2009-0501

Case Number: 2009-0501
[redacted] vs. [redacted]
Hearing Officer: Harry A. Blackburn

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

Impartial Due Process Hearing Decision
Cover Page

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

District Name [redacted]

Phone: [redacted]

Superintendent [redacted]
Address
Represented by [redacted]

Parent Name [redacted]

Phone:

Address [redacted]
Represented by [redacted] **Attorney,** [redacted]
[redacted] nd [redacted]

Date and Timelines

Date of Written Request: 5/26/2009, an amended due process complaint was filed by the Parents on 7/10/2009
Date of Pre-hearing Conf: 09/18/2009

Dates of Hearing: October 15, 16, November 10, 2009, December 1, 2 8, 21 2009, September 27, 2010
Date of Decision: NOVEMBER 1, 2010

Summary of Decision

The School District failed to provide a Free Appropriate Public Education ("FAPE") and develop, in a timely fashion, an Independent Education Program ("IEP") to address the Student's failing academic needs. The District is Ordered to: 1) provide and pay for a Private Therapeutic Day Placement, and related services in sufficient intensity including: social work services and/or psychological counseling at least 60 minutes per week; support for assistive technology software and equipment (including a lap top computer) for at least 30 minutes per week; direct speech language services at least 60 minutes per week; direct occupational therapy services at least 60 minutes per week, and consultative services for 30 minutes per month. 2) provide compensatory education services for loss of FAPE from July 2007 to the present, including: additional social work and or/psychological counseling services of 30 minutes per week for two years; tutoring by a certified special education teacher selected by the parents, at a site selected by the parents, for two hours per week for two years; such additional services as may be recommended by any ordered IEE's (including AT, OT evaluation and a FBA, all paid for by the District); two hours per week of additional services after school hours, with provider and location to be selected by the parent, for a period of two years (areas of services may include speech , OT, tutoring, or counseling, at parent option). 3) convene an IEP meeting that will consider results of evaluations and implement the foregoing relief. 4) pay for independent educational evaluations to include but not limited to: assistive technology; speech/language; occupational therapy to assess organization and attention deficits; sensory processing disorder assessment neuropsychological functioning. 5) provide transportation services to and from the private therapeutic day placement, [redacted], and reimburse the parents for school related transportation expenses incurred for the summer 2010 ESY program.

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

[redacted]
Student,

v.

[redacted]
Local School District.

CASE NO. 2009-0501

HARRY A. BLACKBURN
Impartial Hearing Officer

DECISION AND ORDER

Jurisdiction and Procedural Matters

This matter is before the undersigned Hearing Officer for a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA 2004"). 20 U.S.C. 1415(f)(1)(A), 1415 (f)(3)(A)–(D), 34 CFR 300.511(c), Section 14-8.02(b) of the Illinois School Code [105 ILCS 5/14-8.02c (b)], and 23 Illinois Administrative Code 226.630(a).

The parent, through her attorney(s), filed an amended due process complaint on July 10, 2010. The undersigned was appointed as Hearing Officer by the Illinois State Board of Education ("ISBE") on June 19, 2010. The School District ("District" filed its response to the amended due process complaint. The Hearing Officer subsequently contacted the parties and arranged for the convening of a status teleconference call for the purpose of discussing resolution or mediation efforts and establishing prehearing conference and hearing date(s). The parties and Hearing Officer participated in a telephone Pre-Hearing Conference held on September 18, 2010. The Hearing took place over an eight (8) day span of time, October 15, 16, November 10, 2009, December 1, 2 8, 21 2009, and September 27, 2010. The reason for the apparent gap of time from December 2009 to September 2010 was predicated on a Motion filed by the Parents to have an Independent Evaluation conducted. The Hearing Officer Granted the Motion. Once the independent evaluator was chosen and time arranged for the evaluator to complete his evaluation including an onsite school observation and completion of his written report, the Hearing Officer ordered an IEP to convene within the first two weeks of the beginning of the 2010 – 2011 school year. Shortly thereafter and upon receiving confirmation from the parties that an IEP was convened, a final Hearing date was set where testimony from the independent evaluator and Parent (step-mother) was heard. The Hearing was officially closed until October 20, 2010 after the parties to submit their respective briefs and supporting case law to the Hearing Officer.

Issues Presented and Remedies Sought

MATTERS IN DISPUTE

A. The Parent alleges that the District did not provide a Free and Appropriate Public Education ("FAPE") from June 2005 to the time of filing the Pre-Hearing Conference Report. The following facts are presented in support of the Parents allegations:

1) Failure to conduct adequate assessments of all areas of potential disabilities, with the result that the student's educational program did not address or addressed inadequately the student's learning impediments and emotional/behavioral difficulties.

2) The District withheld information regarding evaluation reports and recommendations completed in June 2005.

3) The District did not provide Parents with notice of their procedural safeguards in 2005.

4) Arbitrary and wrongful denial of eligibility for special education services, despite substantial evidence that emotional/behavioral, attention deficit, and other impairments limited the student's educational, functional and developmental progress.

5) Failure to conduct a timely full individual evaluation and make an eligibility determination on a timely basis despite repeated requests by Parents and private providers.

6) Failure to provide an appropriate educational placement for the student from June 2005 through the present.

7) Failure to convene an IEP meeting in a timely manner in response to a request made by the Parents of the student in January, 2009.

8) Failure to provide essential related services in the areas of assistive technology, psychological, speech/language, psychological and social work services; and transportation.

9) Failure to develop and effective functional behavior analysis and behavior intervention plan for the student.

10) Failure to identify and utilize effective teaching methodologies at a sufficiently intensive level that would enable the student to make progress commensurate with cognitive skills.

B. The Parent contends that the student's IEP:

1) Contains statements of present levels of performance that do not accurately and objectively state the student's skills and functional levels;

2) Provides goal statements that are vague and not measurable, and where the goals set an increase in skill level, the goal is not commensurate with the student's potential for development.

