

Case Number: 2009-0198

s. [REDACTED]

Hearing Officer: Joseph P. Selbka

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

Impartial Due Process Hearing Decision Cover Page

Instructions: Complete this form and return it along with the decision. The information collected on this form will be used for the purpose of indexing the decision by subject matter as required by 23 Illinois Administrative Code 226-695

District Name [REDACTED]
Superintendent [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Phone: [REDACTED]

Parent Name [REDACTED]
Address [REDACTED]
Represented by [REDACTED]

Date and Timelines

Date of Written Request: 11/21/2008
Date of Pre-hearing Conf: 01/16/2009

Date of Hearing: 03/09/2009 to 3/12/2009
12:00:00 AM
Date of Decision: 4/6/2009

Summary of Decision

The School District initiated a due process request contending that its evaluation of the Student was appropriate. The parties settled their dispute over multiple aspects of the evaluation, but ultimately requested the IHO to determine whether the District's psychological evaluation was appropriate and whether the District complied with the law by failing to conduct an occupational therapy evaluation. The IHO found for that the District appropriately conducted a psychology evaluation, but that the District's evaluation was inappropriate in that the District failed to provide an occupational therapy evaluation. Both parties were represented by Counsel.

APR 09 2009

HEARING DECISION, OPINION AND ORDER

TO: Ms. Mary Long
Illinois State Board of Education
100 North First Street
Springfield, IL 62777-0001

[REDACTED]

[REDACTED]

[REDACTED]

This matter comes before us pursuant to the hearing request of Student's father, [REDACTED] ("Student's Father"), on behalf of his son, [REDACTED] ("Student") against [REDACTED] ("School District" or "District"). Student's Parent is represented by [REDACTED] and [REDACTED]. The School District is represented by [REDACTED] and [REDACTED]. The parties have agreed to extend the forty-five day deadline for hearing to allow for a hearing on March 9 and 12, 2009, and for an ultimate decision by April 6, 2009. We have jurisdiction to hear this matter pursuant to 105 ILCS 5/14-8.02(a) *et seq.* and 23 Ill.Admin.Code 226.000 *et seq.*

I. Procedural History

The School District filed a due process hearing complaint, through its attorneys, on December 1, 2008, who has represented the District throughout the hearing. The hearing occurred at the [REDACTED] on March 9 and 12, 2009.

The Due Process Complaint claims that the evaluations provided by the District are appropriate. The Parents have responded by arguing that the evaluations conducted by the District were inadequate and requested that the District pay for the following independent evaluations: (1) psychiatric evaluation; (2) speech and language evaluation; (3) assistive technology evaluation; (4) psychological evaluation; and (5) occupational therapy evaluation.

The parties have settled part of their complaint, and the District has agreed to pay for: (1) psychiatric evaluations; (2) speech and language evaluations; and (3) assistive technology evaluations. As such, the only remaining issues are whether the psychological evaluation conducted by the District is appropriate and whether the District was required to conduct an occupational therapy evaluation in order to properly evaluate Student.

A prehearing conference occurred on January 16, 2009.

II. Issues Identified and Remedies Requested

1) Whether the District failed to conduct an appropriate psychological evaluation (during Student's triennial reevaluation) of Student as required by IDEA. Student's Parents contend the psychological evaluation was flawed in the following ways:

- (a) Student was not evaluated in Spanish, Student's dominant language, as required by federal law;
- (b) Student was not given a comprehensive intelligence and educational achievement test, but rather "brief" intelligence and educational achievement tests. Student's parents contend that this failure to give Student comprehensive tests failed to: properly identify Student's problems with phonological awareness (if any); failed to identify the exact nature of Student's learning disability in regard to math skills; failed to identify the exact nature of Student's learning disability in regard to memory skills (if any); failed to identify Student's learning disability regarding processing information (if any); failed to identify Student's learning disability as to whether Student can pronounce words correctly; failed to identify whether Student has a learning disability can listen to spoken language and demonstrate comprehension; failed to identify whether Student has a learning disability in regard to his ability to orally express and speak
- (c) Student's educational achievement and intelligence were not properly compared to each other because the K-TEA educational achievement test is not normed to the Wechsler Abbreviated Scale of Intelligence test (WASI).

(2) Whether the District violated IDEA by failing to conduct an occupational therapy evaluation, specifically, whether the District adequately evaluated Student's disabilities in regard to sensory processing and the extent of those disabilities.

Student's Parents request the following remedies: (1) that the School District's psychological evaluation be determined to be inappropriate; (2) that the School District's evaluation of Student be determined to be inappropriate because of the District's failure to conduct an occupational therapy evaluation; (3) that the District be ordered to pay for independent psychological evaluations and independent occupational therapy evaluations as a result of the District's failure to appropriately evaluate Student.

