

ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING

AUG 12 2009

[REDACTED]  
Student

vs.

Case No. 2009-0318

[REDACTED]  
ANN BREEN-GRECO, Hearing Officer

### DECISION AND ORDER

This matter is before the undersigned Hearing Officer for a due process hearing concerning the Parent's assertion that the District violated its child find obligation and denied the Student a free, appropriate, public education (FAPE). The Hearing Officer has jurisdiction to hear and decide the matter under 105 ILCS 5/14-8.02a, 34 C.F.R. 300.506-509, 23 Ill. Admin. Code 226 Subpart G, and the Individuals with Disabilities Education Act, as amended, 20 U.S.C. 1415 et seq. ("IDEA"). The parties were informed of their rights pursuant to these statutes.

#### PROCEDURAL BACKGROUND

On March 5, 2009, the Hearing Officer sent the District and Parent the pre hearing notice to set the pre hearing as required by Illinois Administrative Code 226.640(a)d. The pre hearing was set for January 16. On March 23 the Hearing Officer sent an order resetting the 45 day timeline in order to allow the Parent to avail herself of the opportunity to have mediation without having to prepare for pre hearing. On April 3 the Hearing Officer ordered that the parties set a mediation date. The parties engaged in mediation on April 7 but were unsuccessful in reaching an agreement. On April 14 the Hearing Officer granted the Parent's request for a continuance. On April 29 the Hearing Officer granted a continuance in order to allow time for the parties to brief the issue of Parent's request for an observation as part of an Independent Education Evaluation (IEE) and set the pre hearing for May 15. The Hearing Officer, on May 7, granted Parent's Motion for observation.

The pre hearing was held on May 15 by phone. Participating were the attorneys for the parties. The matters reviewed are set forth in the Pre-Hearing Conference Report. The parties selected May 28 at 11:45 a.m. for a continued pre hearing and June 22, 23, and 26 for the hearing dates.

On June 8 the Hearing Officer informed the parties that she was not available on June 26. The

Hearing Officer confirmed by order of June 12 that the parties agree to set the hearing for June 22 and 23 from 8:00 a.m. to 5:00 p.m. to complete the hearing. Based on a request from one of the parties, the Hearing Officer convened a conference call with the parties to discuss another date for hearing. The Hearing Officer offered the date of June 28 but the parties were involved in another hearing. The parties then agreed on the date of July 28 which was confirmed by order of the Hearing Officer on June 24.

The hearing proceeded on June 22 and 23. On July 27 the District's attorney sent an email stating that he was having difficulty reaching witnesses for July 27 and that he would keep trying. On July 28 the hearing was re-convened. The Parent's attorney stated that the District had no witnesses to present and that she had received some but not all records requested. Parent's attorney stated that she would call Mother as a rebuttal witness and was then ready to proceed to closing oral arguments.

The District's attorney confirmed that he had not been able to secure any witnesses. He stated that he recognized that the District's case in chief is less than "ideal" and that it has been frustrating trying to secure witnesses. On July 27 the District's attorney spoke with a school administrator/assistant principal and asked her to call staff. The District's attorney identified, at the request of the Hearing Officer, the witnesses he tried to reach, who are as follows: the case manager, who had appeared to testify in June but was not able to do so because of other witnesses; and two teachers, both of whom were subpoenaed and received the subpoenas for June but did not appear or contact the District's attorney. But the District's attorney did not view the two teachers as being "crucial" and "they might be duplicative." The case manager, however, would be important to clarify procedural things that had happened. He also tried to reach the school psychologist, who had also been subpoenaed, received the subpoena for June, and did not appear. Additionally, he attempted to reach the social worker who had done a social assessment. She, however, had not been subpoenaed because she was no longer working for the District. Finally, he attempted to reach the speech and language pathologist, who also had been subpoenaed for June and did not appear. The District's attorney stated that of those potential witnesses, the case manager would be the most important. The District's attorney was unsuccessful in reaching any of them.

In response to his request on July 27 to the school administrator/assistant principal, she informed him that she was able only to reach the case manager who is in Michigan and will not return until August 4. She gave the case manager the District's attorney's phone number for but there was no contact. The District's attorney then requested a continuance, asserting that the school year starts August 10 but the Student would not be attending (the therapeutic day) school until September. Even if a continuance were granted, he argued, it would still allow for a ruling prior to the school year for the Student.

The Parent's attorney objected to the continuance request, stating that the District's attorney has had more than a month to contact the witnesses. The hearing dates were set and the District's attorney should have known the case manager would be on vacation. She also pointed out that the District's attorney waited until the morning of the hearing to request the continuance. Further, she would not call her client to testify because there might be more rebuttal testimony required based on other witnesses' testimony. Finally, she contended the private placement

starts before September and the Student would not be able to start on time; if the Hearing Officer were to order the private placement then it needs to be in place. She noted that the Student is 15, has repeated two grades, and has a short time period to make up his education. The continuance is prejudicial and she requested that it be denied.

The Hearing Officer suggested that the District's attorney ask the school administrator/assistant principal, who was at the location of the hearing, to contact the case manager to see if he was available for telephone testimony. Parent's attorney had no objection. The District's attorney relayed the message to the school administrator/assistant principal who made the call to the case manager in the presence of the District's attorney. After 20 minutes, the case manager had not returned the call. The Hearing Officer suggested that another call be placed to the case manager. The District's attorney then reported that the case manager answered the call but said he could not participate in telephone testimony.

The Hearing Officer, in deliberating on the request for continuance, notes that there had been at least a six week period of time for the District's attorney to try and reach witnesses. When the case manager appeared for testimony in June the District's attorney could have questioned him as to how long he could stay or when he might again be available. After the two hearing days in June, more than a month's time passed, giving the District's attorney time to follow up on all the witnesses, including those who had been subpoenaed and did not appear. The continuance request was not made until the morning the hearing was reconvened on July 28. Any further delay might be prejudicial to the Student. Accordingly, the Hearing Officer denied the request for continuance.

### **ISSUES AND RELIEF REQUESTED**

Parent asserts that the District: (1) Failed to adhere to child find obligations pursuant to IDEA; (2) Failed to provide an appropriate and individualized evaluation in a timely manner in order to adequately identify the nature and extent of the Student's disabilities from February 17, 2007 through the present, which is a denial of FAPE. (3) Failure to provide an appropriate educational program/placement based on scientific, researched based evidence including a certified special education teacher, and related services with sufficient intensity to meet the student's educational needs from February 17, 2007, to present, including Extended School Year (ESY) 2007 and 2008. 34 CFR 300.35, 300.39(a). (4) Failure to identify in a timely manner and then provide appropriate assistive technology in the classroom setting and for all school work.

Parent as relief seeks a finding that the District violated its child find obligations and denied FAPE by failure to fully evaluate. Parent seeks a private learning disabilities (LD) school program such as [REDACTED] or other private LD school with safe and reliable transportation; Parent may provide a ten day unilateral notice and if there is a unilateral placement, the District is to reimburse the Parent for costs; compensatory services; assistive technology.

## FINDINGS OF FACT AND ANALYSIS

The District has the burden of presenting evidence that the special education needs for the Student have been appropriately identified and that the special education program and related services proposed to meet the needs of the Student are adequate, appropriate, and available. 105 ILCS 5/14-8.02a(g-55). The Parents, however, have the burden of proof regarding the request for a due process hearing involving a denial of FAPE based on the United States Supreme Court ruling in *Schaffer ex rel. Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) which was analyzed with respect to the relevant Illinois statute (the Illinois School Code) by the Northern District. *Kerry M v. Manhattan School Dist.*; and the Illinois State Board of Education, U.S. District Court, Northern District of Illinois, IDELR 194 106 LRP 58547 (September 2006).

Parent filed due process citing four issues, which are addressed here. . . . .

