

- 1) Neither party had objections to the Hearing Officer serving in this manner.
- 2) The Parties were informed that the Hearing Officer would rule on any new evidentiary objections at the Hearing and that the Parties could raise such on the record at the beginning of the Hearing on any matters where they disagreed with the Hearing Officer's rulings.
- 3) No interpreter was needed.
- 4) All witnesses were to be sequestered prior to their testimony.
- 5) The parents chose for the Hearing to be open.
- 6) The District would arrange for the court reporter. As Petitioner, the Parent would present their case first and shoulder the burden of proof.
- 7) Opening statements would be limited to five (5) minutes.
- 8) The five business day rule deadline was at 5:00 PM on June 8, 2009.
- 9) The Parties agreed that written briefs would not be filed at the close of the Hearing.
- 10) The Parties agreed the student is a resident of the District.
- 11) The Parties agreed the student attends [REDACTED] school in the District.
- 12) The Parties agreed the student's primary eligibility is Speech and Language Impairment and the secondary is Other Health Impairment.
- 13) The Parties agreed the student is a student with a disability eligible for programs and services as stipulated by the Individuals With Disability Education Act (IDEA).
- 14) The Parties agreed that the issues identified herein were the only issues in this DPCN and that they contained no insufficiencies.

ISSUES PRESENTED

The parties agreed at the Pre-Hearing Conference there were two specific issues in the filed Due Process Complaint Notice (DPCN). Those issues were identified as:

- 1) Is the District providing sufficient health services for the student?
- 2) Is the student eligible to receive assistive technology at school?

PARENT'S POSITION

The Parent's position, as stated by the mother in her opening and closing statements, is that the Student is a student eligible for special education services and supports and that the Student can only receive a Free and Appropriate Public Education (hereinafter FAPE) if the Student receives the assistive technology at home and at school and specifically an assistive technology like Speak Q. Speak Q is a computer software program that allows the user to speak into a microphone and the software then converts the person's speaking voice into print on the computer that can be printed out as a written document. Additionally, due to the student's medical condition as reported by the Parent of mitochondrial disease, the student requires full time nursing services to be included in the student's IEP while the student is at the school in order to be able to attend and therefore receive a FAPE from the District. The Parent hoped that by the end of the Hearing that the Hearing Officer would know the Student and not just the Case Number of the DPCN. The Parent expressed the student is consistently concerned about what will happen to him if a nurse is not present. The Parent testified that the student will not go to school on days when a nurse is not there. The Parent testified that the student worries about what third grade will be like, will I be ready, can I do this, the Parent testified these are the student's concerns. The Parent expressed that she hoped the District would understand this and provide accordingly. The Parent also expressed in the opening statement that she wanted a full outside evaluation of the student using a team approach. It should be noted that this was the first time the issue of a full outside evaluation using a team approach was raised by the Parent. It was not agreed to issue nor was it raised during the Pre-Hearing Conference. The Parent described a number of physical maladies suffered by the student including, but not limited to, migraines, dehydration, Restless Leg Syndrome, muscle fatigue, muscle weakness etc. The Parent also testified that the student does not always tell the teacher about these issues. The Parent indicated that mitochondrial disease is almost a disease that is invisible. The Parent testified to a concern that "an emergency can happen at any time." Since an emergency can happen at any time, a nurse is required at school all the time. The Parent also testified that the student wants to be a

nurse when he grows up. The Parent testified that the origin of this dream of the student is that he knows "the nurse is there for him all the time." The Parent testified that she would present documentation that the student needs an assistive technology device at school. The Parent also testified that she has an appointment "on Capital Hill for coffee with Senator Dick Durbin." She further testified that she intended to bring up the issue of nursing services in schools with Senator Durbin. In closing, the Parent expressed that she wanted the Hearing Officer to know the student by more than just a name or case number.

DISTRICT'S POSITION

The District expressed that they were sorry to be at the point of a Hearing. The District pointed out that they believed it was important to keep in mind that the Hearing was about two finite issues: whether a nurse is needed full time at school and whether or not the student needed the Speak Q device which the District testified the Parent has said the student needs to have at school due to fatigue the Parent witnesses at home when the student completes a day of school. The District testified that the issue of nursing service should be moot as the District Board of Education has authorized and employed for the 2009-2010 school year a full time nurse at [REDACTED]. Regarding the assistive technology device, the District testified that evidence would show that the student is completely mobile, participates in regular Physical Education with no restrictions or limitations, and the student participates in baseball and basketball programs outside of school and is capable of riding a bicycle. Further, the District asserted that the Parent rejected an offer of Occupational Therapy evaluation or services and indeed "pulled" a script for same earlier in the student's career at [REDACTED]. Finally, the District asserted that the evidence would show that the IEP developed January 14, 2009 meets the needs of the student and would document that the student has made good progress within the normal curriculum. Therefore, it was also the District's stated position that an assistive technology device is not warranted.

FINDINGS OF FACT

There were eight witnesses who testified during the scheduled two day hearing which was completed in one full day. Six of these witnesses were presented by the Parents during their case-in-chief because they requested the due process hearing and thus bore the burden of going forward as well as the burden of proof. Neither party presented post-hearing briefs nor presented any statement of facts on their own behalf. While a transcript of the hearing was taken, the completed transcript was not available for the writing of this decision. There was one volume of exhibits submitted by the District and one volume of exhibits submitted by the Parent. The District exhibits were bound and marked by tabs and page numbers and included 24 exhibits and 216 pages. The District notified the Hearing Officer that pages SD68 through the page after SD 87 should be removed from their exhibits as they pertained to the student's sibling and not the student in the DPCN. Those exhibits were removed as requested. The Parent's exhibits were numbered as exhibits 1-30 but the exhibit pages were not numbered. The Hearing Officer physically counted 109 pages of exhibits submitted by the Parent. Additionally, the Hearing Officer submitted exhibits consisting of 161 pages and marked as "HO 0001 - HO 0084." The Exhibits from the Hearing Officer were documents representing the various email and USPS communications between the parties. The findings of fact that follow represent the most significant and relevant information that the Hearing Officer relied upon when making a final determination and ruling in this matter.