3) Fails to address adequately academic, functional, developmental, communication and emotional limitations of the student;

4) Provides for an inadequate level of related services, specifically:
   i. social work services were not offered with sufficient intensity based on evidence of frustration and anxious behaviors;
   ii. fails to provide support for use of assistive technology resources, and lack provision of adequate levels of assistive technology equipment and software;
   iii. failed to offer occupational therapy services that addressed sensory processing difficulties which interfere with the student's ability to participate effectively in class;

5) Failed to extend school year services despite substantial evidence that the student was not making adequate academic, functional and developmental progress.

6) Failed to offer appropriate compensatory educational services for delays and disruption in the provision of necessary services and supports for the student.

Relief sought by Parent

A. Private therapeutic day school at public expense.

B. The District to pay for independent education evaluations in the areas of identified need including neuropsychological functioning; sensory processing disorder assessment, speech-language, occupational therapy and assistive technology;

C. The District to reimburse the Parents for school related transportation expenses incurred since May 18, 2007;

D. Provide the student with a laptop computer for use in school and at home;

E. The District offer related services in sufficient intensity to allow student access to educational opportunity, including:

1) Social work and/or psychological counseling at least 60 minutes per week.

2) Direct occupational therapy service for at least 60 minutes per week and consultative services for 30 minutes per month;

3) Support for assistive technology software and equipment for at least 30 minutes per week.

F. The District to provide compensatory education services for loss of FAPE from June 2005 to the present, including:
1) additional social work and/or psychological counseling services for at least 30 minutes per week for two years.
2) tutoring by a certified special education teacher selected by the Parents, at a site selected by the Parents, for two hours per week for two years;
3) additional services identified and recommended by any ordered independent educational evaluations.
4) Two hours per week of additional services after school hours, with provider and location to be selected by the Parents, for a period of four ears (areas of services may include speech, OT, tutoring, or counseling, at Parent option).

G. Direct the District to convene an IEP meeting that will consider results of evaluations and implement the relief requested.

H. Other relief that will be determined after the receipt of additional school records.

The District's Response to Parents' identified issues and relief:

The District acknowledges the Parents' filing of a due process request contesting the various aspects of the student's individualized educational program however it also notes that the student has had Section 504 Plans in place during his education, which are covered under the Americans with Disabilities Act (ADA) rather than IDEA. The District denies that records were withheld from the Parents stating that there is no obligation by law or policy to spontaneously send or provide parents with copies of student records, including evaluations, on any ongoing basis without a written request. The District

acknowledges that the parents have the right to request records from the District/school at any time and pursuant to IDEA. The District alleges that no request was made when the Parents enrolled the student in a new school for the 2005-2006 school year, and the District promptly complied with the records request submitted pursuant to the Due Process matter immediately upon its obtaining or locating the student's records. The District also alleges it is unreasonable or inappropriate to accuse the District of withholding student records from the Parents, who did not keep the District's school(s) apprised of new address (es) and phone number(s) in the midst of the student's evaluations during the Summer Assessment. The District asserts that the Parents clearly had reason to know that the 2005 evaluations existed yet they made no requests for records when they enrolled their son in a new school that following school year. The District objects to Parents' references made of any violations that allegedly occurred in the time period prior to May 29, 2007 as being outside the two year limitation period for purposes of IDEA. The District concludes that at all times the student was provided with an adequate educational program, related services, accommodations and modifications and supplementary aids and services reasonable calculated to allow him to make meaningful educational gains.

FINDINGS OF FACT

The Student is currently 10 years old and is a fifth grade student at [redacted]. He will turn 11 on October 30, 2010. The Parents' Amended Due Process Complaint was filed on July 10, 2009, when The Student was nine years old and entering the fourth grade.

The Student was born with a severe heart condition which required a series of complicated surgeries. The Student has a history of lead poisoning and suffers from chronic pica, right front lobe encephalomalacia (a frontal lobe injury associated with a stroke), and impulse control and chronic behavior problems. See e.g., (PD 213; 217;221-228; 231-234; 238-241; 261;263;270). Hearing Transcript (hereinafter "TR") 1373-1376. The Student has a history of anxiety, Post Traumatic Stress Disorder and Reactive Attachment Disorder. (PD 101-107).

An independent neuropsychological evaluation performed by [redacted] as diagnosed the Student with Attention Deficit/Hyperactivity Disorder and a Learning Disability in Math and Written Expression. (TR 1466-69; PD 372-373).

The Student has struggled in the school setting since kindergarten. In 2005, a social assessment performed by [redacted] which was not transmitted to the Student's parents or [redacted] staff working with the Student until 2009, noted that "if the student is able to cope at all in a social setting it is in the company of children who are much younger than he is or pre-teens or even adults on a good day." (PD-97). The 2005 social assessment recommended "school social work services to help the Student develop more age appropriate social and interpersonal problem solving skills as well as assist him in managing his anger." *Id.* The 2005 psychological report concluded that "the Student has a very significant psychosocial history and medical history. These factors appear to have affected his social, emotional and cognitive development....He exhibits some very significant emotional and behavioral concerns." (PD 100).

Shortly before the end of the 2004-05 school year, and before the Student was to attend kindergarten, the Parents approached their neighborhood school, [redacted] ([redacted]), to pursue a Child Find evaluation. (Freeman, TR 428, 462-67; Scott, TR 704-06; Allen-Brooks, 1568-71). The [redacted] case manager, [redacted] testified that the Parents provided consent for an evaluation on June 1, 2005 after the IEP team determined that all eight assessment areas were relevant. (SD 6-7) ([redacted], TR 428-31; [redacted] 705-09; [redacted] 1569-70). The Parent's signature is below the "Step 2 CONSENT TO COLLECT ADDITIONAL EVALUATION INFORMATION" and under the statement, "I understand my rights as explained to me and contained in the enclosed *Explanation of Procedural Safeguards.* In addition, I understand the scope of the evaluation as described on page B of this form." (SD 6) the Student's case was then assigned to the Summer

Assessment site, [redacted] ([redacted] for the actual evaluation. ([redacted] TR 440, 474; [redacted] TR 709; [redacted], 1569). The District highlights that it should be noted that the District form also provides a thorough explanation of the evaluation procedure and that a "conference" occurs "[u]pon completion" of the specified assessments "to discuss the findings and determine eligibility for special education and related services." (SD 6, 32) (emphasis added).