III. Findings of Fact

1. This case concerns the appropriateness of Student's reevaluation in 2007 and early 2008 (Tr. 9, 11). The parties have narrowed their dispute to the appropriateness of the psychological evaluation the District conducted and whether the District should have conducted an occupational therapy evaluation (Tr. 4).

Student's home language is Spanish (Tr. 217). Prior to the evaluation, Student has previously been assessed by a bilingual coordinator and found to be "ELL" which means that he is proficient in English (Tr. 87, SD 77).

2. [REDACTED] and [REDACTED] are two of Student's teachers who testified on behalf of the District.

The Psychological Evaluation

3. [REDACTED] conducted the psychological evaluation (Tr. 16). [REDACTED] has been a school psychologist for the District for ten years (Tr. 14). She has a bachelor's degree in behavioral science; and a master's degree in psychology. *Id.* She also has a Type 73 certificate (school psychologist). *Id.* [REDACTED] speaks Spanish fluently, and can administer evaluations in Spanish when necessary (Tr. 15-16).

4. [REDACTED] testified as an expert witness on behalf of Student. [REDACTED] is the director of clinical services for the [REDACTED] (Tr.156). [REDACTED] is a psychologist (Tr. 156). [REDACTED] has been a clinical psychologist since 1989, and has a doctorate degree in clinical psychology from the [REDACTED] (Tr. 157). [REDACTED] also has a degree in psychology from [REDACTED] (Tr. 157). [REDACTED] sees a wide variety of patients with developmental disabilities with an emphasis on autism, Attention Deficit Hyperactivity Disorder ("ADHD"), and learning disabilities (Tr. 157-158). Her practice consists primarily of children and adolescents (Tr. 158). [REDACTED] conducts evaluations of clinic patients to identify learning disabilities (Tr. 158). [REDACTED] did a consultation with Student's family and her clinic eventually did assess Student (Tr. 159, PD 165-171).

5. In conducting the evaluation, [REDACTED] conducted a records review, a classroom evaluation, a brief educational evaluation, and a brief psychological evaluation (Tr. 17). [REDACTED] also interviewed teachers using behavior assessment scales and questionnaires such as the Gilliam Autism Rating Scales and the Asperger Syndrome Diagnostic Scale. *Id.* As part of her evaluation, [REDACTED] observed Student in the classroom (Tr. 26-27). As part of her evaluation, [REDACTED] incorporated two of Student's teachers' observations (Tr. 21, 22). As part of her reevaluation, [REDACTED] observed Student in the classroom to determine whether Student had a specific learning disability (SD 11-12).

6. [REDACTED] administered the Kaufman Test of Educational Achievement-brief ("K-TEA brief") to assess Student's present level of performance of reading, math, and spelling skills (Tr. 18-19). According to [REDACTED] it was proper to use a brief test because: (1) the brief test is very accurate; and (2) on a reevaluation, the scores of a brief test can be compared and contrasted against previously administered comprehensive scores (Tr. 19). According to [REDACTED] the results of the K-TEA brief gave her an accurate picture of how Student was performing academically. *Id.*

[REDACTED] testified that it would be improper to translate words that Student did not know into Spanish from English because this would affect the validity of the test (Tr. 164-165). [REDACTED] testified that, as a matter of practice, she will translate words students don't know on the K-TEA Brief from English into Spanish (Tr. 64-65).

██████████ does not recall whether she translated any words for Student during his evaluation (Tr. 64).

7. ██████████ also administered the Wechsler Abbreviated Scale of Intelligence ("WASI brief") (Tr. 20). The WASI brief evaluated nonverbal reasoning skills, specifically, visual-spatial and visual-motor integration, abstract reasoning, and nonverbal reasoning. *Id.* ██████████ administered the WASI brief to compare and contrast with initial findings on nonverbal IQ. *Id.* ██████████ did not administer the verbal component of the WASI brief because ██████████ believed that Student's speech problems would have made the verbal component of the test inappropriate (Tr. 20-21).

██████████ testified that the WASI is a brief test rather than a comprehensive test (Tr. 170). On the other hand, the WISC-IV would be a comprehensive test which could determine working memory, processing speed, verbal and performance Q (Tr. 170). ██████████ believed that an IEP Team would find the results of a full IQ test administered in both Spanish and English to be useful to determine the extent of Student's disabilities (Tr. 172). ██████████ also believed that a nonverbal IQ test should have been administered to determine the extent of Student's nonverbal reasoning (Tr. 173).

██████████ testified that the K-TEA Brief is a screening test to determine whether there is enough information to test (Tr. 168). ██████████ also testified that the K-TEA and the WASI should not be used together to compare IQ and academic achievement as the tests aren't complementary to each other (Tr. 168-169). ██████████ did admit that the standard scores of the K-TEA and WASI could be compared to a certain extent- and the two tests could be used together to determine whether there is a severe discrepancy between academic achievement and IQ (Tr. 184-185). ██████████ admitted teachers may be able to determine Student's weaknesses through observation including phonemic awareness, decoding, listening comprehension, oral expression, and written expression (Tr. 185-187).