### 1. Failure to adhere to child find obligations based on IDEA.

Districts are required to identify, locate and evaluate all children with disabilities who regardless of the severity of the disabilities: (1) have disabilities and need special education and related services as a result; or (2) are suspected of having disabilities and being in need of special education and related services (20 U.S.C. § 1412(a), 34 CFR 300.111(c)) even though a student is advancing from grade to grade. A district is obligated to determine whether a student should be referred for an evaluation, not whether a student would actually qualify for services.

The Student's second grade teacher referred the Student because he could not say his numbers or write his name, had an attention span of not more than two or three minutes, and was failing second grade. However, she testified that "experts" stated there was no basis for evaluation. This was an early opportunity for the District to determine whether the Student qualified for services. He failed the next grade and had to repeat the year. His progress record showed grades in Reading a D in first grade, an F in second through sixth grades, and his Grade 4 ISAT 2005 results showed he was below standards in science. He also missed a significant number of school days due to sickness. Despite these low and failing grades, he was not referred for evaluation until sixth grade.

On April 6, 2006, his fifth grade teacher requested a "Full and Individual Evaluation" for him, stating he displayed "erratic behavior when required to perform a task requiring high order thinking skills, reading independently, or participating in in-depth discussion regarding comprehension. (He) lacks in the necessary skills to read words according to vowel team and two-three letter consonants. His grades in reading, spelling, written language, speaking, listening, science and social science were Fs and math was a D. PD 3. It also states that the Student is "constantly out of his seat, his attention span appears to be short, short tempered..." PD4. A number of interventions were noted: modified homework assignments, modified class assignments (not many), peer tutoring, one-on-one tutoring, reciprocal teaching, and oral tests started in February 2006. PD 4, 5. There is no data or any evidence which documents the use of these interventions or outcomes from the use of interventions, as required.

The evaluation commenced and the Social Worker Report April 21, 1006, noted "academic concerns" as the reason for referral. PD 93. On May 22, 2006, a Notification of Referral Decision reported a "stop case study evaluation" because the assessment results were invalid, based on the Student failing his vision exam. PD 9. Parent reported that glasses had been ordered.

The evaluation resumed when he was in sixth grade. In a social assessment dated October 17, 2006, his sixth grade teacher noted that he was not doing the work of a fifth grader and that he "may benefit from specialized services but this will be determined at the IEP." PD 97, 98. Social work services were not recommended. PD 98.

In the November 14, 2006 speech language assessment it was reported he failed vision screening and wears glasses. He was not referred for speech and language services, despite his low vocabulary scores. The November 15, 2006, psychological report states that interventions had been implemented but the response to them is unknown. His reading and math were below average and writing was the lower extreme at the 1<sup>st</sup> percentile. PD 16, 17. Communication is stated as low average and below average, but "...may be attributed to poor general knowledge. Vocabulary can be addressed at home or in the classroom." PD 18. It was noted that he was academically performing below his estimated cognitive ability but the cause for the discrepancy could not be determined.

In the Behavior Assessment system for Children (BASC), December 13, 2006, (PD 11, 58-64) Mother reported his functional communication in the "At Risk" classification range. His teacher reported that his conduct problems, anxiety, adaptability, social skills, leadership, study skills and functional communication were in the "At Risk" classification range, and that hyperactivity, aggression, attention problems, and learning problems were in the "Clinically Significant" range. PD 117.

In the Individualized Education Program (IEP) dated December 13, 2006 it was stated that "Teacher and parent reported about reading and attention. (He) has struggled academically since first grade, but wasn't identified until last year." PD 18. The IEP noted that "For students suspected of having a learning disability" the items "oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, math calculation and math reasoning" (PD 19) were checked. Nonetheless, the Student was not found to be eligible for services because of "a lack of adequate instruction reading (and) lack of adequate instruction in math." PD 19.

The District's use of the phrase "lack of adequate instruction" is essentially an admission that the Student's needs were not being met. Districts are required to ensure that underachievement is not due to lack of appropriate instruction in reading or math. In fact, an evaluation must consider: (1) data that demonstrates that a student was provided appropriate instruction in regular education settings, delivered by qualified personnel; and (2) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents. 34 CFR 300.309(b). The District, although making what is tantamount to an acknowledgement that it has

not met the Student's needs, has not offered evidence to support its conclusion in denying eligibility that the deficits are due to lack of appropriate instruction in reading and math. This conclusion is also illogical because he was receiving the same instruction as other students who were not failing. Alternatively, it would be obvious that he needed different instruction, based on his lack of progress.

The District was obligated to request parent consent to evaluate if a student has not made adequate progress after an appropriate period of time when provided instruction, as described in (b)(1) and (b)(2). 34 CFR 300.309(c). In this case, although the District evaluated the Student, the evaluation was inadequate, the findings of the evaluation were disregarded and he was denied eligibility on an unsubstantiated basis. The evaluation was deficient in addressing the Student's issues, based on his medical history and ongoing struggle academically, particularly with reference to central auditory processing, ADD, vision problems, and motor skills, which were evaluated by the independent evaluators.

Subsequent to the IEP meeting in which the Student was denied eligibility, he continued to struggle academically. His seventh grade report showed his grades during first quarter as A in reading and in speaking standards; C in listening; D in math and in social science; F in writing, science, and research. His seventh grade teacher testified with respect to his grade of A in reading that the grade is a composite of assignments, tests, and in-class performance. She further testified that his in-class performance showed grade level reading but his other scores brought his grade down. She reported that his failing grades resulted from lack of effort in the first eight weeks of school and he is very capable of better performance if he would continually put forth the effort on a daily basis. Her testimony, however, is not substantiated by any of the evaluations conducted by the District. On the contrary, one evaluation noted he persisted in tasks. Her testimony is also refuted by all the evaluators who subsequently did the independent education evaluations.

In May 2008 the Student was referred by the [REDACTED]

[REDACTED] Her function is to assist parents with navigating education issues on behalf of their children. The Student was not on probation nor does he have offenses pending.

Mother expressed concern to [REDACTED] that her son was not succeeding educationally. Mother wanted him to be evaluated for special education concerns. [REDACTED] visited the Student's school in September 2008 and spoke with the case manager/counselor, and after that visited about once a month. [REDACTED] assisted Mother in drafting a letter to the Principal dated October 27, 2008, requesting a case study evaluation of the Student. PD 24. In response, the November 5, 2008 notification of referral decision stated an evaluation was not appropriate. PD 25.

In a December 9, 2008, letter, the Mother requested a meeting based on the denial. PD26. On December 18, 2008, she received notice that the school refused to do an evaluation. PD 27. On January 9, 2009, Mother attended a meeting, convened by the case manager, with school staff to discuss his issues. [REDACTED] was in attendance and given a report on the Student's grades. PD 31. Mother expressed concerned that her son was not succeeding academically and

was not at grade level. For the meeting, the social worker/case manager had prepared an outline of services for the Student. PD 32. There was also discussion of transfer of the Student to a transition academy because the Student was aging out of the grade. The case manager/social worker also provided a copy of the ISAT scores, which reflected that the Student was not meeting standards for reading. Although a note states the Student's scores are in the average range, [REDACTED] found that the scores were not in the average range according to a document generated by school.

[REDACTED] was aware of one suspension and the case manager/social worker indicated concerns regarding the Student's behavior (PD 244-248) but although [REDACTED] requested the document on suspension it was not given to her. [REDACTED] was able to access the attendance record from the main office which showed that the Student was attending school on a regular basis. PD 239-242.

On February 17, 2009, Mother requested a due process hearing. Subsequently [REDACTED] referred the Student for several independent education evaluations. All four of those evaluations found significant deficits.