The primary witness regarding this time period was [redacted] who has worked for the District for over 33 years in the field of special education. ([redacted] 459-61). In 2005, [redacted] served as the site manager for the District's Summer Assessment Program, which provided assessments primarily for early childhood intervention cases. (TR 419-24). [redacted] testified she received the Consent for Evaluation and other relevant documents from [redacted] regarding the Student. ([redacted], TR 427-31).

The District notes that the Consent for Evaluation form that the Parent signed on June 1, 2005 (SD 6) "meticulously" explains the evaluation process, which [redacted] read into evidence. ([redacted] TR 469). The District avers that thanks to [redacted] careful documentation of Parent contacts ([redacted] and notations on the Summer Assessment Cover Sheet (SD 18), the events of Summer Assessment regarding the Student are able to be recreated. First, assessments were scheduled for June 28, 2005 and the Parents were provided with this information via Conference Notification (SD 9) and a "confirmation via phone" (SD 9 and SD 17 – first entry, 6/24/05) ([redacted], TR 477). On June 28, 2005, after procedural safeguards were again reviewed, three of the eight relevant assessments were conducted for the Student: the health history (nursing), psychological, and social work assessments. (SD 10-16; 18) ([redacted] TR 478-83, 487-88). According to the Parent, [redacted] the Student was at [redacted] for testing for approximately four hours and the Parent was present the entire time. ([redacted], TR 1571-72).

Given the fact that the remaining assessments needed to be completed before the Summer Assessment IEP team could sit down to discuss them and determine eligibility, another date had to be scheduled for the Student's assessments. [redacted] TR 445, 449-51. 483; [redacted] TR 1574). Based on [redacted] entries and recollection, she discussed a follow-up date with [redacted] who called [redacted] back later that day to confirm the next date and time for the remaining assessments and eligibility determination. (SD 17-18) ([redacted] 450-52, 483; [redacted] TR 1663).

On July 10, 2005, [redacted] called the Parents at the primary contact number and left a voicemail to re-confirm the July 18, 2005 appointment for remaining assessments and eligibility. (SD 17, 18) [redacted] TR 484). Further, on July 11, 2005, [redacted] sent a Conference Notification, also confirming the July 18, 2005 appointment, along with a copy of the Parents' procedural safeguards. (SD 17, 19). [redacted] then proceeded with her attempts to contact the Parent via telephone at least three more times, but she only reached a recorded message that stated that the Parents' phone number was "not accepting messages." (SD 17) ([redacted] TR 446, 484-88).

The Parents did not arrive at [redacted] on July 18, 2005 for the Student's remaining assessments, thus the evaluation process could not be completed. (SD 18 – "no show" next to 7/18/05) ([redacted] TR 489-91). As such, [redacted] sent her final document to the Parents, indicating that if the they "wished to resume the [evaluation] process return to the attendance area school to request another Full Individualized Evaluaion ("FIE"). (SD 17, 20) ([redacted], TR 490-91). What [redacted] did not know was that the Student's family "had to move right away" from their address on [redacted] (SD 21) ([redacted] TR 1575). Despite having [redacted] phone number at [redacted] and having previously called her, [redacted] admitted that did not directly contact [redacted] regarding the change of address, nor did she contact anyone at Summer Assessment to provide them with a new phone number. [redacted], TR 1662-63). In sum, the District avers that there was no reasonable way for the District to know that the Student and his family had suddenly moved and were not going to return to [redacted] to complete the remaining assessments and eligibility conference.

[redacted] testified that to move forward with a determination of eligibility without being able to complete the remaining assessments and without the Parents on July 18, 2005 would not have been appropriate. ([redacted], TR 500-501). [redacted] stated that the team must consider "the complete picture," and all of the remaining relevant assessments could not be completed if the Student was not present. ([redacted] TR 501). If the evaluation is not complete for a student, then there was "no way" the team could have "provide[d] that child with the best appropriate setting in the least restrictive environment." *Id.* Of additional importance, from the District's perspective, is the fact that the Student's case was an "initial case" and the team needed all assessments deemed relevant before sitting down as an IEP team to review the results with the Parent. (Freeman, TR 448-59, 490-91). Lastly, [redacted] pointed out that "the parent is a very integral part of [the] IEP process," and "it has to be a team decision on what is the best educational placement for that child," thus it would certainly not have been appropriate to go forward with a determination of eligibility without the Student's Parents. ([redacted], TR 491).

Evidence also shows that the Parents did not inform the Student's next school, [redacted] ([redacted]) of the assessments that were conducted just a few months prior, over the summer, even though mom knew clearly knew they had occurred as she was with the Student the whole time or sitting at the side of the room for 4 hours at [redacted] TR 787; [redacted], TR 1571-72). [redacted] was also, in fact, interviewed for relevant information by both the Summer Assessment school psychologist and school social worker on July 28, 2005. (SD 10-12, 13-16) [redacted], TR 786-87; [redacted] TR 1572-73).

After moving, the Student's Parents enrolled him for kindergarten at their new attendance area school, [redacted] for the 2005-06 school year. (SD 24-26) ([redacted], TR 1579). From the evidence, it is unclear when the [redacted] staff first received information regarding the Student's past medical conditions. Meanwhile, the [redacted] and [redacted] staff members had no information regarding the Student's whereabouts or new neighborhood school, thus they did not know where to send the Student's records at the beginning of the 2005-06 school year.