The Student is a male student who was born on August 8, 2000. The student is approaching his ninth birthday. Document # 24 submitted by the District reflected the IEP filed in the District's documents with the earliest date and was dated September 6, 2006. This IEP reflected the student has been receiving special education services at least since that date when the student was then in kindergarten. SD Document 24 reflects the earliest date the student was receiving special education services was April 4, 2003 based upon an evaluation documented in the September 6, 2006 IEP. SD Document 24 reflects the student's primary eligibility as speech and language and secondary eligibility was Other Health Impairment (OHI) due to a medical issue related to mitochondrial disease. A school district psychological evaluation was completed on May 9, 2003 by [REDACTED]. The findings of this evaluation were "...according to these results his Cognitive Ability was in the average range." The IEP submitted by the District as SD Document 24 indicates eligibility determination data was discussed at a conference dated September 6, 2009. The results of that conference as reflected by SD Document 24 indicate eligibility status as speech and language and other health impairment due to mitochondrial disease as diagnosed by [REDACTED], Medical Genetics, [REDACTED] (SD 0202). Several of the appropriate staff members and the Parent attended the IEP conference. This IEP provided for integrated School Nursing Services as needed and both classroom and therapy room for speech and language services 90 minutes per week (mpw). Related services included 120 minutes per week of occupational therapy and 120

minutes per week of social work services and a special bus. The September 6, 2006 IEP reflected regular education services to be provided 31.7% of the school day.

On November 1, 2006, an IEP meeting was held for the purpose of review/revision while the student was still in kindergarten. The meeting was attended by several appropriate staff members and the Parent. The diagnosis of speech/language impairment and OHI were affirmed (SD 0164). Recommendations for services at this time included integrated nursing services and speech/language services for 90 minutes per week. Related services included OT for 120 minutes per week. Social work services were reduced from 120 mpw to 40 mpw. The student was to ride a regular school bus. Further, it was noted that the student was to have some medical work done on his feeding tube in December, 2006. Stated needs at this time were "needs to develop/improve articulation skills and expressive language skills" and social; Needs to be able to identify and express feelings appropriately" (SD 0164). Stated goals included goals so that the student would improve fine motor skills and visual perceptual skills, sensory process skills, and self help skills. Assistive technology and augmentative communication were specifically checked "No" in this IEP (SD 0171).

In a conference summary report (SD 0139) dated 12/17/07, it was noted that "due to an expired Physician's Prescription, [REDACTED] (sic) has not received therapy service since 9/25/07. It has been determined by the IEP team that [REDACTED] will be dismissed from Occupational Therapy." This was followed by the printed name of [REDACTED] OTR/L (SD 0139). Again, Assistive Technology and Augmentative Communication were specifically checked "No" (SD 0149). The Parent/Guardian Notification of Conference Recommendations form contained the signature of the mother of the student (SD 0155).

The first witness called to testify by the Parent was [REDACTED] Special Education Supervisor for the District. [REDACTED] was called to testify to the most recently completed IEP that was dated January 14, 2009. The IEP referenced was Parent Document #5. The purpose of the IEP was noted as checked on the first page of Parent Document #5 was "Other" and listed as "Annual Review" and as signed by [REDACTED]. The Parent asked [REDACTED] about the District's procedures for completing an evaluation of a student. [REDACTED] described the process. The Hearing Officer found this description to be consistent with what is expected by the IDEA and State rules and regulations. The Parent asked if the Parent had ever asked for a "technology evaluation." [REDACTED] testified the Parent did not ask for a technology evaluation but asked for an "aug com" evaluation. "Aug com" was explained by [REDACTED] mean Augmentative Communication Devices evaluation. The Parent then entered into somewhat of a debate with [REDACTED] regarding what was ordered for the student. The debate centered on a device known as Speak Q and its value to the student. The Parent asked if [REDACTED] was aware the Parent did not want anything to speak for the student but rather to write for the student. [REDACTED] responded in the affirmative. [REDACTED] testified she had ordered an Occupational Therapy (OT) observation of the student and that she reviewed the results of that observation with the Parent in December. She further testified that the mother had rejected the results of that observation. Ms. [REDACTED] testified that the District was not seeing anything in the school environment to justify any type of writing device for the student. The Parent asked [REDACTED] if she knew the Parent wanted something that could be used back and forth between the school and home. [REDACTED] testified that was not how she understood it. She testified she understood the Parent had requested the loan of a District laptop so that she could try out the software known as Speak Q. [REDACTED] testified this software enables the user to speak into a microphone connected to the user's computer and the software would then type the users words and enable the user to then print out the user's input into the microphone. The Parent then questioned [REDACTED] regarding Parent Document #4, page 11 of 16. This document was created by [REDACTED] as a summary of a conference with the Parent on September 17, 2008. On page 11 of 16, the box is checked "yes" next to the statement on the conference summary that reads "Assistive technology devices and services." Directions in this section of page 11 of Parent Document #4 require further comment on the bottom section of page 11 when any of the boxes are checked yes. At the bottom of page 11, the supporting statement to the box checked yes reads: "Parent request a Augmentative Device Referral. The SLP indicated that this device had not previously been needed. Mother indicates that memory loss issues and fatigue have become a concern at home due to [REDACTED] medical issues/diagnosis of mitochondrial disease." This written statement on the bottom of page 11 is directly in agreement with [REDACTED]s previous testimony that she recalled that the Parent had asked for an "aug com" referral because the student was having difficulty with fatigue and writing at home. [REDACTED] further testified that she had tried to secure a laptop from the District to loan to the Parent so that the Parent could use the laptop to try out the Speak Q software at home. The Parent asked [REDACTED] why that laptop was not eventually provided. [REDACTED] testified that when the Parent further requested training and other materials for the Speak Q software that her supervisor, [REDACTED]

