Board of Education ("ISBE") where it was received on August 14, 2008. The undersigned was appointed as hearing officer by ISBE on August 16, 2008, via letter, which the hearing officer received on August 16, 2008. The hearing officer subsequently contacted the parties and arranged for the convening of a teleconference call for discussing resolution or mediation efforts and establishing prehearing conference and hearing date(s)

The initial Individualized Education Program ("IEP") team meeting was conducted in January 2007 finding the student eligible for special education and related services under the category of a learning disability.

Independent evaluations, on behalf of the child, were conducted in the areas of a psychological assessment by a Pediatric Neuro-psychologist, [REDACTED] PhD; Screening for central auditory processing deficit, by Audiologist [REDACTED] PhD and Occupational Therapy Assessment by Occupational Therapist, [REDACTED]

**Issues Presented and Remedies Sought**

1. Whether the [REDACTED] provided a Free Appropriate Public Education ("FAPE") during the period from August 5, 2006 through the present time based on:
  - a) Failure to conduct adequate assessment of all areas of potential disabilities, with the result that the student's educational program did not address, or addressed inadequately, his learning impediments and emotional/behavioral difficulties;

- b) Failure to conduct a full individual evaluation and make an eligibility determination on a timely basis in violation of specific "child find" provisions, given knowledge of the student's academic deficits and teacher referrals citing a learning disability in March 2006;
- c) Failure to provide essential related services in the areas of assistive technology, psychological and occupational therapy;
- d) Failure to provide related services in the area of social work;
- e) Failure to identify and utilize effective teaching methodologies to enable the student to make progress commensurate with his cognitive skills;
- f) Failure to provide FAPE by refusing to reopen eligibility and convene an IEP meeting on a timely basis to develop an appropriate program with adequate services in September 2007 despite a new medical diagnoses, including ADHD, anxiety disorder, NOS and dyslexia;
- g) Failure to provide the parent with progress reports that accurately describe actual progress or lack of progress relative to the student's learning impediments and academic deficits;
- h) Depriving the student of FAPE by producing IEPs with:
  - i. Present levels of performance that do not accurately and objectively state current academic, functional and developmental skills of the student;
  - ii. Goal statements that are not responsive to the learning impediments of the student, and do not set objectively measurable milestones to assess progress;
  - iii. A list of quarterly objectives that do not provide accurate and meaningful strategies for improving the student's academic developmental and functional skills.
- i) The February, 2008—June, 2008 evaluations of the student were inadequate in the following respects:
  - i. A psychological assessment;
  - ii. evaluated cognitive skills using the Reynolds Intellectual Assessment Scales (RIAS) which cannot assess processing speed, and category of intellectual functioning which should be assessed in light of the student's significant academic deficits;
  - iii. although the student has verbal and non-verbal cognitive skills in the average range, the psychologist administered a KTEA-brief form, which does not allow for in-depth assessment of reading skills; the student's ready level is a standard score of 64, or 1.3 grade equivalent, although he is about to enter 5<sup>th</sup> grade;
- j. No communication assessment was administered despite substantial evidence that the student has language delays in both expressive and receptive language skills;
- k. The assistive technology assessment was not made available to the IEP team on a timely basis, and the report fails to address student and staff needs for training and support needed to assure effective use of technology;
- l. The occupational therapy assessment did not adequately address organizational skill deficits of the student and did not offer adequate recommendations for addressing identified deficits in fine motor skills, independent functioning and sensory processing.

**The parent seeks the following relief:**

- A. Placement in a private therapeutic day school at public expense was initially requested in the parent's due process request but due an agreement reached between the parties, the student was placed in a multisensory classroom at a school different from the school where he has been attending since 2005. Therefore, the issue was withdrawn and was not a part of the due process hearing.
- B. The District to pay for independent education evaluations in the areas of identified need where the District has conducted inadequate assessment.
- C. The District provide related services in sufficient intensity to allow student access to educational opportunity, including:
  - 1) Social work and/or psychological counseling at least 60 minutes per week ("mpw");
  - 2) Direct occupational therapy service for at least 60 mpw;
  - 3) Support for assistive technology software and equipment for at least 30 mpw.eft
- D. The District provide compensatory education services for loss of FAPE during the past two years including:
  - 1) Additional social work and/or psychological counseling services for at least 30 mpw for two years;
  - 2) Additional occupational therapy services for 30 mpw for two years;
  - 3) Tutoring by a certified special education teacher trained in the methodology for reading remediation adopted at the school that the student attends, for two hours per week for two years with the tutoring site to be selected by the parent;
  - 4) Additional services identified and recommended by any ordered independent educational evaluations.
- E. Direct the District to convene an IEP meeting that will consider results of evaluations and implement the relief requested.

**The District's position on the requested relief is as follows:**

- A. The District has "at all times" provided the student with FAPE by providing IEPs written as the student's needs evolved and has increased services over previous IEPs thus meeting the student's needs through such a program.
- B. The District has adequately assessed the student's needs and has appropriately addressed those needs in an IEP "reasonably calculated" to provide the student with FAPE in the Least Restrictive Environment ("LRE").

The District seeks an Order by the hearing officer affirming that it has provided the student with FAPE and further requests that all relief sought by the parent be denied.

**Burden of Proof**

The parent has the burden of proof as she filed the due process complaint. *Schaffer v. West*, 126 S.Ct. 528 (2005). Under Illinois law, the school district must provide evidence that the special education needs of the child have been appropriately

identified and that the special educational program and related services proposed to meet the needs of the child are adequate, appropriate and available. 105 ILCS 14-8.02a(g).

### Findings of Fact

1. The Student is a 10 year old 4<sup>th</sup> grade student presently attending a multi-sensory classroom at the [REDACTED] as of January 2009. He has been found eligible for special education classes and related services identified as having strong cognitive skills in an average range, however, challenged by severe learning disabilities and behavioral problems.
2. The facts, as presented, identified numerous issues involving timelines and the adequacy of evaluating the student on the part of the District dating as far back as August 5, 2006.
3. School District Document 1 (SD1) and Parent Document 1(PD1) are the same identical student referral form from March 2006, when the student was almost  $\frac{3}{4}$  of the way through 2<sup>nd</sup> grade, that shows extensive efforts on the part of the School District to remediate the student's reading problems from the beginning of 2<sup>nd</sup> grade in September 2005 where the student's reading skills were identified as being at the Kindergarten—1<sup>st</sup> grade level, yet the student was approaching the end of 2<sup>nd</sup> grade, with his math skills higher.
4. The student began the 2005-2006 school year repeating the second grade, with the consent of the parent.
5. In December of 2006 a psychological evaluation was conducted. (SD 6—9; PD 82—85) The evaluation did not show any standardized scores for academic or IQ testing. The IQ test administered to the student was the abbreviated form of the Wechsler, which did not test processing speed or memory despite the test notes that indicated reading scores were significantly underdeveloped.
6. The December 2006 psychological report shows that the school psychologist administered only a screening test, Kaufman Brief, and did not use additional subtests available in the full Kaufman to look at chronological skills and oral written expression.
7. The student was found to possess significant difficulties in focus and attention and a depressed Visual Motor Integration (VMI) score which, in the view of the parent, should have triggered an Occupational Therapy ("OT") evaluation. (PD 84)
8. The testimony of two District speech pathologists noted the student's phonological difficulties and severe learning disability, which the parent alleges are suggestive of a need for a language evaluation that should have generated a referral to a speech and language pathologist to conduct a full speech and language evaluation. This was also the recommendation of a private independent evaluator, [REDACTED] on behalf of the parent.
9. Follow up testing was conducted by the District's psychologist, [REDACTED] [REDACTED] administered a newer version of the Kaufman Brief from what was previously administered to the student and despite the fact that it showed a drop in scores, the parent alleges that it didn't seem to register with the District that this was an issue for a boy that repeated 2<sup>nd</sup> grade and over a year later went from a 1.6 to a 1.3 grade level.
10. The parent maintains, and the testimony supports the allegation, that testing conducted by the District was seriously inadequate and the District failed to conduct additional testing regarding phonological skills, written and oral language skill levels and its failure to provide essential related services.
11. The District made no referral for Assistive Technology ("AT") until March of 2008. (PD 78—81) The severity of the student's learning disability indicated a need for AT when he was first found eligible back in September of 2006. When the referral was made and

evaluations completed in May of 2008 with an IEP meeting held in June 2008, no report was available for the IEP team and said report did not turn up until the November 17, 2008 IEP meeting. Review of the report shows only a list of items to be used but nothing in the IEP for training and support for the staff responsible for implementing AT services. Testimony given by case manager and teachers demonstrated a lack of knowledge of what Kurzweil educational systems, a leading developer of reading technology for people with learning disabilities, was.