In kindergarten, the Student would sometimes get angry and shut down and refuse to do anything. (TR802-03). During the approximately three weeks that the Student spent at [redacted] during the first grade, before transferring to [redacted] both the Student's teacher and is mother testified that he threatened to bring a gun to school and shoot another first grader. (TR820; TR 1599-1600). During the Student's second grade year, his teacher, [redacted] called his father one to three times a day to discuss the Student's anger and challenges getting along with his peers, including fights. (TR1275). His teacher testified she "had the Student's father on speed dial." (TR 1275).

According to [redacted] case manager, [redacted] the Parents provided no verbal or written information regarding any records for the Student, who had not yet attended a [redacted] school. [redacted] TR 786-87). Further, the evidence shows that the Parent submitted no written request for student records until her attorney did so on her behalf in 2009. [redacted], TR 787). The Parents clearly had reason to know that information existed regarding the evaluations that commence that prior summer, yet they made no requests for records when they enrolled the Student at [redacted] a few months later.

According to [redacted] and [redacted] school nurse, [redacted] the Parent informed the [redacted] staff with information regarding the Student's medical condition(s) in March 2006 [redacted] TR 764-65, 788-90; [redacted] TR 614). However, [redacted] provided conflicting testimony, first stating that she did not speak with [redacted] school nurse until toward the end of the 2005-06 school year., then stating that the nurse approached her mid-school year. ([redacted], TR 1590-91).

In March 2006, [redacted] testified that when provided with new medical information she initiated a Medical Referral in order to obtain more information from the Student's physician(s) via the

Parents. (SD 308-10) (TR 613-14). also included the information that was provided to her that warranted the referral, including congenital heart disease and prior elevated lead levels of 60+ and 34, most recently. (SD 308) (Hogan, TR 615). Additionally, requested that the physician "inform the school of any restrictions and/or accommodations needed at school" via the corresponding Physician's Report and Medical Report. (SD 308-11) (TR 616-18). testified that she wrote the Student's name, age, school and the date on the Referral and gave it to the Parent to pass on to the doctor. (TR 614-17). The dates indicated on the forms, in handwriting, are March 30 and March 31, 2006, and her signature appears on the Medical Referral. (SD 308-09) , TR 617).

The form was allegedly filled out by one of the Student's physicians, however, dated the form on June 6, 2006 –over two months after it was submitted, or supposed to be submitted, to him/her by the Parents. (SD 310-11) (TR 789-90; , TR 617-18).

Shortly thereafter, on June 15, 2006, Pirie convened a 504 Conference based on the newly acquired information from the physician, and the Parent was present. (SD 27, 29) (TR 790; , TR 619). transferred the information from the Physician's Report to the 504 Plan and accommodations were incorporated to monitor the Student's safety and functioning. (SD 30-31 or PD 8-9) (TR 619). On that same day and also pursuant to the newly obtained information from the physician, filled out a School Nurse Eligibility Worksheet, reflecting that the Student was taking physician prescribed medication. (SD 28) (TR 624). also indicated that the Student took his medications at home, not at school. (SD 31).

testified that the Parent brought additional documents and shared additional information with the team on June 15, 2006. (, TR 622). The Parent also informed Ms. that the Student had an appointment at La Rabida over the summer and would be evaluated for ADHD. (TR 622). Given the pending appointment and forthcoming additional medical information via filled out the Health portion of an Assessment Planning, or "domain," form and obtained the Parent's consent for a school nursing evaluation in anticipation of the evaluation that would be submitted via . (SD 32-33) (TR 622). The Parent was also provided with another copy of her procedural safeguards on June 15, 2006. (SD 34).

According to the documents submitted into evidence, the assessment was indeed conducted, but not over the summer. According to the relevant document, the assessment occurred on September 25, October 2, and October 9, 2006; and the date of the report is October 11, 2006. (SD 40) (TR 6232-24; s, TR1665-66). The date of the report is shortly after the Student's Parents removed him from . (SD 42 – Parent Interview regarding School/Academic History; SD 58 date Parent enrolled the Student at a new school) , TR 1668-71), consequently, the Pirie staff was not provided with this assessment at the beginning of the 2006-07 school year.

The District called the Student's kindergarten and first grade teachers to testify, Ms. and Ms. respectively. Ms. testified that she remembered the Student because he had "dreads," but was otherwise a "regular kid," a "bright kid and active," and "a normal five-year-old" (, TR 802). Further the Student was interactive with his classmates, and would shut down if he was angry, which was "normal for a five-year-old," especially to a teacher of 23 years such as (TR 800-01, 803). stated that the Parent eventually spoke of the Student's heart condition, but testified that she did not know the significance of the information in the particular context of which it was given. (TR 804). stated that she never observed any manifestations of the Student's medical conditions in her classroom. (TR 804). She also contributed to the Student's June 15, 2006 504 Plan, noting that the Student was "well developed," that he "gets along with his peers," and has good attendance, although his appearance "needs improvement."

(SD 30) (TR 806). [redacted]s concluded that the Student acted out at times or would not do his homework, but, again, "like any kid." (TR 814).

[redacted] also testified that "[t]here were not many things that stood out with the Student," although she only taught him for "two and a half to three weeks" then the Student transferred out after an incident with another student. ([redacted] TR 819-21). [redacted]l also noted that the Student was "very good" at writing "complete sentences" and was able to write a complete sentence at the beginning of first grade. (TR 824).

According to the documents in evidence, the Student was next enrolled at [redacted]n or around October 2, 2006 to complete the 2006-07 school year. (SD 51-58) (*see also,* [redacted], TR 1671). [redacted] is a public charter school that utilizes online teaching instruction and features an individualized approach and unique blend of online learning, as well as approximately one day a week of classroom instruction. (SD 61-66) ([redacted] TR 71-72). Additionally, a parent serves as a "learning coach" for their child, working closely with the teacher. (SD 64) (TR 71).

The [redacted] school psychologist, [redacted], testified that a referral was initiated for the Student at [redacted] thus another evaluation was commenced in November 2006. (TR 68). [redacted] conducted psychological assessment on or near November 28, 2006. (SD 87). The psychological was treated as an initial, and thus more comprehensive, assessment since [redacted] has no prior District assessments at hand. (SD 87) (TR 44-45). The other assessments: social, nursing, and speech-language, were also treated as "initial" evaluations. (SD 72, 77, 79, and 83).