Director of Special Education for the District, indicated that the district was not going to provide the degree of services requested by the Parent. The Parent asked if [REDACTED] knew of an error regarding the use of an epipen by the student as reflected in the January 14, 2009 IEP. [REDACTED] indicated that she was made aware of the error and that this was corrected in a document dated February 8, 2009 and that this IEP reflected that correction. [REDACTED] further testified that there was no other difference in the February 8, 2009 IEP from the January 14, 2009 IEP other than the correction of the referenced error. The Parent asked [REDACTED] about the OT observation that was completed on November 21, 2009 and [REDACTED] testified that the Lead OT accompanied the OT during the OT's observation of the student at the request of the OT. [REDACTED] testified that the Lead OT was asked to attend with the OT because the Lead OT had greater experience in completing the type of OT observation requested. The District asked [REDACTED] if she had spoken to the teacher about the student and if [REDACTED] was familiar with the student personally and educationally. [REDACTED] responded yes to both questions. [REDACTED] testified that the student was placed in a regular education classroom full time with his non-disabled peers. She testified that the student had accommodations in his IEP that included providing extended time for testing, for assignment completion, reduced material and alternative assignments as necessary. She testified the student did need extended time for testing and needed to work during recess on occasion to keep up. She testified the student has been able to keep up to date when these accommodations are provided. She testified the student had no cognitive disabilities and received speech and language therapy. She testified the student had received OT services but that discontinued when the Parent pulled the script for OT services. [REDACTED] testified the Parent was asked if she wanted OT services for the student but the Parent declined. She testified mom stated "he is fatigued at home." She testified mom indicated that he was so fatigued at home he could not complete his homework. The District asked if the teacher reported the student was not completing his homework or other school work and Ms. [REDACTED] responded the teacher had not reported the student as having trouble completing homework or keeping up with school work. [REDACTED] testified the teacher reported the student was progressing with the accommodations specified in the IEP. [REDACTED] indicated there was an augmentative communication screening completed by [REDACTED] who was the District's speech and language therapist. [REDACTED] testified the outcome of the screening by the speech and language therapist was no augmentative communication needs demonstrated by the student. Ms. Lomax testified that she then requested an OT observation and the outcome was that OT services were not warranted. She testified the observation was completed by [REDACTED], OT and [REDACTED], Lead OT. Under questioning by the District, [REDACTED] testified that the aug com observation and OT observation were reviewed during the January 14, 2009 IEP meeting with the Parent. [REDACTED] testified that the conclusion of the IEP team was the aug com device and OT services were not warranted for the student. She testified the mother did not agree. [REDACTED] testified she told mom she would investigate the possibility of getting a free trial at home for mom to try out using the Speak Q software. She also testified that mom was in agreement with the accommodations specified in the January 14, 2009 IEP, with the exception of not providing the aug com device. [REDACTED] testified that she understood the mother's concerns about home and that she was seeking the Speak Q software demo in an effort to help the mother at home with her concerns but was not suggesting the Speak Q should be used at school or was needed at school. She testified that she secured the Speak Q software for the mother after informing the mother she could download the free demo to her home computer. She testified the mother rejected that idea and that was when [REDACTED] testified she would try to get a loaner computer for the mother to try out the demo software at home. She testified that she secured permission for the laptop to be used at home and when she met with the mother to provide the laptop the mother indicated she believed the District was giving the laptop to the mother for use at home and at school and requested training on the software. Ms. [REDACTED] then told the mother she would need further authority from her supervisor which she then sought and was denied by the District's Director of Special Education who told [REDACTED] a meeting would be required before she could authorize the parent's request. At that point, [REDACTED] indicated she informed the mother she would not be providing the laptop for use at home at that time. The District asked [REDACTED] if there is extensive homework or extensive writing for students at home in the second grade classroom. She responded there was minimal, writing of simple sentences (she defined as 5 or six words) was required on occasion. She also testified there was not a significant increase in homework in the District's third grade curriculum. The District asked if the student were to begin to suffer from fatigue in the future what the District would do. [REDACTED] responded that the District would likely complete an OT evaluation. When asked by the District, [REDACTED] testified the student has not demonstrated to date any fatigue issues at school. When asked if the District had employed a nurse full time for the 2009-10 school year at [REDACTED] and whether or not the nurse would be on duty bell to bell, [REDACTED] responded yes. Upon re-direct by the Parent, [REDACTED] confirmed her understanding of the parent's request was that she wanted to have a free copy of the demo software to try out at home and not that the Parent wanted the software for school. The Parent asked Ms. [REDACTED] if it was customary for regular students to require extended time to complete assignments and [REDACTED] testified yes the District has a number of students that require extended time. The Parent asked if the student's extended

time frequency was more than what other normal students experience and [REDACTED] testified no it was not more than what other normal students experience. The Parent asked about Parent Document #14 regarding the student's NWEA scores. [REDACTED] testified that the student's growth score in math was 22 and the typical growth score was 15 and the student's growth score on reading was 23 and the typical growth score on the document was 20. The Hearing Officer noted the student's score was 192 in math and the District average was 190 and the National Group Average for second graders was 191 and the student's score in reading was 178 and the District average was 184 and the average National Group Average for all second graders was 190. The Parent asked [REDACTED] if a parent asks for an evaluation "isn't the District obligated to give them one." [REDACTED] testified the decision was based upon the OT observation, the speech and language observation and student performance in the classroom and this data did not warrant another evaluation. The parent persisted in her questioning that she was entitled to an outside evaluation that she had frequently requested. The Hearing Officer asked the parent to clarify if she was maintaining that she had requested an Independent Educational Evaluation. The parent indicated she wanted an evaluation to determine what services the student deserved for assistive technology. The Hearing Officer asked [REDACTED] to explain the District's process. She testified that the District would have [REDACTED] and [REDACTED] complete an observation and if the observation produces evidence that would warrant an evaluation the district would complete the full evaluation process. The Hearing Officer then asked if the observations completed by the OT department produced evidence that would have indicated a complete evaluation should be completed and [REDACTED] testified that the observations did not produce evidence of a need for a complete evaluation. The Hearing Officer then asked if the timeline included the parent asking for an aug com evaluation, the OT referral and subsequent observation being completed, and the results of that information being discussed with the parent at the January 14, 2009 IEP and the team deciding that further evaluation was not warranted and [REDACTED] testified this was accurate. [REDACTED] was asked about page SD 0092 in District Document 11 to confirm that this reflected the speech and language therapist's report that read in part: "It is my professional opinion that he does not require use of an aug.com. device for communication needs in the classroom at this time (to talk or communicate his needs.)" [REDACTED] testified that this was indeed the recommendation of the therapist at the January 14, 2009 IEP meeting.