8. ██████████ also administered the Behavioral Assessment System for Children ("BASC-2") to assess Student's behaviors. ██████████ had one of Student's teachers, ██████████ respond to the BASC-2 questions (Tr. 21). ██████████ also conducted an interview with Student (Tr. 21). The BASC-2 was administered to identify autistic-like behaviors and to identify symptoms associated with ADHD (Tr. 22). ██████████ also administered the Behavior Rating Inventory of Executive Function ("BRIEF") to assess Student's thoughts and behaviors (Tr. 22). One of Student's special education teachers, ██████████ responded to the BRIEF (Tr. 22). ██████████ used the BRIEF to assess behaviors for possible autism characteristics and/or behaviors associated with ADHD (Tr. 22-23).

██████████ was in agreement with respect to ██████████ findings related to autism (Tr. 172). ██████████ however, believed that additional testing was needed in regard to the exact nature of Student's attention functioning (Tr. 173).

9. [REDACTED] also administered the Gilliam Autism Rating Scales, Second Edition ("GARS") (Tr. 24-25). This test rates atypical behaviors to rule in or rule out autism (Tr. 25). [REDACTED] suspected autism based upon her observations of Student in the classroom- including lack of social interaction, limited speech, odd behaviors, stereotypical behaviors, repetitive behaviors (Tr. 25-26). Stereotypical behaviors included staring at objects and opening and closing doors, fleeting eye contact, using robotic and monotone speech pattern, being unable to sit down and work with the examiner, having to look out an open door prior to sitting down (Tr. 26).

10. [REDACTED] also administered the Asperger Syndrome Diagnostic Scale ("ASDS") to determine whether Student had Asperger's Syndrome (Tr. 28).

11. [REDACTED] determined that Student was learning disabled, exhibited autistic behaviors, had oppositional defiant disorder, and possibly met the criteria for ADHD (Tr. 29). Student was ultimately found to have a specific learning disability by the IEP Team including [REDACTED], [REDACTED] and Student's Mother (SD 88-90).

12. [REDACTED] determined that English was Student's dominant language based upon the fact that Student is currently in a monolingual classroom (Tr. 44). [REDACTED] testified that even if Spanish was Student's dominant language, as long as Student was also fluent in English, testing Student in English would not affect the evaluation results (Tr. 78). Two of Student's teachers testified that Student uses primarily English at school (Tr. 101-102, 137). Student's expert, [REDACTED] did not make a determination whether Student was dominant in English or Spanish (Tr. 161).

[REDACTED] did testify that the best practice is for bilingual students to be assessed in both languages to better assess a child's strengths and weaknesses (Tr. 162-163). Children may know information in one language, but not in the other, and thus assessing in both languages better allows the evaluator to assess the Student's strengths (Tr. 162-163).

13. [REDACTED] did not administer a standardized test for phonological awareness, nonsense word decoding, written expression, processing speed, listening comprehension, or memory index. [REDACTED] testified that she was able to evaluate Student's processing deficits, memory problems, and possible learning disabilities from observation-based assessments of Student (Tr. 72, 91-92). [REDACTED] testified that her observations did determine that Student had problems with processing information and memory (Tr. 72-73, 91-93). [REDACTED] testified that her assessments based upon evaluations can be as informative as a standardized test given to a student (Tr. 85). [REDACTED] testified that, as a special education teacher, she is able to and does determine whether Student has problems with: phonological awareness; ability to pronounce words; comprehension of spoken language; and ability to orally express himself (Day 2- Tr. 10-14). [REDACTED] testified that Student does not have problems with phonological awareness, pronouncing words correctly, or comprehension of spoken language (Day 2- Tr. 10-14). [REDACTED] testified that the IEP Team

understands the nature and extent of Student's disability to the extent necessary to prepare an IEP in regard to oral expression, memory, processing speed, and math (Day 2-Tr. 10-14, 20-21).

██████████ testified that the K-TEA Comprehensive test would measure the following things which the K-TEA Brief does not: phonological awareness (the ability of children to recognize the phonemes or sounds of words (Tr. 165-166); nonsense word decoding which would determine whether a student can pronounce phonemic meaningless words (as a supplement to testing for phonological awareness) (Tr. 166); decoding fluency which tests the ability to decode a word (Tr. 166); written expression to determine if a student is able to put together thoughts in an adequate fashion (Tr. 167); and oral expression and listening comprehension (Tr. 167).