According to the findings of the clinicians at [redacted] the Student was found to present with "age appropriate social skills," speech that was "intelligible," speech skills in the "average range," "no observable inappropriate behaviors." the Student was also "performing to his current potential," and "appeared to be well adjusted and bonded with his stepmother and father." (SD 76, 89).48)

[redacted] also noted a conclusion by [redacted] at [redacted], when the Student was 5 and a half years old, which indicated that the Student "did not really fulfill the criteria for ADHD." (SD 294). Additionally, the more recent October 2006 [redacted] assessment indicated no fulfilled criteria for ADHD. (SD 40-46, 47-48).

The [redacted] team convened an eligibility conference on November 28, 2006 to review and discuss the assessment results, and the Parent was present. (SD 91-95) (TR 80). Given the results of the assessments and the Student's then current level of functioning, the IEP team concluded that the Student did not fulfill the criteria for a child with a disability under the IDEA, however, the Student was provided with a 504 Plan in order to provide him with a safety plan, as well as academic accommodations and modifications. (SD 36-37 or PD 15-17, SD 99) (TR 39 – noting incorrect dates on SD 36-37; PD 15-17; SD 81). The [redacted] EP team also created a behavior intervention plan in order to monitor the Student's PICA, although evidence does not show that PICA was ever observed a[redacted] (SD 96-97) Finally, the Parent was again provided with a copy of her procedural safeguards, as indicated by her signature on November 28, 2006. (SD 103)

The Student's [redacted] 2006-07 report card indicates that, at mid-year, the Student exceeded expectations in math, language arts/skills, phonics/literature, and history. (SD 106). The Student was also progressing adequately in science and art. *Id.* the Student's [redacted] eacher noted that the Student was "a lot of fun to have at the [redacted]" and "enjoys engaging the other children in conversation and is intuitive in [the] lessons." (SD 107).

Principal [redacted] testified that there was a concern about the Student's lack of focus and his not wanting to participate in class during second grade; that he would get angry and upset and would

shut down. (TR 645-46). She stated that when he was having problems in class, the Student's dad would come to the school to support him. *Id.* She testified that as an intervention, she continues to talk to the Student if she saw him in the hallway and they would call his father to come up to the school. ([redacted] 647). [redacted] additionally testified that the Student's behavior was disruptive to the other students in the classroom, and it interfered with his own progress and academic performance. ([redacted] 647-48). The school did not develop a behavior intervention plan. ([redacted] 660). [redacted] testified that the school implemented an "informal school based problem solving" program for the Student. ([redacted] 660-61).

[redacted] the school nurse at [redacted], reported that during the third grade the Student was sent to the principal's office "several times a week due to disruptive behavior." ([redacted] 376; [redacted]-206). [redacted], who was the school disciplinarian at [redacted] testified that the Student was sent to see him "a lot of times" upon becoming enraged, "because the student had a short temper." ([redacted] 833). [redacted] testified that the Student was sent to see him approximately three times a week early in the third grade. ([redacted] 835). The Student was sent to [redacted] office when he was enraged, so that he wouldn't hurt himself or others. ([redacted] 837). [redacted] did not find the Student's responses to being teased to be reasonable. ([redacted] 838). When the Student was in the second grade, during the 2007-2008 school year, [redacted] would handle behavior notices regarding the Student's rage up to twice a week. ([redacted] 845).

The Student's third grade (2008-2009 academic year) teacher, [redacted] testified that the Student was often upset in her classroom, and that oftentimes when he got angry, approximately 2-3 times a week, he wouldn't do any work and would often hit other children. ([redacted] 1182; 1198; 1208-09). The Student's behavior "might have caused him to do not necessarily his best." ([redacted] 1214). Additionally, within the classroom, the Student frequently had a short attention span, was easily distracted, did not complete tests in reading and math, was disruptive of other children's activities, acted impulsively and said things that didn't make sense. ([redacted] 1201-10; PD 136-37). The Student's third grade report card indicates that he did not meet several standards in the areas of "Work Habits and Personal Development." ([redacted]-186).

[redacted], the paraprofessional assigned to the Student's third grade classroom, reported that "the Student's temper can get out of control, when/if someone hits him he wants to hurt them badly." She also reported that the Student "tends to play in his desk" and "puts a lot of different things in his mouth." (PD-300). The Student was "very physical" in the third grade and displayed behavioral issues in the classroom "on a daily basis," causing [redacted] to be concerned that "the Student would hurt or injure himself or someone else." (TR 872-73). She testified that he threw things and hit people. (TR 873). [redacted] testified that the Student's behavior "drastically" impacted his academics with respect to "the amount of time the Student would be out of the classroom missing information. The amount of time that he would sit there angry about something and not focus on what we're doing and not be able to transition to the next subject or to the next task because he was stuck in his anger or he was made at a particular situation that could have happened hours ago." (TR 875).

The Student's step-mother testified that the Student's behavior problems continued in the 2009-2010 school year, when he was in 4th grade, and into summer school 2010. (TR 1643; TR 1648; PD 426; PD 433). According to the Student's step-mother, the Student's 4th grade teacher was concerned that the Student didn't complete homework assignments, didn't respect authority figures, didn't pay attention and wasn't meeting standards in core academic areas. (TR 1643). [redacted] expressed concern about the Student's emotional development notwithstanding the "benign" teacher reports about his behavior (TR 1470-71). [redacted] relied on other various other assessments over time that had identified mood issues, attachment disorder, anxiety, depression and post-traumatic stress disorder. *Id.* He described a drawing by the Student depicting a dead figure as "very disturbing." (TR 1471; PD 425). Upon reviewing a behavior incident report involving the Student in the washroom at school, [redacted] stated that such

document provided a "broader perspective on the Student's behavioral presentation in school" as compared with his teachers' reports. (TR 1509; PD 427-28).