The District next called [REDACTED], Lead Occupational Therapist for the District to testify. The District called her at this time as she needed to leave. She testified that she supervises 12 other OT's in clinical matters and runs the mobility and speaking clinic for the District. She has worked for the District for 10 years and has an assistive technology provider certificate and a MS in OT. [REDACTED] testified she completed an observation of the student in the afternoon around 1pm while he worked in a group activity at a table and then transitioned to a rug activity and then back to the table activity. He was interacting with the other students during this time. She testified she was looking for how the student kept up with the others and how he performed the tasks asked by the teacher. She testified the student performed his tasks "great." She testified she did not observe any mobility, fine motor or fatigue issues of any type. She testified she was invited to do the observation by [REDACTED] to confirm [REDACTED] observations. Ms. [REDACTED] testified she made her observation only knowing there was a concern about the child but not knowing any other specifics about the student. [REDACTED] was asked to look at District Document #13, the observation report of [REDACTED]. She confirmed she had seen the report before and testified she agreed with the conclusions of the report filed by [REDACTED]. She testified that she talked with the student's teacher and indicated the teacher reported no issues with the student's writing or fatigue issues. She further testified that she would recommend a full evaluation of a student any time that a student was reported to be having difficulty with keeping up with the student's peers or otherwise having difficulties reported by the student's teacher. [REDACTED] also testified regarding Parent Documents #27 and 28 the outside OT evaluation and assistive technology assessment respectively. When asked for her overall impression [REDACTED] testified the evaluation had been completed appropriately. When asked about the second paragraph of the report, [REDACTED] confirmed that the report noted the student participated outside of school in baseball and basketball activities and rides a bicycle. When asked if there was anything in the report that would indicate whether the student would require assistive technology in her opinion, [REDACTED] testified the only subtest score indicated that was below average was the peg board test, but this test in isolation would not suggest in and of itself the need for assistive technology in school. [REDACTED] was asked about information on page 3 of the OT Evaluation that reflected the student might suffer from fatigue at school and whether this information was gathered by the evaluator [REDACTED] from the school. [REDACTED] testified that to the best of her knowledge the evaluator did not contact anyone at school to discuss the student's performance at school. [REDACTED] testified there are already accommodations that are in the current IEP designed to assist the student with issues of fatigue like shortened tasks, alternate assessments, and alternate strategies to assist the student when appropriate. The District asked [REDACTED] if there was anything in the report that she could find that would conflict with the student's current IEP and [REDACTED]

testified that she did not find anything when she reviewed the report. The Hearing Officer specifically asked Ms. [REDACTED] if she asked the student's teacher if the teacher had any concerns about the student's performance and Ms. [REDACTED] testified that she had asked the teacher and that the teacher's response was "no."

School District Document #13 contained a one page "OCCUPATIONAL THERAPY OBSERVATION REPORT" dated November 21, 2008. The stated reason for the observation was "Impact of fatigue on writing tasks at school; assess need for assistive technology for writing. Observations were completed in the afternoons in and out of the classroom." The observation form was signed by [REDACTED], MS OTR/L, Occupational Therapist. Parent Document #27 contained an eight page evaluation report titled "Occupational Therapy Evaluation" and was signed by [REDACTED] OTR/L. It is unclear to the Hearing Officer whether or not this signature indicates the examiner [REDACTED] does not have a Masters Degree in Occupational Therapy, though the typed credentials lacking the typical "MS" would suggest that to be the case. [REDACTED] did not testify at hearing. [REDACTED] was called by the Parent to testify. [REDACTED] works in the school district but is employed by an agency under contract with the school district. [REDACTED] testified that she observed [REDACTED] two times, twice in the classroom for about 45 minutes the first afternoon and about an hour the second afternoon and once in the therapy room for about 10 minutes. She testified that she was asked to observe a second grade child to determine if the student had handwriting issues in the classroom and to determine any assistive technology needs. She further testified she obtained the parent's written permission before beginning the process. She testified her observations and teacher interviews regarding the teacher's concerns confirmed "that fatigue was not impacting hand writing." She further testified that continuing to use a writing tool would "increase his endurance for writing tasks so that he does not lose (sic) foundational writing skills he has already developed. Taking it away will only decrease his endurance and impede the growth of further skills." [REDACTED] further testified that the student could write legibly and could keep up with his peers and to take that away right now would have a potentially negative impact on this development. Parent Documents Numbered 15, 16 and 17 were all examples of the student's handwriting and school work. The Documents reflected handwriting that was completely legible with letters formed properly, placed spatially correct and on the line. The handwriting reflected work that is fairly typical of a second grade student as noted by the Hearing Officer who has 32 years experience in K-12 public schools in Illinois. The Parent asked [REDACTED] how many students she had seen or treated with Mitochondrial Disease. [REDACTED] responded that she does not treat the disease, but she treats the impact on function. She further testified in her eight years of experience she has had experience with children who have mitochondrial disease. When further questioned, [REDACTED] responded that she has worked with more than two children with this condition. When asked what she knows about Mitochondrial Disease, she testified she is not an expert on the disease but does know its impact on function, including energy is "a big thing", fatigue, pain, motivation can go down. When [REDACTED] was questioned what she thought making a child with mitochondrial disease write more what the impact would be, she testified that her observation on this student indicated that he was able to write on the line, form letters properly and keep up with his school work to date. When pressed through questioning to acknowledge that making a child with the aforementioned disease to continue to write that it would have a negative impact, [REDACTED] testified that her observations indicate the student is able to keep up with his peers. When asked if she had read the evaluation submitted by the Parent and authored by [REDACTED] - she testified yes and said it was a very factual evaluation except for one statement that she found to be subjective. She testified on page 2 of the referenced evaluation where the evaluator made a statement about [REDACTED] peg board test that "This subtest suggests that hand fatigue was present after school and impacted his motor speed and accuracy." She testified that there could have been other factors that could have explained this, including fatigue. She testified part of her concern was that this one score was so low compared to the other scores - in particular his visual motor score which she testified was significantly above average. The peg board score was .8% (percentile) and the visual motor score was 86% (percentile). She testified that the student "nailed" the visual motor test. She testified that fatigue clearly did not impact the visual motor score. Therefore, as an evaluator she would personally question the significantly lower peg board test score but would not definitively label it as fatigue since fatigue did not seem to have any impact on the visual motor score, she would be hesitant to indicate fatigue as the single factor for the lower peg board score as noted by the evaluator [REDACTED] in the Parent document #27 (page 2). There was a fairly lengthy discussion between the Parent and [REDACTED] regarding time and its impact on the evaluation, but it did not seem to have any significance to the issues in this case, rather it seemed to this Hearing Officer to be more of a discussion about testing protocol that came up during the testimony that deserves mention in this decision, but did not impact the Hearing Officer's decision in any way. When asked to testify further about the Parent's submitted OT evaluation, [REDACTED] pointed out on page 1 of the evaluation that the evaluator [REDACTED] noted that "... he is capable of neat printing, placing his letters on the writing line and using adequate spacing. He appears to have fairly symmetrical strength that is functional for his age." Ms. [REDACTED] testified that these observations were consistent with what she observed and reported in her observation report