14. All experts who have evaluated Student do not believe that he has selective mutism (another disability Student was suspected of having at one point in time) (Tr. 73-74, 191).

Facts Related to the Decision not to Conduct an Occupational Therapy Evaluation

15. ██████████ did not refer Student for an occupational therapy evaluation because Student's fine motor skills are/were not impacting Student's ability to function in the school setting (Tr. 36). ██████████ observed Student and did not note any problems with fine motor skills (Tr. 29).

16. ██████████ admitted that sensory-processing difficulties are common with children with autism (Tr. 65). Sensory processing difficulties are abnormal ways in which a child reacts to sensory stimuli (Tr. 65-66). Sensory processing difficulties can affect a child's performance in the classroom (Tr. 66-67). Student has sensory processing difficulties (Tr. 66). Student's teacher, ██████████ also noticed that Student has sensory needs (Tr. 105).

17. ██████████ did not conduct any formal measurement of Student's sensory processing needs, and testified that occupational therapists generally make this type of assessment (Tr. 67-69). ██████████ rather relied on a past assessment (from 2004) (Tr. 69). ██████████ admitted that sensory motor concerns would be a cause for an occupational therapy referral (Tr. 69). ██████████ agreed that Student has sensory issues which affect his education (Tr. 174-177).

18. ██████████ testified occupational therapists often formulate a "sensory diet" which is a plan to address sensory issues (Tr. 175).

Inferences Drawn from the Facts Received at Hearing and Credibility Findings

i. The Psychological Evaluation

19. The District, as part of its reevaluation, considered Student's needs by evaluating Student for suspected autistic behaviors and possible ADHD. The District's reevaluation was shaped by District observations of Student as well as administration of brief tests to test Student for learning disabilities (SD 1-5). We base this inference on [REDACTED] testimony as set out in Facts ##5-11. The District also considered whether Student needed and continues to need special education and related services (SD-5); Student's current level of academic achievement (Facts ##5-11); related developmental needs (Facts ##5-11); and whether Student needed further modifications and accommodations in light of autistic behaviors, ADHD, and oppositional defiant disorder (SD-5, Tr. 34).

20. The District's various assessments conducted by [REDACTED] gathered relevant functional, developmental, and academic information about Student. We base this inference on [REDACTED] testimony as set out in Facts ##5-10.

21. The District reviewed existing evaluation data on Student as part of its psychological evaluation (Tr. 17). District assessments were based upon classroom observations and teacher and service provider observations. We base these inferences on [REDACTED] testimony as set out in Facts ##5-10 and 21, as well as the actual assessment documents located at SD 11, 13, 16, and 33. This testimony and documents demonstrate that the assessments incorporated observations of the psychologist and Student's teachers.

22. The District properly determined what additional data was needed for the reevaluation. We make this inference based upon the fact that District personnel observed Student's strengths and weaknesses as set out below.

We base this inference on the testimony of [REDACTED] and [REDACTED] in regard to their observations of Student's disabilities on the following subjects: his memory deficits, processing disabilities, learning disabilities related to Student's math skills, disabilities related to oral expression, disabilities related to autism, ADHD, and Oppositional Defiant Disorder, and learning disability generally.

We also base this inference on the testimony of [REDACTED] and [REDACTED] as to Student's lack of problems with: phonological and phonemic awareness, pronouncing words correctly, and comprehension of spoken language. See Facts, #5, 13.

We make an inference that the observation-based assessments of District personnel provided enough information to allow the District to determine Student's disabilities and the extent of Student's disabilities necessary to identify Student's needs regarding special education and related services. We base our inference on the testimony of District personnel set out in Facts, #5-10.

23. We make an inference that the District properly determined that Student had a learning disability by determining that Student exhibited a pattern of strengths and weaknesses indicating a learning disability. To wit: there is a severe discrepancy between Student's cognitive ability and Student's academic achievement (Tr. 52). We base this inference on [REDACTED] testimony set out in the transcript on page 52.

Furthermore, we make a credibility finding in favor of [REDACTED] and against [REDACTED] as follows. It is proper to use the K-TEA brief and the WASI to compare Student's academic achievement and cognitive ability for the limited purpose of determining whether there was a significant discrepancy between Student's academic achievement scores and IQ. We base this finding on [REDACTED] admission that the tests could be used in this way. See Facts, #7.

24. We make a credibility finding that [REDACTED] did not translate any portion of the K-TEA into Spanish for Student. We base our finding upon the fact that there is no evidence that she ever did so. See Facts, #7. We make a credibility finding that all assessments were properly administered because of the credibility findings and inferences set out in Paragraphs 23 and 24, and the lack of any other evidence to the contrary.