For a period of approximately ten years, the Student struggled academically. This struggle was noted in the IEP December 13, 2006 ("Teacher and parent reported about reading and attention. (He) has struggled academically since first grade, but wasn't identified until last year.") It was determined that he has low vocabulary scores, his reading and math were below average and writing was the lower extreme at the 1<sup>st</sup> percentile, communication was low average and below average, yet it was stated "vocabulary can be addressed at home or in the classroom." Finally, it was noted that he was academically performing below his estimated cognitive ability but the cause for the discrepancy could not be determined.

There was reference, in the evaluation, to interventions, but no tracking or documenting to determine if the interventions were ever utilized or if they were successful. The social worker/case manager had prepared an outline of services for the Student for the January 9, 2009 meeting with Mother. This outline incorporates no services reflecting deficits found in the District evaluation and provides no education assistance to the Student. After the completion of the independent evaluations, the reports were forwarded to the District in May 2009. An IEP was to be convened but [REDACTED] testified that when she went to the school to check on the date for the IEP, no one on staff was aware of it.

Based on the evidence, the Hearing Officer finds that the District's evaluation was deficient with respect to areas that should have been evaluated. Parent also presented evidence that the District ignored the findings in its evaluation in denying the Student eligibility. Additionally, the District had the opportunity to review the IEEs, which it paid for, and to convene an IEP to determine whether, based on the IEEs, the Student was eligible for services. The District failed to do so. Accordingly, the Hearing Officer finds that the District failed its child find responsibility.

II. Failure to provide an appropriate and individualized evaluation in a timely manner in order to adequately identify the nature and extent of the Student's disabilities from February 17, 2007 through the present. Failure to fully evaluate is a denial of FAPE.

A school district is required by Congress to identify, evaluate and place potentially disabled students. 20 USC § 1412(a) (3) (A); 23 Ill. Admin. Code 226.100. Specifically, in Illinois, as noted above in the burden of proof description, the school code requires a district to present evidence "that the special education needs for the Student have been appropriately identified and that the special education program and related services proposed to meet the needs of the Student are adequate, appropriate, and available. 105 ILCS 5/14-8.02a(g-55). In this case, the District has not met the standard of the Illinois School Code of "a carefully completed case study." 105 ILCS 5/14-8.02(b). Parent has presented evidence, particularly in the form of the four independent educational evaluations, which the District agreed to pay for, that the District's evaluation was not a comprehensive evaluation.

All four evaluators found deficits -1. Neuropsychological Attention Deficit and Hyperactivity Disorder (ADHD) and Educational Evaluation: ADD, oral language screening -very low score; difficulty with word retrieval; speech scores - below average range--a "red flag" for reading disorder-very low score receptive vocabulary; reading between the second and fourth grade level. 2. Central Auditory Processing deficit; 3. Speech and Language: expressive language skills significantly below average, written language scores significantly below average; written language scores significantly below average; the Student was "profoundly and significantly" below age level expectation. 4. Occupational Therapist: low motor hypotonia indicative of sensory problems which could affect school performance organizational skills, problems identifying spatial relations on pictures; programming problem.

All evaluators made specific recommendations and two recommended a Learning Disabilities school such as [REDACTED] where assistive technology is available and there is significant personal attention. The four evaluators testified at the hearing and their testimony about their findings and recommendations are reviewed below.

**(1) Neuropsychological Attention Deficit and Hyperactivity Disorder (ADHD) and Educational Evaluation**

[REDACTED] a learning disabilities center, conducted a Neuropsychological ADHD and Educational Evaluation of the Student. Her curriculum vitae is included in Parent's documents. PD 234,235. Her 53-page report is also contained in the documents. PD 111-163. She was qualified as an expert in learning disabilities and assessment without objection from the District. As part of the evaluation she also reviewed Parent responses, medical records, the District's evaluation, nurse's report, misconduct reports, and incident reports. [REDACTED] saw the Student for 12 hours over two days.

For her evaluation, she observed the Student in class (PD120) and also reviewed [REDACTED] speech and language evaluation and the report of [REDACTED] an occupational therapist, who evaluated the Student on May 11, 2009, and observed the Student in class. PD 119. She spent time in three of the Student's classes. The case manager/social worker followed her from class

to class. He told her that the Student was not coming back; he would be going to another school to be an eighth grader in a high school setting. In one class where [REDACTED] observed, the teacher used non-standard English. In reading, students were sharing books and [REDACTED] observed no reading. The teacher walked around, checking off homework. The teacher approached the Student and asked him about missing work. PD 122. The teacher told him "You made poor choices", asking him to repeat what he said. The science class had no direct teaching or use of science books. During her observation in his classroom, [REDACTED] observed speech language difficulties in articulation, ambiguous language, pragmatics and formulation. PD 122.

[REDACTED] testified that based on her extensive assessment and the fact that the Student received reading grades of D in first and F in second through sixth grade, she did not understand how he could have gotten an A in reading in seventh grade. PD 117. His seventh grade teacher said that grades are based on in-class reading, homework, and other factors. Although he was doing well at in-class reading, she testified that the other factors brought his grade down. The teacher does not believe the Student is "trying" to read. [REDACTED] disagrees. Reading is not based on effort. The teacher, according to [REDACTED] does not understand that a person is not lazy or not trying if someone is unable to read. The Student could not read the material.

[REDACTED] testified that the psychological test done by the District is specifically for IQ and for an IEP and was disregarded by the District because he was not wearing glasses. The District gave him the Stanford-Binet Intelligence test and he scored 90, which is average. PD 55. The District also administered the Kaufman Test of Education Achievement, which reflected that the Student had very low achievement scores and during testing is doing better than only two out of 100 people. PD 55.

In testing results, the Student's achievement test results exceeded his cognitive. [REDACTED] testified that a cognitive examination tests things one has learned in life. If one is not reading, it will affect the IQ test, based on age, because one is expected to know certain things learned in school. Then the IQ score would come in lower than expected. [REDACTED] who was involved in the testing, both agreed an IQ is a snapshot in time, so a score could change.

The 2006 BASC results of the District's evaluation found he had an executive functioning problem, which is related to organizing skills. PD 58. His teacher at that time felt his attention and learning problems were clinically significant. PD 61.

For her evaluation of the Student, conducted on April 6-7, 2009 [REDACTED] chose tests for intelligence, information processing, reading, writing, math. PD 113. [REDACTED] saw the Student put forward great efforts. When he could not do something, he did not cover up what he did not know. (This counters the testimony of his seventh grade teacher who offered her opinion that he could perform better if he put forth greater effort.).

[REDACTED] had [REDACTED] do an ADHD evaluation. The evaluation result showed ADD disorder. PD 124. The Student had difficulty with working, planning, memory.

The Student was administered the Wechsler Intelligence Scale. The results were low average, lower than the Stanford-Binet, given by the District, which stated he was in the average range. PD 129. [REDACTED] testified that the Student probably has a higher IQ than is able to be found. [REDACTED] also conducted an oral language screening, testifying that if there is difficulty with oral functioning, then there would be difficulty reading. The Student had a very low score. However, he did well on oral comprehension. [REDACTED] gave him a mixed looking at and listening, with which the Student had great difficulty. PD 131. He had difficulty with word retrieval, which is based on what is read. He had been tested for speech at the District and although all the scores were below average, it was concluded that he did not have a communication disorder and he was not referred for services. PD 108, 131. His scores were all below average range. According to [REDACTED] evaluation, speech screening showed a "red flag" for reading disorder-very low score receptive vocabulary. [REDACTED] testified that he should have qualified for speech and language services.

[REDACTED] determined that the Student is reading between the second and fourth grade level. PD137. When she observed him in seventh grade, he could not read a seventh grade text.