12. In the area of psychological services, independent evaluations conducted at the request of the parent by an outside pediatric neuropsychologist provides evidence regarding the emotional and behavioral difficulties and oppositional defiance disorder that the student exhibited. However, despite the identified need, the District did not deem the need for psychological services be provided as a related service that, despite the severity of the student's needs indicate, should be provided in the school setting.
13. With respect to needed OT services, [REDACTED] performed an independent assessment on the student at the parent's request. Based upon the student's identified sensory processing disorder, [REDACTED] recommended a "sensory diet"; focus and attention assistance with organizational skills and additional testing regarding organization and maintenance tasks; and, additional keyboarding skills to be addressed. The OT report written up by the District's OT, [REDACTED] accepts the recommendations of [REDACTED] (PD369) The Student's November 17, 2008 IEP mentions developing sensory goals for processing however there is only one goal and it addresses only handwriting. There is nothing relating to keyboarding and organizational and task maintenance skills. The lack of follow through in the IEP relating to the student's demonstrated need for OT services in the area of his attention difficulties demonstrates the inadequacies of the IEP.
14. Regarding the District's failure to provide adequate related services, testimony by the District's social worker, [REDACTED] indicated that the student began receiving social work services in fall 2007; initially the student received 15 mpw, then 20 mpw and currently the student is receiving 30 mpw social work services and has been receiving these services throughout the 2007-2008 school year. However, despite the gradual increase and relatively minor incremental amounts of social work services, the student's behaviors deteriorated as documented through the testimony of [REDACTED]. The parent contends that a child with this degree of severity requires a minimum of 60 mpw social work services broken up between individual and group therapy.
15. The District's failure to identify and utilize effective teaching methodologies as demonstrated through the student's below average IQ scores and severely depressed reading skills, which have failed to show any significant progress over several years, demonstrate the District's lack of providing an effective reading methodology.
16. The District is required to address behaviors that interfere with a student's education as a result of a disability by conducting a Functional Behavioral Analysis. Once conducted, the District is further required to develop a Functional Analysis Behavioral Intervention Plan ("FA/BIP") to address the student's needs. [REDACTED] testified that the student exhibits behavioral difficulties, Further testimony from the Initiatives For Children At Risk ("ICARE") representative demonstrated that she had reservations about the FA/BIP developed from an IEP meeting that she attended and had not seen it after it had been developed. The ICARE representative expressed concerns about the charting that she developed and that it should continue to be used to refine the FA/BIP as time goes on. However none of those things happened. The student's behaviors improved in the current 2007-2008 school year but [REDACTED] testimony attributed improvement of those behaviors to the fact that the student has been confined to a self contained

classroom where fewer demands are placed on him in terms of interactions with other students and more routine and more consistent academic tasks are provided. Despite improvement, the student continues to have behavior difficulties that require the use of a FA/BIP.

17. The District failed to provide the parent with progress reports that accurately describe actual progress or lack of progress; (note SD 142 progress note at end of 2006--2007 school year that observes that the student made improvements in reading when he in fact was losing ground in reading, at the end of repeating his 2<sup>nd</sup> year of 2<sup>nd</sup> grade).
18. The district failed to develop IEP's in accordance with IDEA specifically related to the student's present levels of performance and goals that adequately address the student's needs. For example, a single reading goal is listed in the student's initial IEP. (PD 34) The student's present levels of performance indicate that the student is unable to decode unknown words and the goal objectives address decoding a high frequency word list which is not truly addressing the phonological difficulties he has to connect sounds to letters and blends of letters to blends of sounds.

#### **Initial Student Referral—March 8, 2006.**

19. The student was referred by his regular education teacher, [REDACTED] for special education evaluation in March of 2006 while the student was approximately  $\frac{3}{4}$  through 2<sup>nd</sup> Grade. (PD 1; SD1). The student was identified as "functioning below level (approximately beginning 1<sup>st</sup> grade/end of Kindergarten) in reading; beginning to mid 1<sup>st</sup> grade level in Math, and kindergarten to 1<sup>st</sup> grade level in written language skills". The basis for the teacher's referral was suspected learning disabilities.

#### **Consent for Evaluation—October 17, 2006.**

20. Parental consent for evaluation was given on October 17, 2006. The student was repeating 2<sup>nd</sup> grade at the recommendation of his teacher and agreement by the parent.

#### **Psychological Evaluation Report—December 12, 2006**

21. The School District psychologist administered the Kaufman Test of Educational Achievement (KTEA) and found the student to be reading at a 1.6 grade equivalency and in math, a 2.4 grade equivalency. Also used were the Wechsler Abbreviated Scale of Intelligence and Beery Test for Visual-Motor Integration. Interviews were conducted with the student, teacher and review of his records. The school psychologist found the student, an 8 year 3 month old boy, who was referred for an initial evaluation due to "failure to achieve at expected levels," with overall cognitive abilities that fall in the average range; verbal and nonverbal comprehension skills that fall in the same range. Deficit areas were found in visual-motor integration, attention and focusing. The student had strengths in verbal abstract reasoning. The school psychologist also found the student's scores in reading "very significantly underdeveloped" with math skills better but still below same age students. The school psychologist recommended learning disability services to remediate and ameliorate academic underachievement and processing deficits. (SD 6—9; PD 82—85)

**Social Assessment (initial)—January 10, 2007 (PD 86—89)**

22. A social assessment was conducted by the school social worker pursuant to the referral dated October 17, 2007. The parent was interviewed and reported that her son had problems with reading, spelling and writing. The school social worker noted that the student was being retained in 2<sup>nd</sup> grade due to poor academic performance since the 1<sup>st</sup> grade. No social/emotional behavior concerns were noted, therefore social work services were not recommended. (PD 89)

