

At the Hearing, the following witnesses testified:

██████████ the School Counselor/Case Manager at Scammon;
██████████ the School Psychologist
██████████ Caregiver;
██████████ General Education Teacher;
██████████ a Scammon Special Education Teacher;
██████████ the School Nurse;
██████████ a Social Worker
██████████ a School Nurse;
██████████ the Student's Father;
██████████ a Scammon General Education Teacher;
██████████ the Scammon's Assistant Principal;
██████████ a CPS Occupational Therapist;
██████████ CPS Administrator

PROCEDURAL HISTORY

An IEP Eligibility Determination meeting was held on November 10, 2009. Virtually every attendee at that meeting testified at the Due Process Hearing in this Case. The IEP Team found ██████████ ineligible for Special Education Services, but did write a Section 504 Plan for him. SD 72-77; 78-80.

At the Hearing ██████████ submitted a bound volume of documents marked PD #1 thru PD #302 (Parents Documents). Over objection, at the Hearing, he attempted to submit three (3) additional pages of documents, marked PD #303 thru #305 for identification. The Hearing Officer declined to permit these last three (3) pages to be entered into evidence as they violated the five (5) day disclosure rule. Additionally, they were documents from the current marking period, dated February, 2010, which is long after the date in question and the Eligibility Determination meeting. Therefore, both were irrelevant and immaterial. The School District also submitted into evidence a white, spiral bound notebook, consisting of pages 1 thru 156.

FREQUENTLY CITED DOCUMENTS (SD packet)

The Eligibility Determination meeting, 11/10/09, Pages 72 – 77
504 Plan, Pages 78 – 80
AP Referral Form, 11/10/09, Pages 81 - 83
OT Evaluation, dated 10/06/09, Pages 65 – 68
Psychological Evaluation, dated 9/17/09, Pages 56 – 63
BASC dated 6/02/09, Pages 21 – 31, 32 -39, 40 – 47, 48 – 55

HEARING TESTIMONY

Findings of Fact

The unanimous opinion of the [REDACTED] Staff at the Eligibility Determination meeting of November 10, 2009, was that finding [REDACTED] eligible for Special Education would be too intrusive/invasive. The Team felt that a 504 Plan was appropriate for [REDACTED]. One factor they took into consideration was the apparent absence of any medical diagnosis that [REDACTED] had Attention Deficit Hyperactive Disorder (ADHD), and was not on any medication for it. However, [REDACTED] did introduce evidence of a prior Doctor's note, and OT/PT referral, providing a diagnosis of ADHD. PD 43, 72. These notes had apparently been overlooked by the CPS staff.

The undisputed testimony was that [REDACTED] was a well behaved student, and not a behavioral problem. [REDACTED] felt that [REDACTED] should be identified as a Special Education Student due, in part, to the above Doctor's note which stated [REDACTED] had ADHD since he was four (4) years old. He testified that [REDACTED] was not taking any medication for his ADHD because he did not believe in medications, except as a last resort.

Over the years, [REDACTED] has progressed from grade to grade, and earned passing grades. [REDACTED] described [REDACTED] writing as "atrocious" and introduced writing samples of same. (PD 12 – 19). The dates of these writing samples were unclear. Both the General Education teacher and the Occupational Therapist were asked to review said writing samples under cross examination and testified that while somewhat difficult to read, they were not indicative of a child who needed Special Education services, apart from the 504 Services he was already receiving.

[REDACTED] 504 Plan included multiple modifications and accommodations for him. (SD pages 78 – 80). For examples, under Specific Organizational System, he was to condense materials into a primary binder that had all subject areas, color coded by subject area, with all homework going into one area of the binder, etc. Under the category of Writing, he was provided with a personal proof-reading checklist (laminated), a personal spelling list for self-identified words that he had spelled incorrectly, he was allowed to turn in typed work for reading assignments, he was given reminders to slow his writing down, and was allowed to use every other line when writing.

Additionally, [REDACTED] was referred for an Assisted Technology (AT) Evaluation SD Exhibit, Pages 81 -83). For Math, [REDACTED] was allowed to sit near the multiplication chart, use a calculator, use scratch paper when working out math problems, and the Staff provided the father with a Parent Guide of Math text and a second set of text books for home. [REDACTED] viewed these modifications and accommodations as "crutches", not really addressing his son's underlying learning needs.

[REDACTED] views his son as being "very intelligent". Psychological test data indicated that [REDACTED] Q was 91. A score of 100 is average, the average range falling anywhere from 90 to 110. Thus, [REDACTED] cognitive abilities, according to psycho-educational testing

done at the School, would fall at the lower end of the average range. [REDACTED] described himself as a father who went through school with an undiagnosed ADHD problem, and, as a result he is trying to help his son. He claimed that School Staff refused to deal with him.