[REDACTED] reviewed [REDACTED] of April 22, 2009(PD 132,133,134) and testified that the Student needs someone to break down tasks into pieces. PD 137. He scored at less than the first percentile on the oral reading test. His oral reading rate is at the 9<sup>th</sup> percentile (grade equivalent 5.7), which is significantly below the average range. PD 138. He had a significant spelling problem, which is not a surprise, according to [REDACTED], because if he has trouble decoding then he would have trouble spelling. PD 141-5. Although he had good math concepts, he had difficulty in translating words into computation.. Based on DSM-IV, she diagnosed him with a reading disorder. PD 149

[REDACTED] recommends a therapeutic day school with significant personal attention where he will have what he needs to read. When asked if this can be done in public school, [REDACTED] testified that "he has been at this school for ten years, maybe it can be done in public schools using [REDACTED] and according to his records this has not happened."

[REDACTED] is familiar with [REDACTED] and feels he would benefit at [REDACTED]. She has sent others there, who have been successful and learned to read. [REDACTED] also provides help after school. PD 149, 150. The Student needs to be taught to read. She recommends highly the [REDACTED] program which scans every book into a computer, so a student sees a book as it is also read, as bars highlight text. PD 153. [REDACTED] also recommends that, while learning to write, the Student should use dictating equipment because he has "good ideas." PD 155. He needs executive functioning skills and would respond well to strategies. PD 157. He needs speech and language therapy, which can be done during the day at [REDACTED] where the technology is available.

He needs a special education program to address reading, and writing. [REDACTED] testified that it is "critical" to have a placement like [REDACTED]. He is 15, has repeated two grades, has been at the District ten years and now must learn to read, write, and spell or, according to [REDACTED] "he will be lost" He will not be an independent functioning adult who can vote, read a menu, or

read medical information if he is ill. To have a job he must read. He could become someone who can read, write, and do math but she does not believe his behavior would cause him to need boarding school. He is not acting out at home.

## 2. Central Auditory Processing Evaluation

██████████ did a central auditory processing evaluation on the Student and wrote a report of the evaluation April 26, 2009. PD 186. ██████████ is a clinical audiologist. ██████████ testified that auditory processing is about what the auditory system does with what it hears. The testing is done in a controlled environment to minimize factors that influence the ability to hear. ██████████ was certified as a specialist in CAPD. Her report is included in the documents, PD 186-193, as is her curriculum vitae. PD 222-233.

Prior to her evaluation, ██████████ reviewed the Student's records, including his medical history, which reflect that his health was compromised by oxygen to the brain. Two issues caught her eye: he had jaundice at birth, which is on the high risk register for hearing loss and related to auditory problems; also, he was in the neo natal intensive care unit. ██████████ testified that there is a risk associated with neo natal intensive care unit and a higher incidence of hearing loss for infants in an incubator. She also noted a report of lead exposure which means the Student would have been at risk of delayed development for anything involving the senses, including visual processing.

In the District's Speech Language assessment, ██████████ noted that there was a big discrepancy between expressive and receptive language scores. PD 107. When receptive is poorer than expressive, that is a sign that there is a language or auditory processing problem. However, in the findings, the District's speech and language pathologist states that "low vocabulary scores could be attributed to poor general and world knowledge or poor semantic representation." PD 108. On the contrary, ██████████ testified that is a sign of a language problem. The District's speech and language pathologist had also noted that the Student asked for repetition and benefited from repetition but the pathologist noted that because of the nature of the test those answers could not be counted. ██████████ found it noteworthy that the Student was aware he needed to hear it again and benefitted from repetition which is a sign of auditory issues, which also have a psycho-social effect because poor hearing results in frustration. Audiological deficit is equivalent to hearing loss, and, accordingly, with discrimination problems, a student can get frustrated and fatigued because he is not able to correct the problem. Hearing impairment and processing difficulties are treated in the same way because they are different parts of the same system.

██████████ did a standard hearing test on the Student and found his peripheral hearing normal. However, the central auditory tasks were below normal limits for auditory discrimination or analyzing fine differences in acoustic spectra, which connotes possible problems in verbal organizing skills. In a classroom, an auditory discrimination deficit can function as peripheral hearing loss because the system is not doing a good job of getting acoustic cues. Under optimal conditions the system is working harder, but in a problem environment, such as a classroom with high ceilings, a listener with hearing discrimination problems will have problems in those environments more quickly. ██████████ testified that the test results are reliable--the Student could

not fake an auditory processing deficit. The Student had abnormal performance in the two main tests and these two tests constitute a pattern. PD 187.

██████████ noted in the Summary of her report that, in essence, the Student cannot determine some whole words. Hearing issues can also impact the ability to read because one cannot hear where a sound ends or recognize where the flow went. On the test, the Student told a pattern backwards, which ██████████ testified, means that the Student knew on an auditory level what the pattern was but reversed it, which reflects verbal organization problems. "As auditory overload occurs, fatigue sets in and overall listening comprehension deteriorates." A person with an auditory processing problem is working harder than others. As listening conditions deteriorate, the system works harder and fatigue sets in more quickly than for a typical functioning individual. The Student presents with discrimination deficit and thus will fatigue more quickly.

██████████ testified that the Fast ForWord is a program effective to improve auditory discrimination skills. She made a recommendation, for speech language evaluation because she was not aware one was done recently. PD 189. Because of the difficulty of reversal on pattern items, she also recommended him for a neurological evaluation to look at executive function. To improve auditory perceptible function and improve top down skills, for a listener to be able to take ownership of a deficit ██████████ recommends short term aural rehabilitation. PD 190.

It was ██████████ opinion that if the Student receives appropriate services, with respect to auditory processing, he should have a significant reducing of auditory handicapping.

██████████ testified that the services could be provided in a school setting. She is recommending the Student receive aural rehabilitation therapy. Regarding teaching strategies, these can be implemented by a regular teacher or special ed teacher; central auditory issues can be addressed in class. These services can be provided in a private school, such as ██████████

### 3. Speech/Language Evaluation

██████████ was certified as a speech/language – Assistive Technology (AT) expert. She testified that she is a speech language pathologist and has a PhD specialization in augmentative communication and child language. She teaches assistive technology use to graduate students. Her curriculum vitae is included in the exhibits, PD 217-21, as is her report. PD 165-183. In her assessment she found the Student's expressive language skills significantly below average and she finds that it is unclear why the District's evaluator did not find the Student eligible for speech services as the scores are similar to her findings. PD 166. On the CELF-IV, the Student had "extremely low range in scores" which means his skills have deteriorated over time. PD 167. ██████████ believes that he should have received speech services many years ago. PD 167. Written language scores were significantly below average (which is similar to ██████████ findings). PD 168. The Student reported that he "writes as little as possible as he knows he is not very good at it." PD 168. ██████████ testified that the student was "profoundly and significantly" below age level expectation. The Student was also willing to work with assistive technology which is not always a given for a student his age.

██████████ recommended a lap top with internet capabilities, screen reading software, talking word processor, word prediction software, organizer/mapping software and books for curriculum and Leisure-Start to Finish series. PD 172. She recommended 90 mpw of speech language services (PD 172) and 60 mpw of AT support with consultation time for training of staff. PD 173. When cross examined by the District's attorney ██████████ testified that the Student has been struggling for a long time and he shared with her how frustrated he was in school. Her report notes that he stated he was motivated to improve his skills. PD 171.

#### **4. Occupational Therapist Evaluation**

██████████ an occupational therapist, was contacted by ██████████ to conduct an evaluation of the Student, PD195-212, which was done May 11, 2009. Her curriculum vitae is in the exhibits. PD213-16. Prior to the evaluation, she reviewed his history. She testified that he has a complex medical history, from birth, including cardiac history, lactose intolerance, digestive problems, failure to thrive, hypotonia. He had exposure to lead, which is significant, according to Block's testimony, and can cause long term behavioral concerns in children. He qualified for Early Intervention, based on OTA, mild delays in gross motor and fine motor skills. There were also vision concerns.