his condition does affect his strength and endurance level "when performing his daily school tasks." Again, there was no mention of any recommendation for nursing services while at school. Parent Document #10 was signed by [REDACTED]. Parent Document #10 was a Home/Hospital Services Request. The request appeared to be the result of the student having been treated for a hiatal hernia surgery. Again, there was no mention by [REDACTED] of the student needing nursing services while at school. The District asked the Nurse if any of the referenced physicians had contacted her about the student regarding any issues related to the student. The Nurse responded "No." When asked by the Parent why the Nurse believed the Doctors would contact her, the Nurse was not sure of the question. When the Hearing Officer clarified the question by asking whether or not Doctors would contact school nurses if their patients had conditions that would affect them at school, the Nurse testified that Doctors are required to do this or face liability issues. When asked by the District whether or not the student had any medicine needs at school, feeding issues at school, or other medical needs at school and the Nurse testified "No." The District asked how often the student visited the nurses office in 09 and the Nurse testified "one time." When asked the purpose of the visit, the Nurse testified the student accidentally had a pencil stuck into his eye socket.

[REDACTED], Health Services Supervisor for the District, was called to testify by the Parent. [REDACTED] testified she had been with the District 11 years and had resigned effective the end of the current school year. [REDACTED] testified that the student had been provided compensatory tutoring after school to help him to catch up after an extended absence to the aforementioned hiatal hernia surgery. The Parent asked [REDACTED] about Parent Document #10 and she confirmed that the document reflected the student was eligible for tutoring due to extended absence as a result of the aforementioned surgery. The Parent then questioned [REDACTED] about Document #12, signed by the tutor [REDACTED]. The document reflected that after a full day of school and the one hour of tutoring after school, that the student showed evidence of fatigue that seemed to affect his ability to recall words. [REDACTED] also noted that during the tutoring sessions she worked with the student that "frustration regarding his inability to show his knowledge was repeatedly observed." [REDACTED] was questioned by the Parent about Parent Document #30 which was a newspaper article reporting on the number of nurses at the time the article was written that were employed by the District. The article also reflected comparative numbers nationally and by surrounding Districts. On cross-examination, the District asked [REDACTED] if you would expect a second grader who had just returned from surgery to be tired during after school tutoring. [REDACTED] responded in the affirmative. When asked if [REDACTED] knew how many times the student had visited the nurses office she testified she was not sure but believed it to be very few times. When asked by the District what would happen with any child if there was an emergency involving that child at school, even with a nurse present, what the District's protocol was and she responded that 911 would be called whether a nurse was present or not.

The Parent also called speech and language pathologist (SLP) [REDACTED]. The SLP testified that she completed an aug.com evaluation, she observed the student, talked with the teacher and determined that the student did not need anything to support his communication needs. The District called [REDACTED] Director of Special Education. [REDACTED] testified what the District's policy was regarding a parent seeking an Independent Educational Evaluation (IEE). [REDACTED] testified that parent's are required to submit such requests in writing to the Superintendent of Schools. [REDACTED] testified that the District had not received a written request for an IEE from the parent. The District also noted during the questioning of [REDACTED] that an IEE was not one of the issues identified in this DPCN. [REDACTED] also confirmed that it was the District's understanding that the Parent was seeking assistive technology for home and school and nursing services in the IEP. [REDACTED] testified that the District Board of Education had decided in January of 2009 to employ full time nurses at all elementary schools in the District beginning with the 2009-2010 school year. She also testified that the nurse had been identified and employed for [REDACTED] as part of that program decision.