25. We make the inference that English is Student's dominant language at school. This inference is based upon the credible testimony of [REDACTED] and [REDACTED] that Student primarily speaks English at school, and is based upon the lack of any testimony to the contrary. See Facts, #12. We make a credibility finding in favor of [REDACTED] and against [REDACTED] that, since Student was fluent in English, even if his dominant language is technically Spanish, this would not affect the evaluation. See Facts, #12

26. We make an inference that Student does not have selective mutism based upon the testimony of the experts in this case.

ii. The Need to Conduct and Occupational Therapy Evaluation.

27. We make a credibility finding that the District knew or should have known that Student has a disability related to sensory processing based upon [REDACTED] and [REDACTED] testimony admitting that Student has sensory processing issues. We make an inference that there should have been an occupational therapy evaluation to determine the extent of Student's sensory processing disabilities and the needs of Student in regard to special education and related services stemming from his sensory processing issues. We base our inference upon [REDACTED] testimony and [REDACTED] testimony that occupational therapists usually address sensory processing issues. See Facts, #15-17.

IV. Conclusions of Law

Burden of Proof and The Authority of The Hearing Officer

28. 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 Article 14 of the Illinois School Code, 105 ILCS 5/14-8.02a. In enacting IDEA, Congress intended to establish a "cooperative federalism." *Evans v. Evans*, 818 F.Supp.1215, 1223 (N.D. Ind.

1993). Thus, 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.* IDEA does not preempt state law if the state standards are more stringent than the federal minimums set by IDEA. *Id.*

29. 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). In this case, the School District filed the due process complaint, and therefore, the ultimate burden is on the School District. The School District must prove its case by a preponderance of the evidence.

30. In determining whether an evaluation is proper under IDEA and the School Code, 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)(like Wisconsin ALJ's, Illinois Impartial Due Process Hearing Officers are presumed to be experts on special education law, see 105 ILCS 5/14-8.02c); *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).

31. Under federal administrative law, 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). 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).

Moreover, hearing officers can make reasonable inferences from the evidence adduced at trial. 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.* Inferences must also be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support our inferences and conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart, supra.*

Similarly, to the extent we rely upon expert opinions, the expert opinions must be inferred ultimately from facts 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).

32. Illinois law imposes an even more stringent standard on administrative hearings. In addition to the substantial evidence standard, Illinois law requires that administrative decisions be supported by "competent evidence." Competent evidence is either: (1)

evidence which would be admissible in a trial; or (2) inadmissible evidence of such a character which responsible persons are accustomed to rely upon said evidence in serious affairs (which We can only rely upon if admissible evidence is unavailable). *Starkey v. Civil Service Commission of the State of Illinois*, 105 Ill.App.3d 904, 910 (1st Dist. 1983) *rev'd on other grounds* 97 Ill.2d 91(1983).

33. Illinois law also requires the trier-of- fact in administrative adjudications to accept uncontradicted factual testimony as true. *Crabtree v. Illinois Department of Agriculture, Division of Agricultural Industry Regulation*, 128 Ill.2d 510, 518 (1989).

Standards for Determining Whether the District Complied with the Law in Evaluating the Student

34. The District has the burden of showing that its evaluation was "appropriate." *Board of Education of Murphysboro Community Unit School District No. 186 v. Illinois State Board of Education*, 41 F.3d 1162, 1167, 1169 (7th Cir. 1994). An appropriate evaluation is one which complies with the pertinent federal and state regulations. *Krista P. v. Manhattan School District*, 255 F.Supp.2d 873, 887 (N.D.Ill. 2003)(federal and state regulations "provide the minimum requirements for an evaluation").

35. As a student eligible for special education, Student must be reevaluated every three years. 34 CFR 300.303(a). A reevaluation¹ must assess a student in all areas related to the suspected disability, 34 CFR 300.303(a), 304(c)(4); and be sufficiently comprehensive to identify all of the Student's special education and related services needs, whether or not linked to the disability category in which the child has been classified. 34 CFR 300.303(a), 304(c)(6).

While a student's reevaluation must be as comprehensive as a preplacement evaluation, the reevaluation need not be identical. *Letter to Shaver*, 17 IDELR 356 (OSERS 1990). Rather, the reevaluation must take into account the student's then current needs. *Id.* It is thus appropriate for a school district to use different procedures to evaluate students during reevaluations than in the student's initial evaluation. Moreover, a school district is not required to use any standardized test of any kind in conducting an evaluation. *Letter to Copenhagen*, 25 IDELR 640 at 4 (OSEP, 1995). A school district has discretion to rely upon methods other than standardized testing in conducting an evaluation or reevaluation. *Id.*

The District's reevaluation must be "comprehensive" to be appropriate. 34 CFR 300.303(a), 304(c)(6). This means that the District must evaluate: (1) all areas of disability or suspected disability; (2) to the extent necessary to identify the needs of the child to special education and related services. 34 CFR 300.15. As part of determining the nature and extent of the special education services and related services a child needs, the School District must determine the extent of the student's disability. *In Re Yuba City (CA) Unified School District*, 22 IDELR 1148 at 4 (OCR 1995)(in determining whether

¹ The District refers to Student's reevaluation as a "triennial evaluation." Regardless of the terminology the District uses, its actions are governed by regulations related to reevaluations.

evaluation under Section 504 complaint was adequate, School District failed to properly evaluate Student by not determining the extent of the disability- Section 504 evaluation standards are essentially the same as evaluation standards under IDEA see e.g. 34 CFR 104.35).