██████████ interviewed the Mother and reviewed school records, which show a history of academic concerns. The records were confusing, according to ██████████ because sometimes he was referred but not followed up. He has a long-standing, below average performance. ██████████ also had access to private evaluations in 2009, one regarding auditory problems and speech/language. For her evaluation, she selected tools related to the Student. She found low motor hypotonia, which is indicative of sensory problems which could affect school performance. ██████████ also did the Loewenstein Occupational Therapy Cognitive Assessment, to explore learning problems, particularly relevant to organization skills.

Based on the evaluation, ██████████ made findings: his visual processing is below average (PD 198) and this could affect school work. She made recommendations for visual processing and visual motor integration support. PD 199-201. These supports could easily be put in place in school because an OT works with the teacher. PD 201. On text, he was appropriate on how he wrote and his motor approach to letters was good. With respect to organizational skills, the Student had problems identifying spatial relations on pictures. PD 204. He shifted between right and left, unable to find the right answer, because of complex designs and he could not place pieces. However, he could do color block design because in color block design everything is organized. He had more difficulty with plain black design. In looking at a text book, the denser it gets the more difficult it is for the Student to sort it out, especially a mixture of pictures and text. The same thing was true for a computer, i.e., for different internet sites, which would require a lot of time to discern and he might get discouraged. ██████████ found he has a programming problem.

The Student is more distracted by stimuli than most adolescents his age and needs to organize himself. He is different than his peers. Consequently, if an OT works with the Student and teacher, organization systems should be put in place, i.e., shorter period of work, chunking, or use outline or graphic, or limit steps to activities. PD 206

The Student is unsure of himself walking downstairs, which might be a vision problem, or related to health or sensory processing. PD 297 [REDACTED] testified that the Student should have had OT by first grade because of his difficulties organizing and sustaining attention [REDACTED] made recommendations on how the Student can get through the day: direct services, 30 minutes per month. The Student must learn to become independent and he also needs consultation to work for transition planning. PD 209.

The District school staff who testified presented no evidence that the District had properly identified the Student and offered services to meet his needs.

One assistant principal testified that she spoke with the Student several times because he walked out of class and was in the hallway. Pd 237. He has a suspension in 2007-08 for fighting, walking out of class, and profanity directed at teachers. However, in the 2008-09 year he was only out twice and has been a "model student" this year. If there is a problem he comes and talks with someone. However, she was unaware of his grades and his academic progress in school.

The other assistant principal testified that she had been the Student's second grade teacher and had made a referral on March 6, 2002, because of an attention span of not more than two or three minutes, could not say his number or write his name, failed first grade, and was failing second grade. She testified that after "talking to experts" she learned that this is not a basis for referral.

In the school year 2007-08 she had interaction with the Student as an assistant principal. She was concerned about behavior reports, which reflects his cursing at staff. He was coming in tardy and refusing to enter class. She contacted Mother for conferences. In a 2007 discussion with Mother regarding attitude and work ethic, this assistant principal told Mother that the Student is very unorganized and needed stability. He was dirty and his backpack was a mess. She testified that she reported Mother to DCFS, but it was unfounded. Mother, in rebuttal, denied, any contact with DCFS.

She also testified that in 2007-08 not easily redirected. The social worker was seeing him. She did not review his health records and was not aware he had lead exposure and had received OT and speech language services (prior to attending school). She talked with Mother regarding health concerns and recommended Mother take him to a doctor.

She testified that the Scholastic reading inventory showed he did not read at grade level. PD 28. She spoke with the case manager/counselor and talked about making sure he was receiving social work. They also discussed "social promotion", because he is "too old" (for the grammar school).

The assistant principal offered her opinion that the Student is capable of performing better if he chooses and can do it in public school setting but admitted that if he had impairments he would not make progress without services. Students are not referred for behavior problems but she acknowledged that she is aware of the category, Emotional Disturbance, but a student would have to display severe behavior, not typical of a child. In 2007-08, the Student's behavior

demonstrated “defiance” but she did not see it as a referral--it was “environmental.” She testified that the Student disrupted the school environment but she never suspected disability because he did not prior to that school year. However, the Hearing Officer notes she had referred the Student in second grade. She testified that in her class he had short attention span and organizational issues. She acknowledged that attention disorder is an issue but she stated she is not an “expert.” She asserted he could regulate his behavior. His behavior is typical for a student retained twice. The assistant principal did not offer any basis for her opinion that he could perform if he chose to and that he could regulate his conduct. His seventh grade teacher also offered her opinion that he could perform if he chose to but she also offered no basis for this opinion. Both of these opinions are refuted by the evaluation and findings of all four evaluators. The District cross examined all evaluators but none were impeached or otherwise discredited. There was no other attempt to challenge the evaluations.

There was testimony on absenteeism and incident reports but the Hearing Officer does not find that either absences or behavior was the impediment to the Student’s academic achievement.

The District has failed to provide a FAPE.

Pursuant to Illinois statute, the District must ensure a FAPE is available to each child with a disability who resides in the state and is enrolled in the district and requires special education and related services, to accord with 34 CFR 300.101 through 300.103. The education and services must be provided according to the child’s individualized education program. 223 Ill. Adm. Code 226. 50.

In this case, the December 13, 2006 IEP rejected eligibility for the Student. In light of all the deficits found by the District’s evaluation and the Student’s ongoing academic struggles and failures, plus the fact that the District paid for the IEEs but failed to convene an IEP to review their findings and recommendations, the District has acted unreasonably. The Illinois School Code places the burden on the school district to show it has identified and evaluated the student’s suspected or identified disability and that, if the student has been or should have been determined eligible for special education and related services, that it is providing or has offered a the services. 105 ILCS 5/14-8.02a(g55)). The Hearing Officer finds that the District has failed to meet its burden.

IDEA defines an evaluation as procedures mandated to determine whether a child has a disability and the nature and the extent of the special education and related services that a child needs. 34 CFR § 300.15. Based on IDEA requirements, the evaluation materials include those tailored to assess specific areas of educational need including that the district “use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information. 34 CFR §300.304 (c)(2). IDEA requires that a full and individual evaluation includes all components that are needed to identify a student’s disability and educational needs including related services. 34 CFR § 300.301(a). The District denied the Parent’s request for another evaluation after the District found him ineligible for services based on its evaluation and the Student’s continuing inability to make progress. Parent has demonstrated through the private evaluators that the Student’s needs will best be met in a private therapeutic day/learning disabilities school. Parent has met her burden has required by *Schaffer* with respect to her filing of a due process complaint regarding lack of FAPE.

III. Failure to provide an appropriate educational program/placement based on scientific, researched based evidence including a certified special education teacher, and related services with sufficient intensity to meet the Student's educational needs February 17, 2007, to present including ESY 2007 and 2008. 34 CFR 300.35, 300.39(a).

Even after the District conducted an evaluation which showed deficits, the District denied the Student eligibility for services. The Student was not found to be eligible for services because of "a lack of adequate instruction reading (and) lack of adequate instruction in math." The independent evaluators' findings refute this conclusion, having determined that the Student's deficits, not inadequate instruction, were the cause for his lack of academic progress. Nonetheless, if the District believed that inadequate instruction were the cause of the Student's problems, it had an obligation to rectify this, based on his having been in the school since kindergarten. However, there is no evidence that the District made any attempt to ensure "adequate instruction" for the Student in these areas. The District retained him in the regular education setting as he continued to struggle, even after the evaluation in 2006. The District stated there were interventions for the Student but there was no documentation as to whether the interventions were utilized and the outcome. His seventh grade teacher offered no testimony about the use of interventions.

Parent requested an evaluation in 2008 which was also denied. The case manager prepared an outline of services but there was nothing on the outline to assist the Student academically, despite his failing grades, and the fact that he had to repeat sixth grade. [REDACTED] testified that the outline referred to a notebook, which the school was to generate (PD 32) but there were no teachers at the meeting to provide a report of work. The outline also indicated that a psychologist was to review records and write a report but [REDACTED] was not aware of any report.