The Student struggled academically since at least the first grade a 2006 District psychological assessment revealed that the Student was performing below grade level in reading, math in writing. (PD-115) [redacted] testified that in her third grade classroom, the Student had difficulty with written composition, math and counting money, reading fluency and decoding skills, "higher order thinking skills," keeping up with class, and that he had been reading below grade level. (PD 186; TR1186-87; 1207-08; 1194). Despite the fact that the Student did not have an IEP, he received a modified grading scale as much as "10 to 20 percent below what the other children were doing," according to [redacted], the paraprofessional assigned to the Student's classroom. (TR 867-68). Additionally, the Student's workload was modified such that "he wasn't expected to complete as much as everyone else." (TR 869). Despite these informal accommodations and supports, the Student's promotion to the fourth grade was made conditional upon summer school, as he had not met standards in math or reading performance, although it was determined at an IEP meeting held subsequent to the Parents' filing of their initial due process complaint that the Student would be promoted without attending summer school. (TR 1214-17; PD-186).

According to [redacted] case manager and the Student's special education teacher, as of October, 2009, the beginning of the Student's fourth grade year, the Student was functioning at a second grade level in math and at a second grade level in reading comprehension. (TR 302; TR 296). As of the Student's 2009-2010 second trimester report card, he was not meeting standards in six of eight academic areas. (PD-433; see also, TR1649). In reviewing this document, and in light of his impressions of the Student having "some solid assets and some real strengths," [redacted] expressed concern in his testimony that the Student is underperforming. (TR 1501). [redacted] testified that the Student's Learning Disabilities in Mathematics and written expression are exacerbated by the Student's attention and organization difficulties. (TR 1469). In his opinion, the Student's struggles with attention and organization impact everything else very broadly, and observed that in February 2010, the Student was not meeting standards in 6 of 8 academic areas. *Id*; (PD 433). At the end of the 2009-2010 school year, the Student's fourth grade year, the Student had failed to meet standards in Mathematics and Reading and had to attend summer school. (TR1651). Again in summer school 2010, the Student failed to meet the standard in Mathematics. (TR 1652). The Student's step-mother testified that during the summer school term of 2010, she would get phone calls every week from the Student who had been sent to the office and would have to tell his parents how he was misbehaving. (TR 1651). The Student's step-mother testified that she did not receive progress reports from his special education teacher, his occupational therapist or his social worker during 2009-2010 when the Student was in 4th grade.

Before the end of the 2006-07 school year, on or near March 22, 2007, [redacted] submitted an application to the [redacted] (SD 108-11) Under the reasons for transferring the Student to a new school, the Parent wrote the following: "the Student's current school is devoid of Afro centric values. We want him to experience the 'community' as his sister, [redacted] has experience it this past school year." (SD 110) ([redacted] TR 699). Additionally, the mother indicated that the Student's current school had not expressed concerns about the Student's academic, physical, social and/or emotional development (SD 110, Item 4) (TR 699).

The Student was accepted into the [redacted] of [redacted] for the following school year, 2007-08, his second grade year. Ms. Thelma Falconer ([redacted] or '[redacted]') was the Student's teacher for that school year and testified that she was definitely aware of the Student's medical conditions and precautions, including his heart condition and [redacted] and had received a copy of the Student's 504 Plan. ([redacted] TR 1269-70).

[redacted]r testified that the Student did not have any problems in doing what was asked of him,

and he did not need much verbal redirection regarding classroom tasks and directions. (TR 1310). Regarding second grade math and reading, the Student was reading at grade level and "could do all the work that was required." (TR 1311). Additionally, [redacted] testified that the Student "would often finish his work early – he was on task with his work," and was thus allowed privileges such as going to the library, read, or do his book report, all of which he enjoyed. (TR 1306-07). The Student was also assigned as the "bathroom captain" and "line captain" as additional privileges. *Id.* Finally, [redacted] noted that the Student was "always organized and prepared and was willing to share what he had even with the children that gave him a rough time;" he also "had a big heart," and [redacted] "really liked the Student." (TR 1305).

The Student's second grade report card indicated that he met standards in all academic areas. (SD 240). the Student did not meet standards in all seven areas of the "Virtues of Ma'at," which were described by [redacted] principal, [redacted] as follows: "It is an ancient system, a way of being characteristic that researchers discovered that was being used in ancient Egypt . . .a value system. There are actually forty-two virtues and they distilled them down to these seven key virtues." ([redacted], TR 691). [redacted] stated that these virtues were unique to the [redacted] and they utilize them because they are based "out of the African American culture," and "they thought it was appropriate to use something from [their] culture and history and also to use something ancient that was a proven system of behavior by a group of people." *Id.* The Virtues of Ma'at are not included in ISBE's State Learning Standards and are not required by the District.

[redacted] ([redacted] or [redacted]) was the Student's third grade teacher and also testified at hearing. [redacted] testified that the Student could "definitely hold a conversation," and that the content of the conversation was appropriate. ([redacted], TR 1232). The Student also had preferential seating, per his November 2008 504 Plan from [redacted], either directly in front of or to the side of [redacted] and was never in the back of the classroom. (SD 114-16) (TR 1232). As such, [redacted] could also monitor the Student's PICA. *Id.*

Regarding math, the Student had mastered addition and subtraction, but he struggled with regrouping and retaining higher math. (TR 1231, 1233). [redacted] worked on math with the Student but stated he had difficulty being able to do it on his own. *Id.*

Regarding reading, [redacted] described the new challenges for a student in third grade. She stated that at the end of second grade, students are expected to read fluently and have good comprehension skills because in third grade more is asked of them and they "build upon what they've already done" (TR 1236-37). [redacted] stated that the Student made reading gains in her class. (TR 1235). It should be noted that Sizemore's speech-language clinician, [redacted] observed the Student in his classroom while she determined whether a speech evaluation was warranted. ([redacted], TR 577-79). [redacted] requested the Student's teacher that the Student read aloud, which he did. (TR 579). [redacted] described the Student as "an excellent reader," while most of the other kids were stumbling over the words in the textbook while the Student was "a very articulate and intelligent young man." *Id.* Further the teacher described the Student to [redacted] as "a well-spoken child," and that "he communicated very well in her classroom." (TR 582).