36. In reevaluating a student, the district must also consider: (1) the present needs of the child; (2) whether the child needs and continues to need special education and related services; and (3) whether any additional modifications or accommodations are required. 34 CFR 300.505(a)(2)(i)(B)(i-iv).

37. During a reevaluation, the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. 34 CFR 300.303(a), 304(b)(1). Moreover, a school district must properly administer tests it does use to evaluate students. 34 CFR 300.303(a), 304(b)(3),(c)(iii), (c)(iv).

In addition, during a reevaluation, the District must review existing evaluation data on the child, evaluations and information provided by the parents; current classroom based assessments and classroom based observations; and teacher and service provider observations. 34 CFR 300.305(a). The School District must then determine what additional data, if any, is needed to determine whether: the child has a disability and the needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child continues to need special education and related services and whether additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP. 34 CFR 300.305(b).

38. School Districts are also required to conduct reevaluations in a student's native language. 34 CFR 300.303(a), 304(c)(1)(ii). A student's native language is the language which: (1) is normally used by the Student's Parents; (2) is normally used by the Student at home; or (3) is normally used by the Student in the school. 34 CFR 300.29(a)(1,2)).

The Illinois Administrative Code requires that a student be evaluated in the Student's primary language. 23 Ill.Admin. Code. 226.150. The District has an obligation to determine the primary language of the child's home, 23 Ill.Admin. Code 226.140, and then determine the child's language use pattern and general cultural identification by determining the home language and language used most comfortably and frequently by the child. 23 Ill.Admin. Code 226.140(a). If the child has a non-English speaking background, the District must determine Student's proficiency in English. 23 Ill.Admin. Code 226.140(b). The Illinois Administrative Code does not define "primary language," and therefore, we interpret primary language to be identical to "native language" in the federal regulations. The child's proficiency in English must be taken into account in the evaluation. 23 Ill.Admin. Code 226.140(d).

39. Although the School District must evaluate properly and according to the OSEP regulations, we 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).

Legal Contentions of the Parties

40. The District contends, in effect, that a reevaluation need not be comprehensive to be appropriate as long as previous possible disabilities had been assessed in the initial evaluation. We reject that proposition for the reasons set out above in Conclusion #35. A reevaluation need not be identical because suspected disabilities can (and indeed must) be influenced by observation in the classroom during provision of related services to the student and previous evaluation data. 34 CFR 300.305(a)(1). However, a school district cannot simply ignore suspected areas of disability because the Student was previously evaluated. Rather, the evaluation must be modified by using information obtained from previous evaluations and observations. See Conclusion #35.

41. Student contends that the District must conduct a comprehensive battery of standardized tests as part of any reevaluation and that the evaluation portions of IDEA were enacted to prevent evaluation based solely upon observation. Student further contends that strengths and weaknesses can only be properly evaluated using comprehensive, exhaustive standardized testing. We hold that the language and the structure of the OSEP regulations provide for the exact opposite: that a school district has discretion whether to use standardized tests as part of a reevaluation, but that assessments based upon observation are required for the evaluation to be appropriate. We base our holding on the following information:

a. Federal regulations specifically forbid the use of screening assessments (essentially brief standardized tests to screen students) for initial evaluations, but federal regulations are silent as to the use of screening assessments for reevaluations. *Compare and contrast* 34 CFR 300.302 which makes screening evaluations impermissible for initial evaluations, but note that 34 CFR 300.303(a) does not include 34 CFR 300.302 as one of the regulations which applies to conducting reevaluations.

b. Neither Congress nor OSEP has enacted any statutory section or regulation which requires comprehensive standard testing as part of a reevaluation. On the other hand, OSEP has required reevaluations to contain assessments based upon review of existing evaluation data and observations by teachers and related services providers. *See* 34 CFR 300.305(a)(1).

c. OSEP has issued at least one letter noting that Districts do not have to use standardized tests to appropriately evaluate a student. *Letter to Copenhaver*, 25 IDELR 640 at 4 (OSEP, 1995).