Although the District referred to a computer program for reading testing no evidence was adduced that a reading program to address the Student's need would be offered, despite his making no progress in reading, even after the 2006 evaluation. District witnesses asserted the Student could perform if he chose to but offered no scientific basis for this opinion. In fact, his teacher claimed that he was not "trying" to read. [REDACTED] however, testified that reading is not based on effort. The teacher's assertion of his not "trying" to read is also contradicted by the fact that she gave him an A in reading and asserted he can read the grade level material in class.

Comparing the evaluations conducted by the District and the IEE providers reflect no educational progress for the Student, despite better attendance (although the District asserts that the Student's lack of progress is based, in part, on lack of attendance) and having to repeat third and sixth grades.

After being denied the request for evaluation, Parent visited [REDACTED] a therapeutic day school.

[REDACTED] testified that [REDACTED] has classes through 12<sup>th</sup> grade and is a private school approved for out of district placement. Students who attend have issues of attention deficit, speech/language, and

central auditory processing. The student to staff ratio is one to three – teacher and assistants. On staff are three occupational therapists, speech/language pathologist, social worker, psychologist. Many of the students have auditory processing and speech language deficits for which the [REDACTED] uses the Orton Gillingham method. The [REDACTED] utilizes a range of assistive technology, has all SOLO products, Write: Out Loud, Kurzweil, and Inspiration. [REDACTED] testified that the Student and Mother visited Acacia. Based on a review of the Student's records and reports, the private evaluation, interviews between the Student and staff, his ability to make eye contact and acceptance of the school uniform policy, [REDACTED] determined that it has a program to meet his needs.

[REDACTED] reviewed [REDACTED] evaluation of his academic, processing and intellectual cognitive skills (PD 111-163) and believes that [REDACTED] could meet the recommendations. PD 149-158. Additionally, [REDACTED] can implement [REDACTED] speech-language and assistive technology recommendations (PD 171-173), [REDACTED] central auditory processing recommendations (PD 189-191); and the recommendations of [REDACTED] who conducted an occupational therapy evaluation. PD 209

Although there was testimony that some of the assistive technology/techniques based on the recommendations of the evaluators can be done in the public school setting, this would prove impractical for a number of reasons. For instance, [REDACTED] noted that as listening conditions deteriorate, a person's central auditory processing system works harder and fatigue sets. [REDACTED] also made reference to high ceilings being problematic, and this cannot be changed in the classrooms. More importantly, as [REDACTED] testified, the Student has been in the school for ten years and no effort has been made to provide him with assistance. At this point the evaluators find that there is a level of intensity needed for the Student to make gains based on his deficits.

[REDACTED] testified that the Student needs a special education program to address reading and writing and that it is "critical" to have a placement like [REDACTED], which also provides help after school. PD 149, 150. [REDACTED] also testified that he needs speech and language therapy, which can be done during the day at [REDACTED], where the technology is available.

Finally, the recommendations of the evaluators and the opinion of two of them that [REDACTED] is the appropriate environment for him, support a finding that the Student's needs for intense academic work can best be met at [REDACTED] (or a similar environment). Based on the evidence, the Hearing Officer finds that Parent has met her burden in proving that the District failed to provide an appropriate educational program/placement based on scientific, researched based evidence including a certified special education teacher, and related services with sufficient intensity to meet the Student's educational needs from February 17, 2007 to the present including ESY 2007 and 2008. 34 CFR 300.35, 300.39(a). Parent has offered evidence, based on the independent evaluations that the Student's needs should be addressed in a therapeutic day/learning disabilities school.

Federal and state statutes and administrative rules require that school districts ensure that a continuum of placement options is available to meet the needs of children with disabilities for

special education and related services. 34 CFR 300.39 and 115, 23 Ill. Admin. Code 226.300. The continuum includes instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions. With regard to the Student the District offered no services or supports in the classroom or any other placement to address the Student's needs. The Hearing Officer is not bound to work "up" a continuum of options where a student has not been provided appropriate educational services. The District planned to move the Student to an eighth grade class in a high school setting but offered no evidence that such a setting would enable the Student to make academic progress. Parent, on the contrary, has met her burden in seeking placement at a private therapeutic school, as advocated by the evaluators based on their findings. Based on the needs identified by the private evaluators and their recommendations for intense services, in addition to the therapeutic day school, the Student is entitled to compensatory services.

(IV) Failure to identify in a timely manner and then provide appropriate assistive technology in the classroom setting and for all school work.

No assistive technology was provided to the Student at the school. Assistive technology device is any item, piece of equipment or product system used to increase, maintain, or improve the functional capabilities of a child with a disability. 34 CFR 300.5.

The IEEs contained findings and recommendations which support a need for assistive technology for the Student. [REDACTED] testified that the Student needs to be taught to read and she recommends highly the Kurzweil program which scans every book into a computer. PD 153. [REDACTED] also recommends that, while learning to write, the Student should use dictating equipment. PD 155. [REDACTED] testified that Fast ForWord is a program effective to improve auditory discrimination skills. [REDACTED] recommended a lap top with internet capabilities, screen reading software, talking word processor, word prediction software, organizer/mapping software and books for curriculum and Leisure-Start to Finish series.

AT is part of a child's special education, related services or supplementary aids and services. 34 CFR § 300.105. The District has provided no AT for the Student. In addition to the therapeutic day school and compensatory services, the Student is entitled to AT.

#### Case Law Review

To meet IDEA requirements, the School Code and implementing regulations, the District must provide the Student with a FAPE in the least restrictive environment (LRE).

Although the District argues that deference must be given to education professionals in school districts, citing *Heather S. v. State of Wisconsin*, 125 F.3d 1045 and *Beth B. v. Van Clay and Lake Bluff School Dist. #65*, 2002 U.S. App. LEXIS 3446, 15 (7th Cir. 2002), the Seventh Circuit also addressed this issue in *Murphysboro*, stating "...deference to educators who testified... would require the court to place (the student) in the program developed by the school district, despite the fact that the hearing officers considered the IEPs inappropriate, as did other expert witnesses. In addition, requiring a court to defer to the educator's decision would

make it very difficult for parents to prevail in situations where they disagreed with the educator's IEP, which is not a result contemplated by the IDEA." *Board of Education of Murphysboro Community Unit School District v. Illinois State Board of Education*, 41 F.3d 1162, 1168 (7th Cir. 1994).

In this case, the Hearing Officer has found that the District's evaluation is insufficient and invalid. The educators who testified offered opinions, not scientific based reasons for their assessment of the Student. Parent, on the other hand, offered four professionals, three of whom were qualified as experts, who conducted exhaustive evaluations. The District presented no challenge to these evaluators. The Hearing Officer finds the evaluations to be professional and meeting legal requirements. Accordingly the Hearing Officer relies on their opinions.

The District asserts that the Parent, to prevail, has the burden in proving that school officials were unreasonable, citing *Schaffer ex rel. Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) and *Kerry M v. Manhattan School Dist. and the Illinois State Board of Education*, U.S. District Court, Northern District of Illinois, IDELR 194 106 LRP 58547 (September 2006) (which analyzed *Schaffer* with respect to the relevant Illinois statute (the Illinois School Code). As cited above, the District failed to meet its burden of presenting evidence that the special education needs for the Student have been appropriately identified and that the special education program and related services proposed to meet the needs of the Student is adequate, appropriate, and available. 105 ILCS 5/14-8.02a(g-55). However, the Parents have the burden of proof regarding the request for a due process hearing involving a denial of FAPE. *Schaffer, Kerry M.*

The Seventh Circuit decided that where a district had not acted unreasonably in developing and implementing a child's IEP, *Alex R. v. Forrestville Valley Community Unit School District*, 375 F.3d 603, (Seventh Circuit, July 15, 2004), a student's IEP "passed muster" and supported a lower court's conclusion that a hearing officer substituted her judgment for that of the school administrator instead of merely implementing the IDEA. This matter is distinguished because the Hearing Officer determined that the District did not act reasonably and, accordingly, Parent has met her burden.