**Initial IEP—January 23, 2007 (two versions P.D. 7—18; PD 24—41)**

23. The IEP team convened on January 23, 2007 with the parent present. (PD 7) The IEP team found the student eligible for special education services as a learning disabled (“LD”) student. The area identified as being in most need was “reading” with allowing the student “extended time on tasks that require reading”. Assistive technology was identified as necessary for the student, specifically the use of a calculator, color overlays, graphic organizers and a tape recorder and books on tape as being used. The services proposed were to be administered in the “general education curriculum”. In reading the specific modifications and accommodations proposed for the student were: High stake testing given in a small group setting; seating in a preferred area; use of graphic organizers; books on tape when needed; child refocused when off task; test read to student when needed; extended time on tasks (1 1/2x) and reduce task load. The student was found to be unable to decode unknown words affecting his reading across the general education curriculum. ~~The IEP recommended removal from the general education curriculum for a period of 200 mpw in a special education class. (PD 14) The second IEP version bearing the same date of 1/23/07 identifies the student as having a learning disability and based upon the administration of the Kaufman Testing of Education Achievement test (KTEA), the student is reading at the 1.6 grade equivalency and at the 1.4 grade equivalency in math skills. (PD 25) The student’s teacher and parent both agree that the student shows great strengths in math and has a high level of communication skills. Prior to the convening of the 1/23/07 IEP, the student was receiving reading intervention from a literary coach, but has shown little progress in the area of reading. Comparing the two versions of the 1/23/07 IEP, the section identified as “8. AREAS IN WHICH STUDENT REQUIRES SPECIALIZED INSTRUCTION AND/OR RELATED SERVICES” (PD 10 AND PD 31) only boxes A & B in the area of Language Arts/English/Reading are checked in the 1<sup>st</sup> version of the IEP. (PD 10) In the 2<sup>nd</sup> version of the 1/23/07 IEP a total of 11 boxes are checked. Comparing sections “12. SPECIALIZED INSTRUCTION,” of the two versions, the boxes identified as “meets” in the “quarterly benchmark” portion of the 2<sup>nd</sup> version (PD 34) are checked, but are blank in the 1<sup>st</sup> version (PD 13). Likewise the “month, year” boxes in the 2<sup>nd</sup> version are completed, whereas in the 1<sup>st</sup> version they are blank. Both versions are consistent in identifying the amount of time for services being “200 minutes”. The 2<sup>nd</sup> version of the 1/23/07 IEP found in PD 24—41 compares to the only version found in the School District documents (SD 18—34) and both the Parent’s second version and School District’s version are consistent in that both show the student requiring 300 mpw of special education services (200 mpw—Reading; 100 mpw—Math) and an additional 15 mpw social work services, but neither shows the social work services amount included in the “total” amount of special education services to be provided.~~

Conference notifications to revisit the IEP were noted in the record for September 17, 2007(SD 35) and October 24, 2007 (SD 36) and Consent For Evaluation was signed by the parent dated 11/15/07. (SD 37; PD 43)

**Developmental and Behavioral Pediatrics Evaluation—July 23, 2007 (PD 90)**

24. The student was seen on an initial consultation by [REDACTED] MD. of the [REDACTED]

The student was observed as having the following developmental and behavioral strengths: expressive language, supportive mother, gross motor skills, adaptive skills and love of drawing. The student was observed as having the following challenges: worrying and fears, oppositionality, decoding (difficulty with reading), impulsivity and intense behavior. (PD 90) The recommendations were that the student would likely benefit from talk therapy to address his anxiety; multimodal supports should be put in place at school to include a minimum someone to read instructions and worksheet and test questions to him and dictate his answers, talking books and/or books on tape, etc. ; a 1:1 aide may be needed and he requires instruction from a reading specialist with training in teaching techniques for children with dyslexia. He should not be placed in a special education room with children who are nonverbal. (SD 91)

**Developmental and Behavioral Pediatrics Evaluation—September 24, 2007 (PD 92)**

25. The student's follow up visit with [REDACTED] produced the following diagnoses: Oppositional defiant disorder (ODD), anxiety disorder NOS and likely attention deficit hyperactivity disorder (ADHD). The recommendations noted the parents continued pursuit of counseling and to "not sign off on the student's new IEP until contact with Designs for Change reviews it". (PD 93)

**IEP—November 15, 2007 (SD 39—43)**

26. An IEP meeting was convened for the purpose of review of the Student's initial IEP of 1/23/07. The parent was in attendance at the IEP meeting, however, there is also a "Waiver of IEP Revision Meeting" signed by the parent included in the 11/15/07 IEP meeting records. (SD 41) The IEP recommends modifications to the existing IEP to include Social Emotional modifications. (SD 42) The Specialized Instruction section of the IEP, specifically for "social work, identifies the student as being 9 years of age and currently in the 3<sup>rd</sup> grade and states that he "tends to give up easily when confronted with difficult and frustrating situations". The School District social worker recommended social work services in the amount of 60 mpw.

The Conference Recommendations Form, dated November 22, 2007 was addressed to the parent informing her of the educational recommendations developed for her child on November 15, 2007 indicating Special evaluation to be conducted. (SD 44)

**IEP—January 29, 2008 (SD 45—58)**

27. The IEP, dated 1/29/08, shows the parent invited but she did not attend. The IEP states "D. has made little progress in his academic,(sp) this is due mainly to him putting forward very little effort. He has had the growth of 2 months in read, and 2 months in

math according to the WJ-III administered (sp) 01/20/2008. His Dibel test scores are all in the below standards range. His grades for this quarter are: Reading D, Match C, Science B, Social Studies B and Gym B". (SD46) The IEP shows an added area of specialized instruction and/or related services needed. This area is "social/emotional". Additionally, a FA/BIP also indicated several nonrestrictive interventions to include, "parent notification, redirection, positive reinforcement, token economy, reward system, motor breaks, planner ignoring for negative behaviors". The FA/BIP also provided the Uniform Discipline Code to be followed with all staff who work with the student to implement the plan, monitored by the social worker, regular and special education teachers. (SD 49) The environmental conditions affecting the student's behavior were listed as ADHD, ODD, dyslexia, lack of eating, medication and lack of structure. (SD 49) Assistive technology (AT) is listed as needed in all subject areas. The AT needed by the student as listed are: Use of calculator, books on tape, graphic organizers. (SD 51) The modifications and accommodations listed include: Reading/Social Studies (graphic organizer, books on tape, reduce the number of task, read test when needed, read instructions to student). Math/Science (graphic organizer, use of calculator, use manipulatives (sp), peer tutoring. (SD 52) For "specialized instruction," in the area of social work, in the present level of academic achievement and functional performance section, the student is described as "extremely defiant in class. He will often shut down when frustrated or bored. He often refuses to do his work". The measurable annual goal listed states that "D. will apply decision-making skills when dealing with (3) academic and (3) social situations". Quarterly benchmarks were listed as well. The student was identified to receive 80 minutes per month of social work services. (SD 53) The Summary of Special Education & Related Services in the LRE were listed as 200 mpw for Language Arts/English/Reading by the special education teacher; 100 mpw in Mathematics by the special education teacher and 20 mpw social/emotional services by the social worker.

Conference notification regarding the special evaluation was sent to the parent dated February 26, 2008, notifying parent of a conference to be held at the student's school on March 27, 2008 @ 11:00 a.m.

#### **Development and Behavioral Pediatrics Evaluation--February 11, 2008 (PD 95--96)**

28. A follow-up visit with [REDACTED] MD, produced similar findings as noted on September 24, 2007. Full neuropsychoevaluational testing was recommended for the student. [REDACTED] also recommended that the school obtain a formal behavioral consultation to enable the development of a detailed behavior plan accounting for all of the student's diagnoses/challenges. [REDACTED] recommended compensatory services be provided by the school due to the parent's requesting assistance since first grade and the student's challenges have gone unaddressed to date and are quite complex. [REDACTED] recommended consideration of a 1:1 aide, time in a contained classroom, a combination of both or a therapeutic day school. (PD 96)

#### **Psychological Evaluation dated 2/28/08 (special reevaluation at parent request) (SD 61--67)**

29. The School District psychologist, in retesting the student, noted the results of his previous psychological evaluation of 12/12/06 where, after administering the KTEA-II