d. Observations in the classroom by educators are often the primary way in which a student's individual strengths are usually assessed. *See* Gargiulo, Richard. Special Education in Contemporary Society: an Introduction to Exceptionality, (3rd Ed.), Sage Publications, Inc. (2009), pp. 60-67. Interindividual differences are differences between pupils which are often determined by norm-referenced tests. *Id.* On the other hand, intraindividual differences are a student's unique pattern of strengths and weaknesses. *Id.* Intraindividual differences are determined using criterion-referenced assessments where a student's performance on a task is compared to a particular level of mastery. *Id.* These criterion-referenced assessments are often based on naturalistic

observation, interviews, work samples, and portfolio creation and review (all of which are based upon teacher or educational professional evaluation). *Id.*

In light of the structure and language of the regulations; the conspicuous lack of any requirement for comprehensive norm-based testing as part of a reevaluation; OSEP's nonbinding letters to the contrary; and the wide-spread practice of evaluating students' intraindividual differences on observation assessments, we reject Student's contention that comprehensive norm-based testing is a required by IDEA as part of a reevaluation. In the absence of a clear statutory or regulatory directive, we believe questions of educational policy should be left to the local school district. *See, for example, Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 207-210 (1982).

Conclusions of Law Associated with the Appropriateness of the Evaluation of Student's Suspected Learning Disability

42. There are additional requirements for evaluating students suspected of having apply to evaluating a student suspected of having a specific learning disability. 34 CFR 300.307-310. The additional requirements relevant to this case are set out below.

43. The determination of whether a student has a specific learning disability must be made by the child's parents and a team of qualified professionals including the student's regular teachers and a person qualified to conduct individual diagnostic examinations such as a school psychologist. 34 CFR 300.308. The group may determine that the student has a specific learning disability if the student is not achieving adequately; is not making progress in response to research based interventions; or the child exhibits a pattern of strengths and weaknesses which indicate the existence of a specific learning disability. 34 CFR 300.309. The school district must ensure that a student is observed in the learning environment to document academic performance and behavior in the areas of difficulty and use the observed information to determine whether the student has a specific learning disability and the extent of that disability. 34 CFR 300.310.

44. Illinois allows the use of the severe discrepancy model to determine if a student has a specific learning disability. 23 Ill.Admin. Code 226.130(d). The severe discrepancy model determines the existence of a learning disability by determining whether there is a severe discrepancy between the student's cognitive abilities and the student's academic achievement.

Conclusions of Law Associated with the Appropriateness of the Evaluation in Regard to Student's Suspected Disability as to Sensory Processing

45. Occupational therapy is one of the related services which a school district must provide to students with disability if appropriate. 34 CFR 300.34(a). Occupational therapy includes services which: (1) improve, develop, or restore functions impaired through illness; (2) improve the ability to perform tasks for independent functioning; and

(3) using early interventions to prevent further impairment or loss of function. 34 CFR 300.34(c)(6).

46. A school psychologist is charged with, among other things, consulting with other staff members in planning school programs to meet the needs of children as indicated by assessments. 34 CFR 300.34(c)(10)(iv).

Miscellaneous Issues

47. The District repeatedly objected on the basis of relevance to documents and evidence which contained observations; previous evaluations of Student; and records of Student's performance prior to and after the current evaluation. Because the reevaluation at issue must be based, at least in part, on observation and analyzing previous evaluations, the documents and evidence which record observations of Student, actual observations of Student, and previous evaluations of Student are relevant to either support or contradict the District's observations and analysis of previous evaluation of Student (which eventually constituted the basis of the assessments).

Documentation and evidence concerning Student's performance after the evaluation is relevant because it tends to show whether the special education and related services are operating to provide Student with an educational benefit. If the special education and related services are providing Student an educational benefit, the documents and evidence tend to show that the evaluations were appropriate, or at least, any flaws in the evaluation constituted harmless procedural errors. If the special education and related services provided are not providing an educational benefit, it may be a permissible inference that a faulty evaluation caused the District to improperly identify Student's disabilities. For these reasons, we overruled the objections.

48. The District objected to the hearing officer calling and examining witnesses. We are entitled to do so pursuant to 23 Ill.Admin. Code 226.660(b) (hearing officer is empowered to examine witnesses) and 105 ILCS 5/14-8.02a(g-55)(hearing officer has the power to require additional information of any party prior to conclusion of hearing).

49. The District claimed that Student was tardy in bringing his due process complaint. The District points to no authority which would bar a due process complaint by laches. The District also failed to show how it relied on Student's failure to act, which is a requirement for laches. Finally, IDEA gives students' two years to file a complaint for due process. 20 U.S.C.A. 1415(f)(3)(C). Student's complaint was brought within two years of the evaluation. We will not impose requirements greater than the statute of limitations set out in IDEA, and therefore reject the School District's proffered laches defense.

50. The District objected to [REDACTED] testimony on the basis of relevance. [REDACTED] testimony was relevant as she critiqued the appropriateness of the District's evaluation. The District never presented a Daubert challenge as to [REDACTED] credentials as a psychologist. The District's objection is thus overruled.