Recently, the Supreme Court addressed a case similar to the one at issue. In *Forest Grove Sch. Dist. v. TA*, . 2009 U.S. LEXIS 4645, page 7 (June 22, 2009), the Supreme Court, noting the school district's position was "at odds with the general remedial purpose underlying IDEA...and similarly conflicts with IDEA's 'child find' requirement", declared that "when a school district unreasonably failed to identify a child with disabilities it would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services" if an appropriate remedy was not available. *Forest Grove*, page 7. The student in *Forest Grove*, similar to the Student in this case, was found not eligible for special education services, after the school district's evaluation. A private specialist advised the parent that he would "do best in a structured, residential learning environment" and parents then enrolled him at a private academy that focuses on educating children with special needs. *Forest Grove*, page 3. In this case, the Student's Parent appealed the decision denying him an evaluation and filed for a due process hearing but has not yet placed him in the private therapeutic day school recommended by the private evaluators. This Hearing Officer's finding that the District acted unreasonably in denying the Student eligibility for special services, despite his compelling needs,

requires a remedy to meet the standard enunciated in *Forest Grove*: “the express purpose of the Act is to ‘ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs’ Sec. 1400(d)(1)(A).” *Forest Grove*, page 7. That remedy in this case is a private therapeutic day/learning disabilities school.

The Seventh Circuit in *Murphysboro*, also found that if a district has failed to offer FAPE and did not present any alternatives, the only option is the alternative offered by the parent. The hearing officer is not required to locate another school that would satisfy the LRE requirement, but simply to determine whether the one offered by the district would be appropriate. *Board of Educ. of Murphysboro Comm. Unit School Dist. No. 186 v. Illinois State Board of Educ.*, 41 F.3d 1162, 1169, P6 (7<sup>th</sup> Cir. 1994) Page 4. In the instant case, the District has not offered any special education services and the Parent has proven that the therapeutic day/learning disabilities school is appropriate.

With respect to the request for compensatory services, the Seventh Circuit affirmed a hearing officer’s order of compensatory OT services for a student in elementary school in *Evanston Community Consolidated Sch. Dist. No. 65 v. Michael M.*, 356 F.3d 798 (7<sup>th</sup> Cir. 2004). The Seventh Circuit states that “Compensatory services are well-established as a remedy under the IDEA.” In that case, the Seventh Circuit found that an award of compensatory education is appropriate under IDEA for an inappropriate education in addition to residential placement.

Parent has met her burden pursuant to statute and case law in demonstrating that the District failed its child find obligation and violated applicable statutes in failing to provide the Student a FAPE. Accordingly, based on the Student’s compelling needs as identified by the independent evaluators and District’s unreasonableness in failing to identify his needs and find him eligible for services, the Hearing Officer grants all Parent’s relief. It is noted that although Acacia Academy is recommended by the evaluators and requested by Mother, and Parent has proven that the Student needs this kind of therapeutic day school, the Hearing Officer is precluded from naming a specific school in the order. Nonetheless, the Hearing Officer recommends that the District place the Student at [REDACTED] which has accepted him.

### **CONCLUSIONS OF LAW**

Based on the evidence, the Hearing Officer makes the following conclusions of law:

I. The District violated its child find obligation which requires all States to identify, locate and evaluate all children with disabilities residing in the State to ensure they receive needed special education services. 20 U.S.C. § 1412(a)(3)(A); the public agency must promptly request parent consent to evaluate if a child has not made adequate progress after an appropriate period of time when provided instruction, as described in (b)(1) and (b)(2). 34 CFR 300.309(c)

II. The District violated its obligation, in compliance with applicable law, to offer the Student a free, appropriate public education. IDEA 20 U.S.C.A sec. 1400(d)(1)(A). To meet IDEA requirements, the School Code and implementing regulations, the District must provide the Student with a FAPE in the least restrictive environment (LRE). The Act provides access to specialized instruction and related services individually designed to provide educational benefit. A district must identify a student's needs in light of the disabilities and utilize instruction and related services to meet those needs. 34 CFR 300.101 through 300.103, 105 ILCS 5/14-8.02a(g-55), 223 Ill. Adm. Code 226. 50.

III. The District failed to provide an appropriate educational program/placement based on scientific, researched based evidence including a certified special education teacher, and related services with sufficient intensity to meet the Student's educational needs February 17, 2007 to present including ESY 2007 and 2008. 34 CFR 300.35, 300.39(a).

IV. The District failed to identify, in a timely manner, the Student's needs, for assistive technology and failed to provide appropriate assistive technology in the classroom setting. 34 CFR § 300.5.

**ORDER:**

1. The District is to convene an IEP during the first week of school to develop an appropriate IEP for the Student.
2. The District is to review all evaluation results and recommendations and have appropriate certified staff at the IEP meeting.
3. The District is to include all of the outside evaluators in the IEP. If they are not available, the District must still consider all of their recommendations.
4. The District must develop an appropriate IEP with individualized and measurable goals/objectives and accurate present levels of performance based on the Student's eligibility and identified educational needs including appropriate modifications/accommodations.
5. The District is to identify all direct and related services including, but not limited to psychological and speech/language 90-120 mpw direct services, CAP interventions, OT 60 mpw direct services, and learning disability services with appropriate individual and group social work services across all educational settings.
6. The District will identify a private intensive placement/services, as recommended by the evaluators, for children with severe learning disabilities/language disorders that has appropriate methodology, such as Orton Gillingham, Wilson or other multi-sensory, sequential systematic intensive reading program as well as safe and reliable transportation and full day of ESY 2009 based on the Student's needed education programming.
7. The District will provide reliable and safe transportation.
8. The District will provide appropriate assistive technology based on the recommendations of the experts, including classroom implementation and training to Student, parents and staff as required; Inspiration, Draft builder, Earobics Step 1, Simon sounds it Out (or Lexia), Word Maker (or Lexia), Co:Writer and Write Outloud (or similar programs that includes use of flexible spelling features, word banks, and talking word processor), screen reading/scanning software (Kurzweil), and Literacy Starter reading series; additional assistive technology to

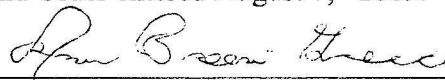
- assist the Student in all academic areas placed on the Student's lap top to enable the Student to complete homework including but not limited to: Inspiration, Earobics, Write:OutLoud, Co-Writer, Draft Builder, Kurzweil 3000 for Windows and Start to Finish books;. 60 mpw of direct AT services for the student by an AT trained and certified staff (AT, OT, Sp).
9. The District will reimburse Parent for the placement, services, and assistive technology if the District fails to place the Student and Mother is required to place the Student unilaterally and file a ten-day notice.
  10. The District must provide compensatory services, based on the recommendations of IEE providers:  
1:1 tutoring services beyond the regular school day by a certified special education teacher trained in scientific research based interventions for non-readers for 60 minutes per session, twice a week for the period denied FAPE; 1:1 speech language services beyond the regular school day by a certified speech pathologist at 60 mpw, for the period denied FAPE; and, 1:1 OT services provided by a certified OT beyond the regular school day 60 mpw for the period denied FAPE; and, as determined on a yearly basis at the annual review by the IEP team, if warranted, compensatory services in the form of a placement at the private LD school that has accepted the Student one year beyond the 09-10 school including ESY 2010 and 2011.

**RIGHT TO REQUEST CLARIFICATION:** Either Party may request clarification of this decision by submitting a written request for such clarification to the 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. A copy of the request shall be mailed to the other parties and to the Illinois State Board of Education. The right to request such a 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.

**FINALITY OF DECISION:** This decision shall be binding upon the parties unless a civil action is commenced.

**RIGHT TO FILE CIVIL ACTION:** 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 105 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 was mailed to the party.

This Decision and Order entered August 7, 2009.