Brief Form, showed the student's reading level at 1.6 Grade Equivalency and mathematic skills at a 2.4 grade equivalency level. (SD 62). The student, at time of re-testing, is in the 3<sup>rd</sup> grade, at age 9 and 6 months. The psychologist administered the same KTEA-II Brief Form and found the student reading at 1.3 grade equivalency level and mathematics @ 3.0 grade equivalency. Additionally the psychologist administered the RIAS, a comprehensive intelligence test which provides a thorough assessment of the individual's level of intellectual functioning and evaluates the relationship between the individual's memory and cognitive skills. The test includes a two-subtest verbal intelligence index (VIX), a two-subtest nonverbal intelligence index (NIX), and a composite intelligence index (CIX). The CIX assesses overall general intelligence including the ability to reason, solve problems and learn. The VIX assesses verbal intelligence by measuring verbal problem solving and verbal reasoning where acquired knowledge and skills are important. The NIX assesses nonverbal intelligence by measuring reasoning and spatial ability using novel situations and stimuli that are predominantly nonverbal. The RIAS also includes a composite index (CMX) derived from the two supplementary subtests, verbal memory and nonverbal memory. The verbal memory subtest provides a basic overall measure of short-term memory skills and measures recall in the verbal domain. The nonverbal subtest measures skill at recalling pictorial stimuli in concrete and abstract dimension. According to the District's psychologist report and testimony, the student scored average in the VIX, NIX, CIX, but on the CMX the student tested in the borderline range on a measure for working memory, which suggests a significant deficit in that area. (SD 63)

The Vanderbilt ADHD Diagnostic Teacher Rating scale, administered by the District's psychologist, showed the student testing at a significant level for ADHD Combined Type and Oppositional-Defiant Disorder. The student's symptoms included inattention, impulsivity, difficulty delaying gratification, hyperactivity, emotional over arousal, noncompliance, social problems and disorganization. (SD64)

The Behavior Rating Inventory of Executive Function (BRIEF) is described as a questionnaire designed to provide a better understanding of a child's self-control and problem solving skills by measuring aspects of executive functioning. Ratings of the student described him as having difficulty managing his behavior and emotions. He is also described as having difficulty with planning and impulsive responses, adjustment to changes in routine or task demands, modulating emotions, initiating problem solving or activity, sustained working memory, planning and organizational problem approaches and organizing his environment and materials and monitoring his own behavior.

The Behavior Assessment System for Children –II (BASC –II) is based upon the student's teacher, [REDACTED] rating of the student's behavior using the BASC-2 Teacher Rating Scales form. The student's teacher reports that he displays a high number of behavior problems stemming from anxiety which included symptoms of worry, nervousness, and/or fear and depression which included symptoms such as "becomes easily upset, has difficulty making added decisions, sadness, cries easily and is negative about things". The teacher also reports that the student displays an unusually high number of aggressive behaviors and may be reported as being argumentative, defiant and breaks rules. (SD 65) Further the School Problems and Learning Problems Composite-Scale T scores suggest that the student experiences problems that might disrupt academic performance and functioning. His teacher reports that he has significant difficulty

comprehending and completing schoolwork in a variety of academic areas. With respect to Adaptive Skills, the student's teacher reports that he has extreme difficulty adapting to changing situations and that it takes him much longer to recover from difficult situations than most others his age. The teacher further reports that the student demonstrates weak study skills, is poorly organized and has difficulty turning in assignments on time. (SD 66)

The District psychologist concluded that the student "may benefit from services for children with learning disabilities to ameliorate and remediate processing deficits and academic underachievement. In addition, he also may benefit from services for children with emotional disorders within a structured environment. He may also benefit from strategies and interventions for ADHD. This examiner also agrees with the recommendation ...that the student may also benefit from someone reading the questions to him and allow him to dictate his answers". (SD 66—67)

**Social Assessment (SD 68—70; PD 107—111)**

30. The School District social worker administered a social assessment of the student. Included in his assessment was an interview of the student's teacher, mother and the student himself. The social worker recommended the following: "Be consistent with the student; give precise directions; give calm reminders about who is in charge; give the student constructive choices rather than direct demands; help him learn cause and effect and the ability to reason; point out his good decisions and require him to fix bad ones; avoid threatening situations; catch him when he is good; develop a behavior plan that involves positive reinforcement". (SD 70)

**IEP—March 27, 2008 (PD 46—49; SD 71—77)**

31. The IEP meeting of March 27, 2008 shows the parent attending with a "Parent Advocate," [REDACTED]. The student was found to continue to be eligible for special education services as a student with a learning disability. Included in SD 3/27/08 IEP documents was a typed "Attachment to General Consideration in the Development of the IEP". (SD 75) To paraphrase, the parent related her concerns about her son's problems with reading which affect his overall ability to learn. The parent believes that her son's current IEP does not provide enough services or support to help him make progress especially in light of the fact that since her son has begun receiving special education services, his reading abilities have gotten worse. The parent believes that because of her son's identified ADHD he needs individual attention to help him stay focused. She believes her son needs assistance with reading and math and needs to have instructions on how to do them. The parent believes that her son could succeed in an environment where he received one to one instruction and intensive tutoring in math and reading, to help bring him to the level of other children his age. The parent believes her child needs individual counseling and psychological services in a school where they will help her son learn how to express his feelings and feel safe enough to tell his teacher when he is falling behind or doesn't understand the materials. (SD 75)

The IEP indicates a referral for Assistive Technology ("AT") which indicates the teacher strategies to be used are "multi sensory approach and token economy". (SD 80)

Conference Recommendations found the student eligibility completed but the IEP Meeting continued until May 8, 2008. (PD 45; SD 77)

A Conference Notification, dated April 27, 2008, to the parent indicates that an IEP meeting will be convened on May 8, 2008, consistent with the conclusion of the March 27, 2008 IEP meeting which was continued. (SD 82)

**Clinical Therapist Report—March 25, 2008 (PD 104—106)**

32. The student was referred by the parent to the Community Mental Health Council, Inc. for difficulty in managing the student's aggression, anxiety and oppositional behaviors. The clinical therapist, [REDACTED] noted the student's participation in individual therapy since December 2007. The therapist also noted the student's difficulties with "rule-governed behavior" and suggested he may benefit from a structured and routine environment where he is clearly informed of his expectations. Several methodologies were offered as suggested ways to deal with his challenges. Also noted were the student's tendency to become overwhelmed which could also contribute to difficulty completing homework. The therapist recommended dividing long assignments into 2-3 parts to adapt to his attention span, thereby allowing the student to complete the whole assignment in smaller steps. Placement of the student near the teacher in the front of the classroom was suggested and working with a 1:1 aide who is able to read things to him was also noted. The need to work on socialization skills was recommended by the therapist and to pair him with a peer tutor where he could benefit academically in reading and also improve his socialization skills. (PD 105)

**IEP Meeting –May 8, 2008 (PD 51—55; SD 83—86)**

33. An IEP meeting was convened on May 8, 2008. The parent and her Health and Disability Advocate, [REDACTED] nor, attended along with school district staff. A FA/BIP was included in the IEP. The following "targeted inappropriate behaviors" were listed: "Does not respond to requests: Student will refuse to engage in activity, requiring several re-directives, with little to no success. He will refuses (sp) to attend separate (sp) class (sped classes) regularly". (SD 84) The nonrestrictive interventions planned are stated as follows: "Teach and model copying skills to assist in minimizing levels of frustration, anxiety provide lessons that incorporate socially appropriate skills. Practice/repeat rules and rules expectations. Allow the student motor breaks daily. Provide student with a visual schedule". (SD 85) The expected behavior changes listed in the BIP plan are: "The student will increase response to request after 3 prompts". The method/criteria for outcome measurement are, daily monitoring of behavior on target chart; anecdotes (sp) for behaviors not defined on present FA/BIP. (SD 85)