V. Application of Fact to Law

51. We find that [REDACTED] psychological evaluation was appropriate as it complied with federal and state regulations. In making this determination, we find:

a. The District evaluated in all areas of suspected disability, and the extent of Student's disabilities necessary to determine Student's needs to special education and related services. Relatedly, we find that the District's evaluation did not need to administer comprehensive tests to comprehensively reevaluate Student. We find that the District could, in its discretion, rely on observation-based assessments. We find that the District did not abuse its discretion in choosing to rely upon observation-based assessments. We find that the District comprehensively evaluated Student in regard to his memory deficits, processing disabilities, learning disability related to Student's math skills, disabilities related to oral expression, and learning disability generally.

We find that District personnel were able, through observation, to discern Student's ability and lack of disability in regard to phonological and phonemic awareness, pronouncing words correctly, and comprehension of spoken language. See Facts, #13.

b. The District considered the present needs of Student; whether Student needs and continues to need special education and related services; Student's present levels of academic achievement and developmental needs; and additional modifications and accommodations. See Facts, #19.

c. The District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student. See Facts #3-10, 20.

d. The District complied with the law by using teacher observations of Student and previous evaluation data to narrow the subjects of the reevaluation. See Facts, #5-10, 21.

e. The District properly determined what additional data was needed, and conducted the proper assessments to evaluate Student's suspected psychological disabilities. See Facts #22.

f. The District properly administered the tests it used to evaluate Student. See Facts, #23, 24.

g. The District evaluated Student in Student's dominant language/primary language at school- English. The District previously determined Student's proficiency in English in accord with Illinois regulations. The District also properly determined Student's language use pattern and cultural identification. See Facts, #1, 12, 25. To the extent that the District (and this hearing officer) may have been mistaken, Student is fluent in English, and conducting the evaluation in English did not render the reevaluation inappropriate, See. Facts, #1, 12, 15. Thus, assuming *arguendo*, Student's dominant language is Spanish, it was a harmless procedural error to conduct the evaluation in English.

h. The District properly determined that Student did not have Selective Mutism. See Facts, #14, 26.

i. The District properly determined Student has a specific learning disability using a team which included Student's mother [REDACTED] and [REDACTED]. See Facts, #11. The District properly determined that there is a severe discrepancy between

Student's cognitive abilities and academic achievement and that Student thus has a learning disability. See Facts #23. The District, through [REDACTED] observed Student in the classroom to determine whether Student has a specific learning disability. See Facts, #5.

52. We find that the District failed to conduct an appropriate evaluation in that the District was aware that Student had sensory processing issues; was aware that occupational therapists determine the extent of sensory processing disabilities and Student's needs in regard to providing related services for sensory processing issues (See Facts #15-18, 27); and yet the District did not provide Student with an occupational therapy assessment. Contrary to the District's contentions, the District's obligation to provide related services for occupational therapy requires more than correcting Student's fine motor skills. See Conclusion of Law # 45. Rather the District has to provide related occupational therapy services related to improve Student's ability to independently function and provide interventions to prevent further impairments. See *Id.* Student's issues with sensory processing certainly are related to his ability to independently function. As such, the District should have conducted an occupational therapy evaluation to determine the extent of Student's sensory processing disability and Student's need for special education and related services related to his sensory processing disability.

VI. Order

As to the psychological evaluation, we find that the District's evaluation was appropriate, and that the District need not take any further action in regard to the psychological evaluation. As to the District's failure to have an occupational therapist evaluate Student, we find that the District failed to appropriately evaluate Student by failing to conduct an occupational therapy evaluation. We therefore order the District to pay for an independent educational evaluation in the area of occupational therapy. The District shall provide proof of compliance with this order to the Illinois State Board of Education, Compliance Division, by July 6, 2009.

VII. Right to Request Clarification

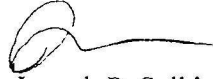
Section 14-8.02(a)(h) of the School Code, allows the hearing officer to retain jurisdiction after the issuance of the decision for the sole purpose of considering a request for clarification. A request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the other parties and to the Illinois State Board of Education. The request shall operate to stay the implementation of those portions of the decision for which clarification is sought. I shall issue a clarification of the specific portion of the decision or issue a partial or full denial of the request in writing within ten days of receipt of the request and mail copies to all parties to whom the decision was mailed.

VIII. Finality of Decision

This decision shall be binding upon all parties.

IX. Right to File Civil Action

Any party to this hearing aggrieved by the final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS 5/14-8.02a(I) that civil action shall be brought in any court of competent jurisdiction within 120 days after this decision was mailed.



Joseph P. Selbka
Impartial Due Process Hearing
Officer

Date: 4-6-09