[REDACTED]'s original 504 Plan was created on April 16, 2007 (SD pages 1-3). The 504 Summary indicated he was a nine (9) year old third grade student who demonstrated characteristics of ADHD, but had not yet been diagnosed with same, and was not taking any medication. He had trouble staying focused and concentrating. He did not complete work on time and forgot to turn in completed homework assignments. He demonstrated hyperactive behavior. He had F's in reading, math and a D in writing. He needed accommodations to help him perform better in school. He also needed a physician's evaluation and an OT evaluation. (SD page 2). He was provided with accommodations back in 2007, such as: Teachers shortening his assignments, prompting and cueing him as necessary, providing him with proximity seating, providing him with extended time on standardized tests, allowing him to be tested in small groups, etc. (SD page 3).

According to [REDACTED] at some point the 504 Plan "disappeared" which he did not find out about until 2008. The testimony as to why the 504 Plan was suddenly terminated and when it was reinstated was vague and incomplete. However, it appeared that everyone agreed that at some point, the 504 Plan services were discontinued until [REDACTED] insisted that they be reinstated.

The 504 Plan was developed before [REDACTED] came to [REDACTED]. She testified that his mother did not want the 504 Plan even though the father did. Reportedly this is why it was discontinued in 2008.

The next 504 Plan was not discussed until May 8, 2009. (SD Pages 11 - 14). According to the record, the 504 Plan was terminated on April 15, 2008 by his "mother". (SD Page 12). [REDACTED]'s evidence, while incomplete, based upon his testimony, indicated that [REDACTED] Mother did not have custody of him, and had no basis to be making any educational decisions for him. The Hearing Officer notes that [REDACTED] Mother did attend the Hearing on both days and assisted him as his Advocate. She did not ask any questions, nor did she provide any testimony in this regard. Interestingly, the consent for the evaluation, dated April 16, 2007, was signed by [REDACTED] even though she is not legally [REDACTED]'s wife nor [REDACTED] Parent, but described herself at the Hearing as his "Caregiver". (SD Page 4).

[REDACTED] filed his request for Due Process on May 8, 2009, the same date as the 504 Meeting on May 8, 2009. (SD Page 11). (SD Page 98). A Domain Meeting was held on May 22, 2009 to determine which areas [REDACTED] would be evaluated in. On the same date [REDACTED] provided his signature of consent for said evaluation. (SD Pages 16 -17). The Meeting went from approximately 11:00 AM to 4:00 PM. All the evaluations were shared at said Meeting. As a result of the evaluations, no area of disability was identified. [REDACTED] described his results as "average" and said he was earning passing grades. It appeared [REDACTED] was doing well under the 504 Plan. The 504 Plan addressed [REDACTED]'s needs, particularly in the area of organization or executive functioning.

Prior to the November 10, 2009 Eligibility Determination meeting, [REDACTED] underwent a battery of psycho-educational tests. These included the BASC-II, a psychological evaluation, an occupational therapy evaluation, and a social work evaluation. The BASC is an acronym for the Behavior Assessment System for Children (Second Edition). It is a multi-grader report in which information is provided to the Evaluator, from various sources such as the Teacher, Parent, etc. (SD Pages 24 -55). On the BASC, a T-score of 50 is average. In the area of hyperactivity, [REDACTED] earned a T-score of 80, which falls at the 99% rank. (SD Page 25). He also earned high scores in conduct problems, externalizing problems, anxiety, depression, internalizing problems, atypicality, attention problems and the behavioral symptoms index. The score differed slightly based upon the Reporter to process [REDACTED] vs. [REDACTED], but it was noteworthy that each of these scores fell at the 92% rank or higher. (SD Page 25).

[REDACTED] cognitive abilities, as tested by the WISC's (IV) range from 88 to 96, with a full scale IQ of 91. These scores range from the 21% to the 39%. (SD Page 62).

In comparison, [REDACTED] academic standardized testing, as measured by the Kaufman Test of Educational Achievement – 2nd Edition (KPEA-II) range from a low of 73 in written language to an 83 in math, and a 90 in reading (standard scores) SD Page 62. In terms of percentile, these range from a 4% in written language to a 13% in math, to the 25% in reading (SD Page 62).

[REDACTED] the Occupational Therapist, provided her evaluation of [REDACTED] on October 6, 2009. Her Report is found at SD Page 65 – 68. The only standardized test she administered was the [REDACTED] Developmental Test of Visual Motor Skills (VMI). On the VMI [REDACTED] achieved a standard score of 84, placing him in the "low average" range. Her evaluation also included a review of his school records, student observation, Staff Report and classroom observation. She observed that he was able to independently assess the school environment and able to manipulate all classroom materials. He was also independent with all school related self-help tasks, given increased time, as needed. His written communication was completed with overall "adequate legibility" given occasional cues to decrease the pace of his work. His signature was "functional". His overall spatial awareness was "somewhat compromised". The OT's conclusion was that he did not need school based OT because he was able to participate in all classroom tasks, given modifications. However, she did note that he may need increased time to complete the Arrival/Dismissal routine of managing his clothing and materials, etc. SD pp 67 -68.