The May 8, 2008 IEP conference recommendations note that the "IEP started" but added a meeting to convene on June 5, 2008 for the team to reconvene to finalize the IEP and review and consider an OT Evaluation. (SD 86; PD 50) The consent evaluation found in both school district and parent's documents show a Consent For Evaluation form signed by the parent on May 15, 2008 for an OT Evaluation – Fine Motor & Sensory Evaluation. (PD52; SD 88)

**Assistive Technology Evaluation Report—May 15, 2008. (SD 90—92; PD 112--114)**

34. The student was evaluated on 3/15/08 by an Assistive Technology Evaluator associated with the District's Assistive Technology Resource Center (ATRC). The evaluator found that the student's ability to read the materials required for school is seriously hampered by his inability to decode unfamiliar or difficult words which severely impacts his ability to read with fluency and understanding since the words encountered are essential for understanding the text and the flow of reading is interrupted. The evaluator recommended the use of a "reading pen" to assist the student to identify a word in context to what he is reading. The evaluator also recommended the Kurzweil program to assist with reading material which may be scanned so that it can be read to him while he reads along on the computer. A phonics program was also recommended for daily practice to decode unfamiliar words. Additionally a talking word processor and talking word prediction software was recommended to assist with writing assignments in all subjects that require decoding skills.

**Occupational Therapy Assessment—June 5, 2008 (SD 93—97)**

35. The OT therapist administered the Beery Development Test of Visual Motor Integration (VMI) 5<sup>th</sup> edition. The student scored "below average" in the area of VMI age equivalent 7 yrs 6 mos, he scored "average" in the area of visual perception age equivalent 10 years 3 mos, and he scored "low average" in the area of motor coordination age equivalent 6 yrs 0 mos. The OT therapist recommended direct OT services be provided, 30 mpw to address the student's fine motor concerns and decrease independent functioning skills and address his SPD concerns. (SD 96-97)

**IEP—June 5, 2008 (SD 98—123; PD 56-81)**

36. An IEP meeting was convened on June 5, 2008 as recommended by the May 8, 2008 IEP meeting. The parent and her Health and Disability Advocate, Sarah O'Connor attended along with school district staff. The following information was considered by the IEP team: the school psychologist's report of 2/28/08 ; the parent's concerns as stated in a March 27, 2008 letter by the parent; the FA/BIP dated 5/8/08.

Modification and accommodations included: AT services recommendation that the student can benefit from use of low level assistive technology in the classroom. (e.g.... books on tape, text frames, graphic organizers, calculator and word processor); Nursing services; visual motor adaptations and other accommodations for all subject areas; OT therapy, Social Work; reading/social studies, math/science, writing. The IEP recommended a total of 1110 mpw special education services broken out as follows: Reading 400 mpw; Math 300 mpw; Biological & Phy. Science 150 mpw; Social Sciences 200 mpw; Social /Emotional 30 mpw; OT independent functioning 30 mpw to be provided in a separate classes).

In the Compensatory Services section of the IEP, the parent "dissented" to having the issue tabled to a later date.

Conference recommendations sent to the parent dated June 9, 2008 stated that the student will receive the special education and related services as listed on the IEP. (SD 123)

Conference notification dated October 22, 2008 sent to the parent indicated that a meeting would occur on October 27, 2008 to review and consider private evaluations. Invited to participate in the meeting were: The attorneys for the school district, the social worker, case manager, nurse, parent, principal, sped teacher of the student and the speech pathologist. (SD 124)

Conference notification dated October 27, 2008 addressed to the parent indicated a meeting to be held on November 3, 2008 to review and consider private evaluations (amended schedule). The participants were to include, the parent, school district attorneys, case manager, nurse, social worker, psychologist, speech therapist, sped teacher and the principal.(SD 125)

An amended conference notification dated October 30, 2008 was sent to the parent indicating that the meeting to be held on November 3, 2008 to review and consider private evaluations (amended schedule) would also include the audiologist and general education teacher.

**Neuropsychological Evaluation—September 29, 2008 and October 1, 2008 (PD 123--142)**

37. [REDACTED] PhD, a Pediatric Neuropsychologist, conducted an independent evaluation of the student at the parent's request on two separate occasions. [REDACTED] notes that the student was referred for a comprehensive neuropsychological evaluation to clarify his diagnostic profile and assist in setting for an appropriate educational plan. [REDACTED] report noted the following areas of review and analysis: the reason for referral; background information concerning the mother's pregnancy, the student's birth, developmental and medical history; academic history and previous evaluations; family and social history; current evaluation measures including a list of tests administered and a list of questionnaires administered; current evaluation results, including behavior observations and impressions, classroom observation, test findings in general intellectual functioning, academic achievement, discrete neuropsychological capacities (attention/executive ability; learning and memory; language ability; visual motor ability), psychological and adaptive functioning. [REDACTED] findings were: 1). The student has significant and unremediated learning disabilities in reading and written expression and that his learning disability in reading has been unsuccessfully treated leaving him two grade levels delayed in basic reading skills (e.g., decoding) and three grade levels delayed in more complex applied reading skills (e.g., reading in context and reading comprehension). [REDACTED] concludes that the student "must" have the opportunity to learn from a systematic, multisensory, phonics-based reading instruction program (e.g., Orton-Gillingham, Wilson), that is implemented daily with a high-level of intensity; 2). The student has a significant problem with attention and sustained focus as well as with hyperactivity and impulsivity. The difficulty is compounded by, and possibly confounded by, a significant difficulty with behavioral regulation and behavioral control, especially when frustrated or upset. [REDACTED] notes these behaviors as not uncommon for children with ADHD, especially children with combined ADHD and learning disabilities. She concludes that the student is developmentally behind in his self-regulation, planning and organizational skills; 3). The student is struggling with anxiety and is fearful and suspicious. He tends to be moody to show symptoms of withdrawal

and to have difficulty accurately assessing social situations often making unnecessarily negative attributions to others' behavior. [REDACTED] notes these factors raise concerns about personality and psychological functioning going forward, the specific nature of which might be difficult to determine until his later teen years. She concludes that competent, preventative psychological care of an ongoing nature will be important. (PD 132-133)

[REDACTED] believes that the student's "combination of difficulties, especially given that he is not very old to begin effectively remediating difficulties reading, writing, and speech-language, will require highly specialized and intensive services to make meaningful gains". (PD 133)

[REDACTED] listed several recommendations for consideration in the following areas: School Placement; Speech-Language; Attention and Psychological. Included in [REDACTED] report is a bill for services rendered on 9/25/08, 9/29/08 and 8/14/08 which remains unpaid.

#### Central Auditory Evaluation—October 9, 2008 (PD 143—147)

38. [REDACTED] PhD, Consulting Audiologist, conducted an independent auditory evaluation of the student at parent's request on October 8, 2008. The purpose of the evaluation was to "clarify auditory skills and to provide recommendations as needed". (PD 143) Several batteries of tests were administered: the Puretone Hearing Testing revealed normal hearing sensitivity for each ear; the Low-Pass Filtered Speech (LPFS) Test revealed scores within normal limits; the Time-Compressed Speech Test revealed scores within normal limits; the Dichotic Digits (DD) revealed scores within normal limits for each ear; the Dichotic Rhyme Test revealed scores within normal limits for each ear; the Pitch Patterns Sequence (PPS) Test, was within normal limits with excessive reversals in which target label is given backward (e.g., HHL for LLH, HLH for LHL, etc.); the Competing Sentences Test scores revealed slightly below normal limits for age in his left ear; Test-Taking Behaviors are considered "reliable estimates of auditory skills". The audiologist observed that the student was in near-constant motion throughout the session. He shuffled his feet, had difficulty remaining seated, looked around the test booth, waved his arms and fidgeted with the earphone and cords. Although noting most of the testing was found to be within normal range, [REDACTED] made several recommendations relating to evaluation of language, language process and related memory/recall skills. They included, activities to enhance sequencing, recall, use of mnemonics, visual imagery, verbal rehearsal, paraphrasing, and categorization, use of met cognitive techniques such as problem-solving, dictionary and thesaurus use, note-taking strategies, test-taking strategies, and study skills were recommended for use in the student's educational program. Several environmental modifications were recommended to be implemented/continued to include: gaining the student's attention before giving instructions; using clear speech; speaking at slightly increased volume and slightly reduced rate; use of concise and explicit language when asking questions or giving directions; repeating information as needed with associated visual cue and/or demonstration/example; provide extended time for tests, including standardized tests; use "pre-learning" where the student should have advanced notice of material and an opportunity to become familiar with task demands, vocabulary and general concepts

before “diving in” to task; use of a tape recorder or note taking service in class; keyboard and word process to aid written language skills. (PD 146)

Included in [REDACTED] report is a bill invoice for services rendered on 10/8/08 that remains unpaid.