Returning to [redacted], she also pointed out that the Student had "great imagination," "always had a very interesting story to tell," and "can be helpful and he tries his best to engage with others." [redacted] described positive changes with the Student, such as stating that the longer the Student was with her, the better they understood each other and she began to notice signs before the Student got frustrated, so she made sure she provided the Student with much verbal praise and tried to build his confidence, both of which he responded well to. (TR 1244-45).

Lastly, [redacted] participated in the IEP meeting held for the Student on June 11,

2009 and stated that the IEP was appropriate and that "[e]verything she saw and heard during the meeting led [her] to believe they would have the modifications and the services in place to aid him in working more independently and being successful in the next grade," which would be fourth grade (TR 1247). [redacted] noted this was important because third grade "is considered the end of their early childhood years," while the "fourth grade is considered intermediate," and requires "a lot more independent work" and responsibility. (TR 1247-48). Meanwhile, third grade provides a lot of "support, guided practice and instruction." (TR 1248). As such, the IEP team was right on point in deciding to provide the Student with and IEP for the upcoming school year (fourth grade), rather than a more generalized 504 Plan. This decision was also reasonable given the new medical information that was obtained in January 2009 and provided to [redacted] case manager, [redacted], in late January or early February.

[redacted] testified that [redacted] initiated a 504 conference in response to the information submitted to the school nurse and [redacted] staff via the Parents. On November 25, 2008, the [redacted] staff convened a meeting to review the Student's most up-to-date medical information and needed accommodations to his educational program. (SD 114) [redacted] testified that prior meetings had been scheduled, but the school nurse needed more information from the Parents before the team could proceed. (SD 112) ([redacted] TR 234-37). [redacted] stated that, on November 25, 2008, the team also discussed whether or not it would be appropriate to evaluate the Student and potentially provide him with a full IEP, but the Parent stated that she would like the team to "hold off" on the evaluations because she was going to take the Student to the doctor for more tests. (TR 246-47; 332). [redacted] told the Parent to notify her when the results were available and then they would begin an evaluation for a full FIE. (TR 247). [redacted] was asked whether the Student's Parents had asked for an evaluation during the time the Student had attended [redacted] and before November 25, 2008. (TR 248). [redacted] responded that she got the impression that [redacted] was more concerned about the Student's 504 Plan being in place. (TR 248).

In January 2009, the Student was out of school from January 26th to the 27th and would return to school on February 2, 2009. (SD 117) ([redacted] TR 333). After testing, [redacted] had the Parent sign a release of medical information form in order to obtain as much medical information from the Student's doctors that was available, including the results from the recent evaluation at the University of Chicago Medical Center. (SD 117, 119, 120-124). After obtaining a packet from both the Parent and the hospitals in late February (SD 245, 341), [redacted] held a domain meeting to initiate the evaluation process on March 4, 2009, and the Parent provided consent to evaluate and again received her procedural safeguards (SD 129-131) It should be noted that the Parent also requested an evaluation in writing, based on information obtained "since [the] meeting November 25, 2008. (PD 39). [redacted] then attempted to schedule a number of eligibility determination meetings, but met with resistance from either the Parents or the Parents' attorney. (SD 205-212; PD 187) (TR 338-49).

An IEP meeting was held on June 11, 2009, with all parties present, and an IEP was developed based on the results from the recent medical evaluations, school evaluations, and especially pursuant to much information provided by [redacted] and in anticipation of the Student entering fourth grade. (SD 215-238) The Student was provided with additional accommodations and modifications, as well as specialized instruction minutes in math (120 mpw) and language arts (90 mpw). (SD 233).

Pursuant to an Order by this Hearing Officer, an Independent Educational Evaluation ("IEE") was conducted by [redacted] on or near February 12, 2010. (PD 372) ([redacted] TR 1440). At this point in time, as based on aforementioned evidence, the Student had just undergone additional medical testing and was about midway through third grade.

Amid his findings, [redacted] noted school-based reports of the Student as "a very helpful child," "a fast learner," as well as "eager to participate and willing to learn," and "appears intelligent and

creative." (PD 377) Based on [redacted]'s personal observations during the testing process, he noted that the Student was "very responsive to structuring and redirection," and was "a well-socialized child who engaged with comfort and skillfulness, maintained appropriate eye contact, displayed a good sense of humor, and was responsively playful." (PD 377-78).

According to the District, most notable in the IEE were [redacted] recommendations. (PD 388-89). Virtually all of the recommendations appeared in past interventions for the Student, either in his 504 Plans, his IEP, or both. (E.g., compare Recommendation 2 with SD 116, 226; Recomm. 3 with SD 116, 226; Recomm. 4 with SD 37, 226; Recomm. 5 and 6 with 116, 226; Recomm. 7 with SD 226; and so on) The evidence patently demonstrates that the District had been implementing many of [redacted] recommendations prior to the evaluation, and certainly incorporated virtually all of his recommendations into the June 11, 2009 IEP even though they obviously did not have the February 2010 IEE at that point in time.

Burden of Proof

The parents have the burden of proof as they filed the due process complaint. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Under Illinois law, the school district must provide evidence that the special education needs of the child have been appropriately identified and that the special educational program and related services proposed to meet the needs of the child are adequate, appropriate and available. 105 ILCS 14-8.02a(g). The Illinois School Code clearly requires the district to present evidence at hearing that it has properly identified and evaluated the nature and severity of the student's suspected or identified disabilities including eligibility for special education and related services. 105 ILCS 5/14-8.02a(g-55). *Kerry M. v. Manhattan*, 106 LRP 58547 (N.D. Ill. 2006).