The Parent then called herself to testify. After asking how she should proceed, the Parent was directed by the Hearing Officer to simply "say what she wanted to say." No one questioned the parent, and she made the following factual assertions in her stated testimony. The Parent first presented a DVD that lasted about 8 or 9 minutes that was professionally prepared as an information presentation reflecting options that districts could take when working with students with mitochondrial disease. The DVD presentation was informative with options that might work when working with students afflicted with the disease. The DVD information included some ideas that were consistent with accommodations currently listed in the student's IEP. The Parent, in her testimony following the DVD, confirmed that the DVD was an effort to share a little bit more information about students with mitochondrial disease. The Parent also shared a health care plan that she believed would be ideal for a child with mitochondrial disease. She testified the

student was late to school at least 10 days the past year because the student was afraid to go to school if the nurse was not scheduled to be there as the student was afraid of choking at school when a nurse was not present. The parent testified she and the student had a breakfast meeting scheduled with Senator Dick Durbin about the nursing issues at school and the amount of money school districts would get from the stimulus money. The parent testified she had requested a technology evaluation from September of 2008 and ongoing. The parent testified she is still waiting for this technology "eval." The parent testified that her Document #4 reflects that assistive technology is checked in an IEP document that is being ignored. (The Hearing Officer notes herein that the Parent Document #4 that references the check for assistive technology is not an IEP document, but rather a summary of a conference held in September of 2008 with the District Coordinator, [REDACTED] and the parent wherein they discussed completing an "aug. com" evaluation. This factual discussion regarding this section of Parent Document #4 can be found in paragraph 5 of the Findings of Fact herein.) In cross examination by the District, the Parent was asked about the point of the DVD. The Parent testified that her point was to demonstrate the value of the assistive technology to the older student in the DVD. The District asked the Parent to confirm that this was an older student in the DVD and the Parent did so, but commented we could not tell from the DVD when the student began to use the technology. The Parent was asked if there were similarities to the DVD and the student's services in the District including items noted in the DVD like an IEP, a health plan, instructing staff about the disease, having modifications and accommodations, information to the school staff provided by the nurse, since all of these things were all recommended by the DVD and are also being provided for the student in this DPCN. The Parent agreed with the similarities as stated by the District except for the quality of the health plan. The District then asked if the health plan was part of the issues raised in the DPCN and the Parent agreed it was not. The District asked the parent if there was any evidence of information from staff that the student was impaired by pain or fatigue at school. The Parent indicated that Parent Document #5, page 3 of 16, the speech pathologist noted "she has noted come fatiguing." This document was dated January 14, 2009. The District asked about the speech and language report dated May 20, 2009 and submitted as District Document # 10. The District asked the Parent if this most recent report reflected anything about pain or fatigue affecting the student, but rather that the student was making steady progress and the Parent responded that was correct. The Parent confirmed that the Parent's outside evaluators made no contact with school staff to gain information from the school staff regarding the student's progress in school. When asked if the evaluators expressed a desire to contact school staff the Parent testified she did not think they were allowed to without her permission.

In closing the hearing, the Parent and the District's attorney, [REDACTED], made a closing statement. The Parent emphasized in their closing statement that the parents see fatigue at home and this fatigue was a result of his mitochondrial disease and this impacts his ability to do his homework. The Parent hopes the school district will be there for him so that he does not fall too far behind before the district starts to help him. Essentially, [REDACTED] indicated that many of the parent's concerns are about what might happen in the future. She emphasized that the District is charged with providing for the student with what he needs at this point in time and that there has been no evidence submitted to support that the student needed nursing services this past year or in the coming year. She summarized that he does not have medication at school, he does not require a special diet at school and the most recent letters from physicians submitted by the parent for hearing purposes do not indicate the need for nursing services in the student's IEP. With respect to the assistive technology device, [REDACTED] purports that an IEE was not in the due process request, that none of the witnesses testified they understood that the parent had requested an IEE, and further, that an IEE must be submitted in writing to the superintendent. The evidence reflects that almost all of the evidence indicates that conversations between the mother and the school revolved around the Speak O device and the securing of a demo for mom to use at home. The evidence further reflects that there was no evidence to indicate the student needed any assistive technology help at school.

CONCLUSIONS OF LAW AND OPINION

The Hearing Officer has read and considered the positions of the District and the Parent in their written submissions requesting and then responding to the due process procedure and the 161 pages of exhibits as submitted by the Hearing Officer. Also, read and considered were the 24 exhibits submitted by the District and the 30 exhibits submitted by the Parent totaling 325 pages combined. The Hearing Officer also utilized the contemporaneous notes of the Hearing Officer and consulted the electronic record of the Hearing that was kept by the Hearing Officer.

When considering a dispute regarding a student with a disability and the student's school district, the Hearing Officer must first begin by considering the Supreme Court decision in Rowley (Board of Education of the Hendrick Hudson