[REDACTED] did file a request for independent evaluation prior to the Hearing. (Hearing Officer Exhibit A). The Hearing Officer had denied [REDACTED]'s request for said independent evaluation based upon the fact that there was abundant relatively recent test data available. (See SD Exhibit Pages 24 – 68).

CONCLUSIONS of LAW

This is a "child-find" case. The Student claims that the District should have assessed him eligible for special education services when first requested in May, 2009. Further, this case involves consideration of two (2) Federal Statutes promoting the access of students with disabilities through educational opportunities: The Individuals with Disabilities Act (IDEA) 20 USC Section 1400 etc. (1994) and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 USC Section 791 etc. (1994).

The purpose of IDEA is to guarantee children with disabilities access to a free appropriate public education (FAPE). See 20 USC Section 14 (d)(1)(A). Under the IDEA, a School District conducts an initial evaluation to determine if a child qualifies for special education or related services in the form of an Individualized Education Program (IEP). See 20 USC Section 1414 (d)(1)(A). To conduct this evaluation, the School District sets up an IEP Team comprised of the Parents, at least one (1) general education teacher, a special education teacher, and a representative of the local school district. See 20 USC Section 1414 (b)(1)(B). Parties who disagree with the recommendations of the IEP Team are allowed to pursue an impartial Due Process Hearing, with certain procedural safeguards. See generally USC Section 1415.

The purpose of Section 504 is to insure that disabled individuals have the opportunity to participate in, or benefit from, the aid, benefit or service of any program receiving Federal Financial Assistance. See 29 USC Section 794 (a). Programs receiving Federal Financial Assistance include Public Schools. See 29 USC Section 794 (b)(2)(B).

The student, as the party requesting relief, has the burden or persuasion. Schaffer vs. Weast, 246 US 49 (2005).

There is no doubt here that [REDACTED] has some academic issues. The only question to be resolved is whether the 504 Plan, with modifications and accommodations is enough to allow [REDACTED] to access his learning environment, or whether, due to an undiagnosed learning disability [REDACTED] needs more in the way to specialized educational instruction, including an IEP.

A disabled child is one whose disabilities fall under one or more of the eligibility categories and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a). To be eligible for special education and related services, a student must establish that a) the disability has an adverse affect on educational performance, which b) requires specially designed instruction in the classroom, in a hospital, in the home and other settings.

While the School District's modifications, accommodations and implementation of a 504 Plan for [REDACTED] commendable, it does not go far enough. While the School District is not required by IDEA to "maximize" a student's potential, it is required to develop a program for the student which is reasonably calculated to provide an educational benefit. GL and ML vs. Mercer Iowa School District, 46IDELR 273 (2006). The mere fact that he is advancing from grade to grade does not necessarily mean he is making academic

progress. Bd. of Ed., Henrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, ftnt 25 (1982).

Some factors courts examine in deciding whether a student's disabilities (including ADHD) warrant special education are: 1. Academic progress. Alvin Independent Sch. Dist. V. A.D., 503 F.3d at 384; Whether student is at or below grade level, Hood Encinitas Sch. Dist., 486 F. 3d at 1106-1109; 3. Whether the student is performing as an average student vis a vis his classmates, Roericus L. v. Waukegan Sch. Dist. No. 60, 90 F.3d 249, 254 (7th Cir. 1996); 4. Whether the student has difficulty learning in class on a consistent basis, Williamson Cty. Bd. of Ed. V. C.K., 52 IDELR 40 (M.D. Tenn. 2009);

Under IDEA and corresponding State Law, students with disabilities have the right to a free appropriate public education (FAPE). 20 USC Section 1400 etc. FAPE means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's IEP. 20 USC Section 1401 (9)

A School District has an obligation to seek out children with disabilities who may need special education within its jurisdiction. That obligation is known as "Child Find". A pupil is eligible for special education if the pupil has exceptional needs, requiring instruction and services which cannot be provided with modification of the regular school program.

This Hearing Officer disagrees with the conclusion of the [REDACTED] Eligibility Team that [REDACTED] does not have a Learning Disability. Illinois allows the use of the severe discrepancy model to determine if a student has a specific learning disability (SLD). 23 Ill. Admin. Code 226.130(d). The severe discrepancy model determines the existence of a learning disability by determining whether there is a severe discrepancy between the student's cognitive abilities and academic performance.