**Occupational Therapy Evaluation—October 10, 2008 (PD 148-177)**

39. [REDACTED] Occupational Therapist, conducted an independent OT evaluation of the Student at the request of the parent on October 10, 2008. Several clinical assessments were utilized: Play observations and gross motor; Writing and hand-use for text production; The Developmental Test of Visual Perception-II (DTVP-II); Spatial problem solving; Self-Care; Sensory processing (auditory, visual, vestibular, touch, multisensory, oral processing). [REDACTED]’s recommendations, based upon the various assessment tools utilized, concluded that “due to the student’s extensive record of increasing needs, an OTR/L or a therapist with a more advanced degree rather than a tech or COTA be used at the outset of services delivery. As the student’s skills improve, responsibilities may be transferred”.

Included in [REDACTED] report is a bill invoice statement for services rendered on 10/15//08 that remains unpaid.

**Chicago Public Schools Occupational Therapy Assessment—November 3, 2008**

40. [REDACTED], a District OT, prepared a report which appeared to review the results of the independent OT evaluator’s findings. [REDACTED] concluded that the student requires direct OT services at 120 minutes per month. (PD 369—375)

**IEP—November 17, 2008 (PD 335—345; SD 127—136)**

41. An IEP meeting was convened on November 17, 2008 which is presumed to have been done by agreement of the parties for that date despite the conference notification of October 30, 2008 indicated that the next IEP meeting would be on November 3, 2008. School District personnel were present along with the attorneys for the school district, the parent and her attorneys. Suffice to say the IEP, as written, appears to address a much more thorough review of the student’s needs than IEP’s previously developed prior to involvement of the parent’s advocate/attorney(s). There is evidence to show that the IEP team considered much of the independent evaluations performed on behalf of the student at the request of the parent although there is a note within the IEP that the parent feels that services discussed at the meeting “remain inadequate” but with no further information or explanation of inadequacy. The conference recommendations, dated November 17, 2008, identify the student eligible for special education and agreed to place the student in a self contained multisensory classroom within the district as a student with a “Learning Disability/ED/ODD”. (PD 342; PD 343) The parent agreed to the multisensory classroom placement setting at the Ray School. The Consent For Evaluation Assessment Planning Form (ISBE Form 34-57B) in the “existing information about the child” column next to “communication status” reads as follows: “outside reevaluations (neuropsychological evaluation and central auditory evaluation reports date on 10/8/08; 9/29/08; 10/1/08 are recommending a speech language evaluation. Parent :

team also agree on a speech evaluation” In the “additional evaluation data needed” column the statement made is “CPS standardized testing for communication skills”. In the “Sources From Which Data Will Be Obtained” column the statement made is “formal/informal testing teacher report”. (PD 344). On the Consent For Evaluation (Additional Information Needed) form (ISBE Form 34-57B2) the parent checked the box indicating that she does not consent “to collect the additional evaluation data as described on page B2 of this form”. (PD 345)

It is noted that although the “specific” classroom placement was not made available at the IEP meeting, the specific classroom and school location were made known to the parent and her attorneys subsequent to the IEP meeting and the opportunity to have the parent’s outside expert observe the proposed classroom placement before the Hearing convened was made.

#### **Additional Documentation considered by the Hearing Officer**

42. An ICARE report prepared by the behavior interventions teacher (May 2008) was made available at the conclusion of the hearing, but was not available during the course of the hearing and at the time the ICARE consultant provided testimony. (PD 376—378) Suffice to say recommendations were made to the student’s teachers and explanation/instruction given on how to utilize and complete an associated Behavior Tracking Chart regarding the student but the testimony and record showed a lack of consistent follow-up in completing the form by many of the District’s staff having interaction with the student. (PD 279-286).

Although not all progress reports reviewed in both school district and parent documents showed a total lack of failure on the district’s part to report the student’s progress, the progress note at end of 2006--2007 school year that observes that the student made improvements in reading when he in fact was losing ground in reading, at the end of repeating his 2<sup>nd</sup> year of 2<sup>nd</sup> grade demonstrates a lack of accurately describing the student’s current progress and a lack of attention to accuracy on the part of the teacher.

This hearing officer found the school district staff to be dedicated and concerned professionals interested in doing what is best for the student. None of the individuals called to testify gave the impression that they were not concerned for the student in making the decisions they did and in carrying out the services they thought were in his best interest. The major shortcoming the staff as a whole face appears to be in the time it takes to set the process of identifying a student’s needs in motion and to identify the needs accurately, so that a minimum amount of time as possible passes. In this student’s case, entirely too much time expired with too little services identified before it was finally realized, through the assistance of independent evaluators, what the student likely needs in order to correct the challenges he is faced with.

Finally, this hearing officer was impressed with the parent’s involvement throughout the hearing and genuine concern expressed for her son during the entire course of the 5 day hearing. Likewise, the hearing officer valued the opportunity to meet the student and engage him in a brief conversation. He presented himself in a confident and cordial manner.

## Conclusions of Law

### Statute of Limitations

Testimony and evidence produced at the hearing falls within the statutory 2 year statute of limitations period. There are no issues relative the statutory period. The applicable regulation states: "The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint\*\*\*\*" 34 CFR 300.507(a)(2). The parent through her attorney, filed a due process complaint on August 5, 2008. The District received the complaint on August 7, 2008. And forwarded it to the Illinois State Board of Education ("ISBE") where it was received on August 14, 2008.

### Free Appropriate Public Education

Determining whether a student has received a FAPE begins with the two-prong analysis set out in *Bd. Of Educ. Of Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176 (1982) ("*Rowley*"). First, the district must comply with IDEA's statutory procedures; second, it must develop an IEP reasonably calculated to enable the student to benefit from the special education and related services. Once the school district has met these two requirement, the courts cannot require more; the purpose of IDEA is to 'open the door of public education' to [disabled] children, not to educate a [disabled] child to his/her highest potential. *Board of Ed. Of Murphysboro Community Unit School Dist. No. 186-v. Illinois State Board of Educ.* 41 F.3d 1162, 1166. (7<sup>th</sup> Cir. 1994).