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Ann Breen-Greco, Impartial Hearing Officer

ILLINOIS STATE BOARD OF EDUCATION  
IMPARTIAL DUE PROCESS HEARING

[REDACTED]  
Student

vs.

Case No. 2009-0318

[REDACTED]  
ANN BREEN-GRECO, Hearing Officer

**CERTIFICATE AND AFFIDAVIT OF DELIVERY BY MAIL**

The undersigned Hearing Officer certifies that she 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, through the United States Postal Service at [REDACTED], by certified mail before 5:00 p.m. on August 7, 2009:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

email

Due Process Coordinator  
Illinois State Board of Education  
100 North First Street  
Springfield, IL 62777-0001



Ann Breen-Greco  
Due Process Hearing Officer  
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ILLINOIS STATE BOARD OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

)  
) ISBE CASE NO. 2009-0302  
)  
) Joseph P. Selbka  
) Impartial Due Process  
) Hearing Officer

SEP 14 2009

Special Education Services

**MODIFICATION OF HEARING DECISION, OPINION AND ORDER TO  
CORRECT TYPOGRAPHICAL ERRORS**

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

[REDACTED]

[REDACTED]

This Supplemental Order is filed to correct typographical errors and other omissions in the original hearing decision, and order filed on August 18, 2009, *nun pro tunc*. Our ultimate disposition in this matter remains the same. The deadline for filing administrative review remains the same and is not tolled by this order.

The August 18, 2009, decision is amended as follows (items eliminated are indicated by a strikethrough; items added are underlined):

14. At the beginning of the school year, [REDACTED] tried to provide filled-in notes to Student prior to every class, but [REDACTED] found that Student would then not focus on the class (Tr. 840-841). In lecture, [REDACTED] noticed Student keeping up with the notes in lecture by handwriting notes (Tr. 843, 857). Therefore, [REDACTED] gave the notes to [REDACTED] Student's case manager [REDACTED], ~~Student's case manager~~ (Tr. 857). Student obtained or could have obtained filled-in notes in three ways. To wit, Student was able to obtain filled-in notes by accessing the website; through [REDACTED] and they were later mailed to Student's Parents at home.

21. Student received a laptop computer at the beginning of the school year, but he intentionally damaged the first computer the District provided for him (Tr. 991-992; 994-995; 1135-1136). There was no testimony that the destruction of the laptop was a result of any of Student's disabilities. Student strongly dislikes using the laptop in class because it makes him feel different that the other students (Tr. 1118-1119). Student also

dislikes carrying the laptop from class to class because the laptop makes him stand out (Tr. 1062, 1143). The District suggested and attempted to use several accommodations including using a laptop sleeve and a brief case; a back pack to carry the laptop; a zip drive to be carried from class to class; and a keeping a laptop in the classrooms (Tr. 1062-1063; 1144, P 855-856). [REDACTED] also attempted to set up the laptop in biology class for Student, but he refused to use it (Tr. 866-867, 1063, 1560).

25. Kurzweil is a program where forms are scanned onto a computer, and answers can be typed into the forms (Tr. 728). WINN was supposed to do this, but apparently could not (Tr. 729). To make up for the failings of WINN, [REDACTED] had Student handwrite on worksheets and provided Student with completed worksheets (Tr. 1165-1166). Student was able to fill out the worksheets by hand (Tr. 1166).

26. The computer which Student was issued at the beginning of the year ~~has had~~ Draftbuilder on it (Tr. 1000). Student's current computer has Draftbuilder on it. To the extent teachers had difficulty using Draftbuilder, the teachers created prompts for Student using Microsoft Word (Tr. 1000-1001).

33. Student worked on his goals, one of which was to use his computer in class, using the internet to look up information; ~~and e-mailing~~ e-mailing teachers and home including formatting; and saving and printing at least five times per week [REDACTED] [REDACTED] worked with Student to prioritize what areas he needed work on, whether or not they were OT specific; determined whether he was completing his homework log to be e-mailed home; worked on access to Share Point and e-mails to teachers; and worked on software such as Kurzweil and Draftbuilder (Tr. 611).

35. [REDACTED] and [REDACTED] worked as occupational therapists to provide Student his occupational therapy services. [REDACTED] and [REDACTED] are nationally certified and have a state certification (Tr. 588, 925). [REDACTED] has a bachelor's degree in elementary education and a master's degree in occupational therapy (Tr. 588-589). [REDACTED] also has a bachelor's degree and a master's degree in occupational therapy (Tr. 926). The occupational therapists kept a log of minutes which the Student was provided, but there are, admittedly, mistakes in the log, and [REDACTED] did not keep her own log nor did she verify [REDACTED] recordings of [REDACTED] time (Tr. 662-663, 931-932).

36. Student unequivocally has the skill to use his computer in the classroom; is very good with Draftbuilder; can use the internet to look up information; can e-mail teachers; is good with formatting; and ~~copy~~; and copying; can save copy; can paste and use other computer functions (Tr. 612, 1718). SS opined that, at this point in Student's career, the Student has to desire to use the computer in class and can not be forced to use the technology (Tr. 669).

44. [REDACTED] testified on behalf of the District. [REDACTED] has a master's degree in speech/language pathology and a bachelor's in speech pathology (Tr. 1248). She also has state certifications, and is "ASHLA" certified, and she has a license from the Illinois Department of Professional Regulation (Tr. 1248-1249). [REDACTED] has a certificate of clinical competency (Tr. 1249). [REDACTED] has worked with a number of students on the autism spectrum (Tr. 1250). [REDACTED] provided Student with his speech and language related services minutes.

50. Student was allocated resource time by the January 23, 2008, IEP Team wherein Student's case manager would help Student organize his day; stay up to date with assignments; break down assignments; look at what needs to be done; clarify content; and get additional instruction as needed (Tr. 1548-1549).

63. █████ testified that she sent extensive progress reports to Student's Mother (Tr. 1111-1116). Student's Mother admitted to receiving progress reports in the mail (Tr. 1037). Student's Mother and the District also testified to numerous conversations, e-mails, grade reports, progress reports, and correspondence related to Student's progress in class and education. Communications in the record between Student's Mother and District personnel is are too numerous to cite and may number in the hundreds.

64. We make a credibility finding that Student was provided with a computer and provided with a second new computer after Student intentionally damaged the first computer. We base this credibility finding on the testimony of District personnel, the admissions of Student's mother, and the lack of any testimony to the contrary.

66. We make an inference that District personnel were able to compensate for the lack of Kurzweil and the lack of expertise with Draftbuilder. The District personnel were thus able to accommodate Student using Word and using handwritten documents. We base this inference on the testimony of █████ that the lack of these programs did not affect Student's educational experience and the lack of any direct testimony to the contrary. We also base this ~~credibility finding~~ inference on Student's good grades in many of his classes and passing grades in biology.

84. We make ~~an inference~~ a credibility finding that Student reached his sole social work services goal based upon the testimony of AB and the language of the IEP.

92. We make an inference based upon the plain language of the IEP that Student was denied many of the resource minutes required in the IEP until he broke his leg on October 31, 2009, and had to use gym class as a resource period.

94. We make a credibility finding that all records necessary to participate in IEP proceedings were made available, but Student's Mother never timely picked them up. We base this credibility finding on the testimony of █████ and Student's Mother.

134. We find that the District made available Student's records, but Student's Mother never timely picked them up. We find that the District provided all records for this litigation except for some e-mails. We find that there is no harm to Student's Parents because inferences of what the e-mails would have shown were drawn against the District. We find no denial of records, even if one occurred is outcome-determinative to any aspect of the IEP creation, implementation, or litigation process.

All other paragraphs of the decision remain unchanged. The ultimate disposition of this case remains in place unchanged.

/S Joseph P. Selbka  
Joseph P. Selbka  
Impartial Due Process Hearing  
Officer

Date:9/9/2009

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