The [REDACTED] Team's conclusion is inconsistent with the results of its own Evaluative Test Data. According to the School Psychologist's test results obtained on the KTEA-II, [REDACTED] written expression fell at the 2%, or the 1.8 grade level equivalent (GE). (SD Page 58). According to the KTEA-II test data provided (SD Ex. p. 62). His written language skills fell at only the 4%. These scores are significantly below what would be expected, based upon his overall average WISC's (IV) score of 91 and indicate a learning disability in the area of written expression. This is also documented by his actual writing samples, which, this Hearing Officer would agree, are "atrocious".

Furthermore, the KTEA-II, given on September 14, 2009, revealed math computation ability at the 4%, for a GE of 3.4, some three (3) years below his current academic grade level of 68. (SD Page 58). Similarly, his overall math score on the KTEA-II fell at only the 13%. (SD Page 62). This indicates a learning disability in the area of math as well.

While the Hearing Officer may defer to the School District staff, educational experts in their own regard, the Hearing Officer cannot ignore the educational test data provided by the School District Staff itself. The objective standardized test data provided by the

Assessment Team flies in the face of the Team's conclusion that [REDACTED] would not benefit from Learning Disability Services and that he does not have a learning disability. In determining whether an evaluation is proper, the hearing officer does not need to defer to the school district witnesses. Sch. Dist. Of the Wisc. Dells v. Z.S., 295 F.3d 671 (7TH Cir. 2002) (like Wisconsin ALJ's, Illinois Hearing Officers are presumed to be experts on special education law); Bd. of Ed. Of Murphysboro Comm. Unit Sch. Dist. 186 v. ISBE, 41 F.3d 1162, 1167 (7th Cir. 1994) (hearing officer characterized as expert witness in determining whether placement is proper). Also see 105 ILCS 5/14-8.02c;

Here, the OT evaluation, with all due respect, appeared to be rather perfunctory. Limited standardized tests were given. Only the VMI, a rather gross screening instrument was utilized (in addition to classroom observations and other subjective data referenced in the OT report). For a student who has been identified with fine motor delays as being one of his most challenging areas, more should have been done to diagnose the situation. Occupational therapy is one of the related services which a district must provide to students with disability if appropriate. 34 CFR 300.34(a).

While the School District's concern that [REDACTED] be educated in the least restrictive environment (LRE) is commendable, the fact is at least ten (10) students in [REDACTED]'s class are already receiving Learning Disability Services and are identified as Special Education Students. Thus, it does not appear that any change in [REDACTED] classroom placement would be necessary at this time.

The School District should have found [REDACTED] eligible for special education services at the time of the Eligibility Conference in November 2009, and has since failed to provide him with FAPE. [REDACTED] is eligible for Special Education and related services under the Eligibility category of "Learning Disabled".

ORDER

1. The School District shall convene an IEP meeting within 14 days hereof and provide [REDACTED] with an IEP, including annual goals and benchmarks/ objectives in the areas of both math and written expression, to enable him to derive an educational benefit.
2. The School District shall also provide [REDACTED] with an independent evaluation by an independent occupational therapist at the School District's expense, within twenty-eight (28) days hereof. The District shall tender a list of independent evaluators (IEE) to the Parent within 7 days hereof. The parent shall promptly select an IEE and tender his/her name to the District. If acceptable to the District, that person shall complete the IEE. Should that person not be acceptable to the District, the District shall tender another name within 7 days thereafter, and the two "named" IEE's shall select a third IEE, that third person being the one who will ultimately conduct the IEE.

3. ██████████s found eligible for an Extended School year for the 2010-11 school year as and for compensatory education for the failure of the school district to provide him with FAPE since November 2009. IF an ESY is not available for special education students at ██████████ the District shall be responsible to provide transportation for ██████████ to and from the School were same is provided.

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 party and to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777. 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. **THE EFFECTIVE DATE OF THIS DECISION IS THE DATE OF RECEIPT OF ANY CLARIFICATION OF THIS DECISION.**

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 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 was mailed to a party.

It is so Ordered.

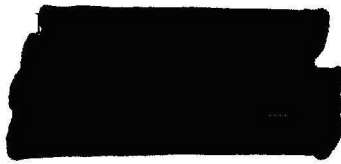
Dated this March 5, 2010



ALFRED A. SPITZZERI
Impartial Due Process Hearing Officer

CERTIFICATE AND AFFIDAVIT OF DELIVERY VIA FACSIMILE

The undersigned hereby certifies that a copy of this Order was sent by Certified Mail, postage prepaid, on March 5, 2010, from the U.S. Post Office in Naperville, IL, to:



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

A handwritten signature in black ink, appearing to read "Alfred A. Spitzer".

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