### Compliance with Procedural Requirements

One of the two prongs of Rowley requires that LEAs comply with statutory procedural requirements. These include, among other things, written notice and participation requirements. According to 23 Il.Adm.Code 226.520, "The written notice a school district is required to provide to a parent prior to a proposal or refusal to initiate or change the identification, evaluation, or educational placement of, or the provision of FAPE to, a child shall conform to the requirements of 34 CFR 300.503. That notice must be provided whenever the public agency (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1))

According to 23 Il.Adm.Code 226.530, with respect to parents' participation in meetings, school districts shall conform to the requirements of 34 CFR 300.322 and 300.501. For purposes of 34 CFR 300.322(a)(1), "notifying parents of the meeting early enough to ensure that they will have an opportunity to attend" shall mean notification no later than ten days prior to the proposed date of the meeting. In addition, the district shall take whatever action is necessary to facilitate the parent's understanding of and participation in the proceedings at a meeting, including arranging for and covering the expense of an

interpreter for parents who are deaf or whose native language is other than English. (Source: Amended at 31 Ill. Reg. 9915, effective June 28, 2007)

It is clear that adequate parental notice, involvement and participation in planning the student's IEP is necessary to fulfill procedural requirements. *Alexis v. Bd. of Educ. For Baltimore Cnty. Pub. Sch.*, 40 IDELR 7 (Md. 2003). It is undisputed that minor procedural flaws or technical violations do not automatically require a finding that a district has denied the student a FAPE. *Heather S. v. State of Wise*, 125 F.3d 1045,46 (7th. Cir.1997).

However, there are times when violations will be determined to be more substantial and rise to the level of a denial of FAPE. In *Knable v. Bexley City School District* 238 F.3<sup>rd</sup> 755 (6<sup>th</sup> Cir. 2001), the parents sought reimbursement for placing their child in private school after they withdrew him from Bexley Public Schools.

Knable was first enrolled in a private school, began exhibiting behavioral problems in first grade and began receiving private therapy. He was moved into the public schools, and at age 10 he was diagnosed with ADHD, oppositional defiant disorder and dysthymia, and was admitted to an inpatient facility for his aggressive behaviors. He was found eligible for special education and an out of district placement was recommended. The student was hospitalized, received day treatment with no IEP, and then returned to public school with a BIP. He continued to exhibit behavioral problems, and failed three classes. The Knables found an out of state placement for him and sent him there. Months later, a draft IEP was created, but no meeting convened. After their son was in the private placement for two years, they filed for due process seeking reimbursement.

In this case, the court found that the procedural violations the district engaged in, i.e., not convening an IEP meeting for nearly a year after the student was found eligible for special education services, resulting in the parents sending student out of state, caused substantive harm, seriously infringing on the parents' opportunity to participate in the IEP process and resulted in the loss of educational opportunity for the student. *Id.*

Similarly, despite a history of disability as well as documented behavioral difficulties, it took two years of decreasing reading scores, increasingly aggressive behaviors, and the filing of a due process complaint for the district to take notice of this student and focus on his specific needs for special education services. This can clearly be considered a procedural violation of the type contemplated under IDEA. Similarly, a failure to properly evaluate a student can result in a denial of FAPE.

### **Failure to Evaluate**

Under IDEA a district must assess a student in all areas of suspected disability using a variety of assessment tools and strategies to gather functional developmental and academic information to determine if the student has a disability. 20 USC 1414(b)(2)(A); 20 USC 1414(b)(3)(B).

A district must ensure that it recognizes a student's needs and completes a full and individualized evaluation. *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 36 IDELR 153 (N.D. Il. 2002). The failure to fully evaluate a student leads to inadequate

programming. *Bd. of Educ. of Oak Park and River Forest High Sch. Dist. No. 200 v. Kelly E.*, 21 F.Supp. 2d 862, 875 (N.D.Ill. 1998).

In *Kelly E.*, the court held that the failure of the school district to respond to the MDC recommendation that psychological testing be conducted to better assess Kelly's possible learning disability was not a de minimis procedural violation" but a denial of FAPE.

In the present case, the School District began the process of recognizing that the student may have a learning disability beginning when the student was almost  $\frac{3}{4}$  through second grade an initial referral was made (March 2006). His then, regular education teacher noted that the student was functioning below level, approximately at the end of kindergarten—beginning of 1<sup>st</sup> grade in reading and beginning to mid 1<sup>st</sup> grade level in math and kindergarten to 1<sup>st</sup> grade level in written language skills. Consent for evaluation was obtained from the parent in October 2006, when the student was repeating 2<sup>nd</sup> grade at the recommendation of the teacher and agreement by the parent. The student was tested by the District's psychologist in December 2006 and an initial social assessment was conducted by the District's social worker in January 2007. The initial IEP team was convened in January 2007, 10 months from the initial referral for special education-eligibility determination and recommended the 200 mpw of reading and 100 mpw math in pull out services. Additional evaluations were conducted, IEP's convened but still the student failed to show any significant gains. In fact, the student's behavior began to deteriorate giving rise to the need for a FA/BIP. Despite special re-evaluations requested by the parent, and subsequent IEP's convened, the services offered the student showed him decreasing in reading skills rather than increasing. It wasn't until March 2008 when the parent began bringing an advocate/attorney to the IEP meetings did the School District perk up and take notice of its services and testing of the student. IEP meetings were convened in March, May and June of 2008 each for the purpose of considering a new school district evaluation that had been requested and undertaken. In August 2008, when the due process request was filed, the school district considered the parent's request for independent evaluations by a pediatric neuropsychologist, audiologist and occupational therapist. In November 2008, an IEP meeting resulted in all independent evaluations conducted on behalf of the student by the parent being considered. The period of time it took from the initial referral for special education services to November 2008 is precisely the denial of FAPE contemplated by the *Kelly E.* and *Knable* courts.

Though it is clear that procedural violations resulted in a denial of a free appropriate public education, it is still necessary to examine the IEP that was developed to determine if it was reasonably calculated to confer an educational benefit.

### **An IEP Reasonably Calculated to Confer Educational Benefit**

The second prong of *Rowley* provides that the IEP developed for a child with disabilities must be "reasonably calculated to confer educational benefit." *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). The IEP should include the following information: (1) a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum; (2) annual goals and short term objectives for improvements; (3) a description of the specifically designed instruction and services that

will enable the child to meet those objectives; (4) a statement of how the child's progress toward the annual goals will be measured." *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 36 IDELR 153 (N.D. Ill. 2002).

An IEP must contain specific goals, and the goals and objectives must provide measurable criteria against which the student's achievement can be measured. *Independent Sch. Dist. No. 701, Hibbing Pub. Sch. v. J.T.*, 45 IDELR 92 (Minn. 2006). Additionally, the student must receive more than a nominal benefit from specialized instruction and related services. *T.H. v. Bd. of Educ. of Palatine Comm. Consol. Sch. Dist.*, 55 F. Supp. 830 (N.D. Ill. 1999). Rowley does not mean that a de minimis benefit is sufficient. *M.C. v. Cent. Regional Sch. Dist.*, 81 F.3d 389,393 (3<sup>rd</sup> Cir. 1996).

In accordance with *Rowley*, the regulations governing IDEA require that IEPs should be based on the child's unique needs and not on the child's disability. 34 CFR 300.300(a)(3)(ii). A student's intellectual potential must be considered in determining whether the student benefited from his educational program. *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 2002 WL 433061 (N.D. Ill. 2002).

In *Kevin T.*, the court said that to determine if Kevin's IEPs were reasonably calculated to confer sufficient educational benefits, it must assess Kevin's intellectual potential, given his disability and then determine the academic progress Kevin made under the IEPs designed and implemented by the district. Though Kevin possessed average intellectual potential, his scores decreased on IQ and academic achievement from 1990 to 1999. Despite knowing of the decrease, the district did not review or revise his IEPs to address the academic difficulties.

Similarly, in *Nein*, 95 F.Supp 2d at 972, the student's IQ score dropped twenty points in three years but the district didn't make any changes to the IEP to address the change. The court held "that where a child with a severe learning disability but significant potential makes no transferable progress in three years and where there was no indication the public school was ready and able to change direction, the limit of due weight and judicial deference to school authorities have been exceeded." *Id* at 975.