School District, Westchester County et al. V. Rowley by her Parents, Rowley et ux. 458 U.S. 167 (1982)). In Rowley, the decision is directed by the Supreme Court which set forth a two pronged test for determination of a Free Appropriate Public Education (FAPE) in the least restrictive environment (LRE). The first prong directs the decision to determine whether or not the District has complied with the statutory procedures required by the Individuals With Disabilities Education Act (IDEA) 20U.S.C. 1401 et seq. Rowley indicates that any substantial denial of procedural safeguards that results in adverse impact on the parents' participation or the Student's education in so much as the result is a loss of educational opportunity then there has been a denial of the law's requirement for FAPE. This first test of Rowley provides for relief only when the procedural violations result in substantial harm to the student (W.G. v. Board of Trustees, 960F.2d 1479, 1484 (9th Circuit 1992)). The only possible procedural violation raised by the parent in this case was contained in Parent Document #4. The Parent contended this document was an IEP and contained evidence that the student's IEP as written and reflected in Parent Document #4 required the use of assistive technology for this student (page 11 of 16, Parent Document #4). Indeed, Parent Document # 4 was a document printed out on the District's software program for producing IEP's. Parent Document #4 had all the appearances of an IEP but for the following evidence: the Document was dated September 17, 2008 and there were no signatures on the signature lines to indicate who participated in the IEP process. Evidence in the Hearing supports that Document 4 was not an IEP document as it indeed appeared to be. Evidence from the Hearing and evidence contained in Document #4 itself supports that Parent Document #4 was the District's attempt to reduce to writing a parent conference between the parent and [REDACTED] the District's Special Education supervisor, as well as, other [REDACTED] service team members. Page 1 of 16 of Parent Document #4 under Purpose of Conference the box labeled "Review of Existing Data" was checked. The box labeled "IEP Review/Revision" was not checked. For that reason, the Hearing Officer concludes that even though the information was recorded on the District's IEP form, it did not reflect an actual IEP meeting and its outcomes. Page 2 of 16 in Parent Document 4 contains the following statement preceded by the date "9/17/08" and reads "Mother and parent advocate met with members of [REDACTED] team to discuss/update changes related to [REDACTED] current health status, educational status, and communication skills. This was not an IEP meeting. SLP informally discussed [REDACTED] s stats as progressing. Parent requested an augmentative communication device to be used as needed. [REDACTED] s annual review will be scheduled for December, 2008. The school nurse informally discussed plans already in place for medical interventions/emergencies (e.g. training for staff in use of epipen, emergency plans for swallowing difficulties etc) Parent requested IEP be changed to add interventions/accomodations (sic) for medical interventions into the IEP." Page 11 of 16 of Parent Document #4 indeed has the box checked yes that is labeled "Assistive technology devices and services." However, this section of the document directs the reader to a section at the bottom of the page labeled "Supplementary Aids, Accommodations, and Modifications." Under this referenced section the following is recorded: "9/14/08: Parent request a Augmentative Device Referral. The SLP indicated that this device had not previously been needed. Mother indicates that memory loss issues and fatigue have become a concern at home due to [REDACTED] medical issues/diagnosis of mitochondrial disease." This discussion and evidence is included here because it was a cause of considerable confusion at the Hearing. Indeed, for a period of time it was confusing to the Hearing Officer as to whether or not Parent Document #4 was a completed IEP for this student. The evidence supports that it was not. Further, the evidence supports that it does not rise to a substantial denial of a procedural safeguard but is rather a legitimate, albeit confusing, effort on the part of the District to record a meeting between the parent and members of the service team and the outcome of that meeting. Further, the evidence supports that this practice is likely designed to enable the District to incorporate the outcomes of these meetings into the IEP's of students as appropriate. Additionally, there was no evidence submitted either in the exhibits or in the testimony to indicate the Parent had alleged that a substantial procedural violation had occurred.. As such no substantial violation of the procedures as described herein is found in this case. It is, however, recommended by the Hearing Officer that the District may want to review this process and determine if it is the best way to record such conferences between parents and service team members since the evidence supports that this document was at least confusing to the parent, as well as, to the Hearing Officer.

The second prong of the Rowley test is to determine whether or not the individualized program developed through such procedures is reasonably calculated to enable the Student to receive educational benefit. With respect to the issue of "Is the District providing sufficient health services for the student?" Cedar Rapids CSD v Garret, F, 526 U.S. 66 (1999) provides answers directly on point to this first issue in this DPCN. The Supreme Court, in its decision of Garret, F. stated that school nursing services must be provided by school districts when those services are necessary for the student to remain in school: The legal question in this case is whether or not the student requires school nursing services in order to remain in school. If the evidence in this DPCN supports a conclusion that the student's medical condition requires nursing services to attend school, then the aforementioned Supreme Court case would require that

such nursing services be included in the student's IEP. The facts established in this case include three separate letters from three separate physicians caring for the student who is the subject of this DPCN. Not one of those letters makes reference to the need of a school nurse or any type of medical service being required in order for this student to be able to participate effectively in school. Additionally, there is testimony in the record from the current school nurse that the student only visited the nurse's office one time in the past year. Indeed, the Parent testified that an emergency can happen at any time. But this is true of all students whether the student has a disability or not. Further, the District produced testimony from the Director of Special Education, the Supervisor of Occupational Therapy, the Coordinator of Special Education, the School Nurse, and the Health Services Supervisor that a full time nurse has been employed for [REDACTED] for the 2009/10 school year. This evidence is overwhelming that the question of sufficient health services being provided for the student is being met by the District. Further, there was simply no evidence introduced by the Parent that the student in this DPCN that suggested the student required more health services than the student's non-disabled peers in order to benefit from the programs and services provided for by the student's IEP.