In *Board of Education of Oak Park & River Forest High School District No. 200*, 21 F. Supp. 2d at 877, the court found the student's poor academic record indicated that the educational benefit she was receiving was minimal. Student had failed half her classes and except for passing several pass/fail classes and making one B she received Ds in the remaining half. The court agreed that the district failed to institute a "systematic and comprehensive plan to deal with the student's reading difficulties" and that "such a failure was manifested by the absence of any goals or objectives that specifically addressed these reading deficits." *Id*.

In the present case, student has received little, if any benefit from his education, at least as it pertains to his reading. From first grade on, the student has shown a drop in reading from a 1.6 grade equivalency when the student was in the 3<sup>rd</sup> grade to a 1.3 grade equivalency at the time when the due process hearing convened in December 2008. This lack of progress given the student's age and grade equivalency, cannot be what the Rowley court had in mind when they said the IEP should be reasonably calculated to confer an educational benefit.

Review of the case law referenced and provided to the hearing officer by the District to promote its theory that the District has produced, over the years, an IEP that is "reasonably calculated to enable the child to receive an educational benefit" do not appear applicable based upon the "specific" facts and circumstances in this case. *School District of Wisconsin Dells v. Z.S.*, 295 F.3d 671. The student was first identified as needing special education attention back when he was in the 1<sup>st</sup> grade. The District and parent worked together at trying various methodologies to remediate a growing need in reading and gradually escalating to behaviors that were not acceptable. Meetings and adjustments and evaluations by the District, with the parent very involved along the way, still did not produce the results to improve the student's reading. From 1<sup>st</sup> grade to 4<sup>th</sup> grade, attempts were made to correct the student's reading scores, but to no avail, keeping in mind that the student is now at age 10 and should be in the 5<sup>th</sup> grade but for being retained 1 year back in the second grade. The District recently agreed to place the child in a multi-sensory classroom, albeit, at the 11<sup>th</sup> hour. This placement was supported by the independent evaluations conducted on behalf of the student and at the request of the parent and her attorneys. While this placement does not, in and of itself, automatically impose "fault" on the District for not acting sooner, it begs the question of whether or not more could have been done by the District at an earlier point of time in the student's educational planning. Other cases reviewed also do not appear to exonerate the District from its earlier obligation of addressing the student's apparent lack of responsiveness to programming and services recommended. (*O'Toole v. Olathe District School Unified School District No. 233*, 144 F.3d 692; *Roland M. v. The Concord School Committee*, 910 F.2d 983; *Heather S. v. State of Wisconsin*, 125 F.3d 1045; *Alex R. v. Forestville Valley Community Unit School District #221*, 375 F.3e.603; *Beth B. v. Van Clay*, 282 F.3d 493).

The parents are requesting compensatory education due to the District's lack of providing a Free and Appropriate Public Education. The District's recent placement of the student in a multi-sensory classroom in a school different from where he has been receiving education for the past 3-4 years, although more restrictive than keeping him in the school that he would normally attend with his peers, appears, for all intents and purposes, the placement most likely for him to succeed and address his reading deficits and other identified needs. While compensatory education is often requested near the end of a student's special education program and services eligibility, age 21, this hearing officer believes that compensatory services can most definitely assist the student now, at these early, formative years. Therefore, even though the student may very likely benefit from the new placement as implemented in January 2009, compensatory services may also provide the added "boost" needed for the student to get back on track and performing at grade level. Therefore, the case law offered by the District in denying compensatory education, although considered by this hearing officer, is not deemed applicable to the particular facts of this case. *Kerry M. v. Manhattan School District #114*, 2006 WL 2862118 (N.D.Ill.)

This case does not involve a question of whether or not the placement is the least restrictive environment for student. The parties were able to agree on a change of placement for the student to begin the second semester of the 2008-2009 school year. The change in placement involved the student attending a self-contained multi-sensory classroom at a different school from where the student had been originally attending.

Provisions were made in the student's current IEP for review and transitioning to a least restrictive environment based upon student gains and progress.

### Remedies

One of the remedies requested by the student, and which a hearing officer is empowered to provide is compensatory education. "Compensatory education" is a "legal term used to describe future educational services" which courts award to a disabled student under the IDEA "for the school district's failure to provide a FAPE in the past." See *Kevin T.*, *infra*.

When an IEP fails to confer some (i.e. more than de minimis) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by IDEA. It seems clear, therefore, that the right to compensatory education should accrue from the point that the school district knows or should know of the IEPs failure. *M.C. and G.C. v. Central Regional School District*, 81 F.3<sup>rd</sup> 389, 397 (3<sup>rd</sup> Cir. 1996). This student should have been found eligible for special education as early as March or April of 2006; but no later than the beginning of the student's repeating 2<sup>nd</sup> Grade in September 2006. His right, right to compensatory education, therefore accrues from that period of time.

### It is Ordered That:

1. [REDACTED] provide for independent educational evaluations at public expense, including but not limited to psychological assessments of cognitive and academic skills, occupational therapy assessments, and assistive technology assessment, as well as reassessing the nature and extent of the student's learning disabilities.

2. [REDACTED] shall reimburse/pay the cost of the independent Pediatric Neuropsychologist, [REDACTED]; the independent Consulting Audiologist, [REDACTED] and the independent Occupational Therapist, [REDACTED]

3. [REDACTED] shall provide compensatory education services for loss of FAPE during the past two years, including:

- a. Additional social work and/or psychological counseling services of 30 mpw for two years;
- b. Additional occupational therapy services for 30 mpw for two years;
- c. Tutoring by a certified special education teacher trained in the methodology for reading remediation adopted at the school the student

attends, for two hours per week for two years with the tutoring site to be selected by the parent;

- d. Additional services identified and recommended by any ordered independent educational evaluations.

4. [REDACTED] shall convene an IEP meeting and draft an IEP that will consider the full nature and extent of student's disabilities to provide a program of education and related services that will provide the student with a free and appropriate public education, incorporating (1) through (4) above.

5. Within forty-five (45) days of receipt of this Order, [REDACTED]

[REDACTED] 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:**

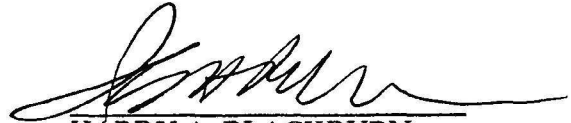
Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party(s) 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.

The undersigned Hearing Officer certifies that he served copies of the aforesaid Decision and Order upon Parents and District, through counsel, and the Illinois State Board of Education at their stated addresses by depositing same with the United States Postal Service at Joliet, IL via certified mail, with postage prepaid before 5:00 p.m. on March 2, 2009.

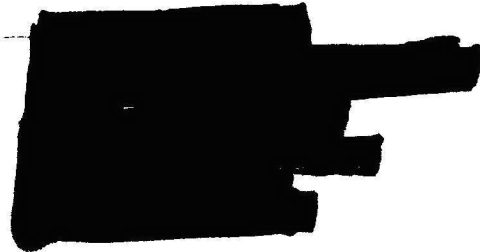
Dated this 2<sup>nd</sup> day of March , 2009.



HARRY A. BLACKBURN  
HEARING OFFICER

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the Decision and Order was sent via e-mail and placed in the U.S. Mail via certified mail at Joliet, Illinois, and directed to:



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

before 5:00 p.m. on March 2<sup>nd</sup>, 2009.



HARRY A. BLACKBURN  
P.O. BOX 34  
JOLIET, Illinois 60403  
(312) 401-2236  
(815-254-3658 (FACSIMILE))