The second issue in the DPCN: Is the student eligible to receive assistive technology at school? The record in this case and the evidence submitted by the District including the testimony and observation report of the OT, [REDACTED], the supporting testimony and interpretations of the Lead OT, [REDACTED], the observations and testimony of the School Nurse, [REDACTED], the Supervisor of Health Services, [REDACTED], and the reports and testimony of Special Education Coordinator [REDACTED] all support one another and lend credibility to their collective testimony and can only lead to the conclusion that the student is currently keeping up with his non-disabled peers with the program and accommodations currently identified in the student's IEP dated January 14, 2009 and slightly modified on February 8, 2009. The student's standardized tests submitted as Parent Document #14 reflect the student is slightly above the average scores of both other students in the second grade in the district and the nation in mathematics and slightly below the average when compared to the same categories in reading. The test scores in Document #14 further reflect that the student's growth scores in both reading and mathematics were above the "typical" growth scores reported on that same test. The January 14, 2009 IEP reflected on page 14 of 20 (District Document #11, page SD 0102) that "Augmentative Device Referral was submitted and results indicate that he is functioning in the classroom and is currently not needing the use of an augmentative device. Please see attached report." The evidence submitted by the District to support this statement included the Observation Report (SD 0110) completed and testified to by OT [REDACTED] and authenticated by OT Supervisor [REDACTED], as well as, testimony by [REDACTED] that conversations with the teacher reflected the teacher did not have any concerns with the student's ability to perform the tasks required of him. When questioned specifically by the District's counsel, all three staff members responded that the teacher had never raised any concerns regarding fatigue or pain or the inability to keep up impacting the child's performance. The Parent did submit evidence in the form of statements from three different physicians. These statements did reflect recommendations for making assistive technology available to the student as needed. They were not specific regarding which type of assistive technology would be most appropriate. Indeed, they did not reflect knowledge on the part of the physician as to what accommodations were being provided to the student through the current IEP. Testimony established that the physicians neither sought nor had any information from the school that may have informed their opinion differently if they had gathered such information prior to writing their recommendations. Similarly, the Parent submitted an OT evaluation completed by [REDACTED], Parent Document #27. While this report did reflect that fatigue was impacting the student's performance on the evaluation, the report itself noted that this fatigue "was present after school..." Part of the recommendation from [REDACTED] was weekly OT (p. 4, Parent Document #27) and yet, the District has offered OT services but the record reflects to date they have been declined by the Parent. While the evaluation also recommends the use of energy conservation techniques including "software that predicts words" to reduce fatigue, it further notes this is only necessary "if the amount of writing compromises his endurance and quality of schoolwork, especially as the demand increases over the next few years." This finding is consistent with the District's assertion in the record that the Parent is concerned about issues that "may" exist in the future. The record produces no corroborated evidence that supports a finding that the student's fatigue is currently preventing or interfering with his ability to perform the tasks requested by his classroom teacher. The Hearing Officer found the testimony of [REDACTED], OT to be very credible on its face. This testimony was given further weight in the decision of the Hearing Officer when it was corroborated by the testimony of Lead OT [REDACTED] who both verified the findings of [REDACTED] and produced conclusions of her own consistent with [REDACTED] based upon her testimony of her own observations of the student. Normally, this corroboration would be considered sufficient, but the District Nurse, [REDACTED] testified to the same conclusion after completing her own independent observation of the student.

The facts in this case that have been presented through exhibits and testimony demonstrate strong support in defense of the District when it comes to both issues in this DPCN. The testimony of the Nurse, [REDACTED] and the Health Services Supervisor, [REDACTED] provide corroborating evidence that the student has no special or uniquely identifiable medical needs that would prevent him from attendance at school such that the District should be required to include nursing services in the IEP. Further, there were three letters from three separate physicians submitted on behalf of the student and not one of them mentioned any medical need that would prevent the student from attending school without the benefit of nursing services included in the IEP. While the Parent did submit an outside evaluation completed by OT [REDACTED] that District staff testified was an evaluation that seemed to be both accurate and fair, there was evidence submitted that it was not complete in that the evaluation produced no evidence that the evaluator made any effort to gather input from District staff regarding the performance of the student in school. Since the evaluator made no reference to such information, the Hearing Officer can only wonder if such information as presented in the testimony of the District staff in this hearing might have influenced and/or changed the recommendations of the outside evaluation. Testimony and exhibits clearly support the District's position that the programs, services and accommodations provided the student in the IEP dated January 14, 2009 are sufficient to enable the child to progress through the normal curriculum and to receive reasonable benefit from same, and that is indeed what is required by the second prong of Rowley.

There was some question in the Hearing Officer's mind whether or not the parent had asked the District for an Independent Educational Evaluation (IEE). The Hearing Officer believes (though it is certainly not clear from the evidence submitted) that the Parent believed she had indeed at several points along the way asked the District for an IEE. The Hearing Officer notes that whether or not that is the case was not and is not an issue in this DPCN as jointly identified by the parties during the May 12, 2009 Pre-Hearing Conference. As a result, the Hearing Officer does not have jurisdiction to rule one way or another at this time. The Hearing Officer further notes that the evidence submitted strongly suggests, but does not definitively prove, that the District did not at any time believe the parent was requesting an IEE, but rather believed the parent wanted an evaluation for assistive technology at school. Because this was a major point of discussion during the Hearing, but was not an issue for the Hearing Officer to decide, the Hearing Officer decided to comment on the matter in this section and recommend to the parents that should they still believe an IEE is appropriate they can consider requesting same in writing to the District superintendent. The parents should be informed that should they elect to formally request an IEE to the District superintendent, the District may either grant that request or file a DPCN of their own to prove that an IEE at public expense is not warranted.

DECISION ON ISSUES

- 1) Is the District providing sufficient health services for the student? The decision by the Hearing Officer is "Yes."
- 2) Is the student eligible to receive assistive technology at school? The decision by the Hearing Officer is "No."

ORDER:

1. The District is ordered to continue with the implementation of the IEP for the Student dated January 14, 2009 and slightly revised dated February 8, 2009.
2. If the student's medical condition suspected to be mitochondrial disease should worsen anytime in the next six to 12 months, the District shall complete (upon written request of the Parent to the Superintendent of Schools) a full OT evaluation to determine what additional services (if any) should be provided in the IEP to accommodate the student's then current medical condition, so long as, that medical condition impacts the student such that the student demonstrates difficulty maintaining his performance in a manner that is consistent with his then educational peers.

RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other parties and to the Illinois State Board of Education. **The right to request such a clarification does not permit a party**

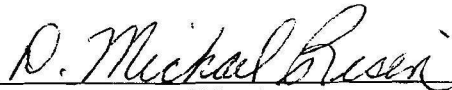
to request reconsideration of the decision itself, and the Hearing Officer is not authorized to entertain a request for reconsideration.

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.01(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

CERTIFICATE OF SERVICE

The undersigned Hearing Officer certifies that he served copies of the aforesaid Decision and Order upon Counsel for the District and to the Parents by email, return receipt on June 23, 2009 and the Illinois State Board of Education and the aforementioned parties at their stated addresses by depositing same with the United States Postal Service at East Peoria, Illinois with certified postage prepaid before 5:00pm on June 24, 2009.



D. MICHAEL RISEN, PH.D.
ISBE IMPARTIAL DUE PROCESS HEARING OFFICER

ENTER: June 23, 2009