Discussion and Conclusions of Law

A. The Parents allege that the District did not provide a Free and Appropriate Public Education (FAPE) from June 2005 to the time of filing the Pre-Hearing Conference Report.

The Parents filed an Amended Due Process Complaint on July 10, 2009. Unless waived, the two year statute of limitations period dates back to July 10, 2007.

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Statute of Limitations

A due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint. 20 U.S.C. 1415(b)(6)(B); see also 34 C.F.R. 300.507(a)(2). However, the two year timeline is waived "if the parent was prevented from requesting the hearing due to… the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent" or if there have been specific misrepresentations by the local educational agency that it had resolved the problem that was the basis of the complaint. 20 U.S.C.S. 1415(f). Hearing officers must "make determinations, on a case by case basis, of factors affecting whether the parent 'knew or should have known' about the action that is the basis of the complaint. *J.L. v. Ambridge Area School District*, 2009 WL 1119608 (W.D.Pa. April 27, 2009). A negligent misrepresentation by the district can invoke the exception to the statute of limitations. *Id.* In *J.L. v. Ambridge Area School District*, the court found that an LEA had relied on information provided to it by third party service providers and reported the same to the parents, without conducting any independent review to determine

if the results were accurate. *J.L.* at *37.

Prior written notice is required regarding identification, evaluation, or educational placement of a child or the provision of FAPE to a child, or a refusal to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE to a child. 34 C.F.R. 300.503(a). Upon completion of the administration of assessments and other evaluation measures, a copy of the evaluation report must be given to the parent. 20 U.S.C.S. 1414(b).

In support of their argument that the two year statute of limitations period should be waived, the Parents state that they signed a District consent form for the Student to be evaluated in all eight domains in June, 2005. (PD-2). The Student's information was then transferred to a summer assessment site at another school. (TR709). At the summer assessment site, the Student was evaluated by a school social worker and a school psychologist, who then generated evaluation reports. (PD-94; PD-98). The record of the summer assessment evaluations, including the reports, was sent in the fall to a school that the Student was not attending and as a result, none of the Student's teachers, case managers, nor any of the teams who evaluated him after the summer of 2005 were aware that the Student had been evaluated in 2005 nor what the results of the evaluation had been. (TR714-716; TR45). Additionally, the Student's parents were not aware that a school psychologist and social worker had completed assessments of the Student and those reports were not made available to the parents. (TR1574). When the Student was enrolled in Kindergarten in [redacted] by his parents in Fall, 2005, [redacted] informed the school that the Student had been evaluated that summer. (TR1580). No one contacted the case manager at [redacted] however, to retrieve the evaluation records. (TR715-716). The case manager from [redacted] testified that upon receipt of the records from summer assessment at Earhardt, she placed the Student's file in the case manager's file cabinet at [redacted] and didn't recall ever being asked for those records. (TR 712-716).

The Parents aver that the two-year statute of limitations should be waived because the District withheld essential information that prevented the parents from complaining and/or initiating an appeal. The 2005 evaluation was incomplete, but provided sufficient information to indicate the need for additional testing and even eligibility under IDEA. (PD 94-100). The Parents aver that the District's failure to provide those results tainted everything that follows for the next four years: The November, 2006 case study evaluation was flawed because the evaluators did not have the 2005 evaluation, and the parents and all subsequent school staff working with the Student lacked information about the 2005 evaluation to complain about failure to make the Student eligible in 2005, 2006, 2007 and 2008. Furthermore, the Parents state that the two-year statute of limitations should also be waived because the Parents did not receive notice of their procedural safeguards at any point during the evaluation process in 2005. (TR1594). The Parents did not receive their procedural rights until the November, 2006 evaluation. *Id.* As a result the Parents did not even fully understand what an IEP was, let alone that the Student may be eligible for one. (TR1593).

Alternatively, the Parents claim that even if the statute of limitations is not waived, introduction evidence regarding the Student's educational development and progress prior to two years before the parents' due process complaint should not be prohibited. *Letter to Zimberlin* (OSEP, October 19, 2000). All relevant evidence, including evaluations and evidence dating back prior to the filing of the complaint, should be considered to the extent that it is probative. *Id.*

The facts as identified above on pages 7 through 11, enumerate the District's position against waiving the two year statutory period. The District's cites additionally, with respect to documents related to the determination of eligibility, the Commentary to the Federal Regulations which states that "it would not be appropriate for a public agency to provide documentation of the determination of eligibility **prior to discussing a child's eligibility for special education and related services with the parent.**" (F.R., Vol.71, No. 156, at 46645). (emphasis added). The Commentary continues with the opinion that "providing documentation of the eligibility determination to a parent prior to a discussion with the parent

regarding the child's eligibility would indicate that the public agency made its determination without including the parent and possibly, qualified professionals, in the decision." *Id.* The District asserts that any claims or allegations that fall within the time period prior to July 10, 2007 must be stricken as a matter of law. 20 U.S.C. §1415(c)(2)(E)(ii) and 34 CFR §300.507(a). For example, any claims dated in 2005 and up to July 10, 2007 are clearly well beyond the statute of limitations per the IDEA. *Id.* The law is clear on this matter as it requires that a "due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or *should have known* about the alleged action that forms the basis of the complaint." 34 CRF §300.507(a) (2) (emphasis added); *see also* 20 U.S.C. 1415; 34 CFR 300.511(e); 23 Ill. Admin. Code §226.615.

In view of the facts, related law and case law and testimony presented at the Hearing, it is the determination of the Hearing Officer that the two year statute of limitation period should not be waived but that all relevant evidence, including evaluations and evidence dating back prior to the filing of the complaint be included and considered for its "probative" value. Therefore, the relevant time frame for purposes of the Parents' Complaint will begin on July 10, 2007.

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

The student is not entitled to the "best" education. *Rowley,* 458 U.S. at 198, 200-01. Nor may parents specify what methodology must be used with their children. *Lachman v. ISBE*, 852 F.2d 290, 296 (7th Cir. 1988). However, the student is fundamentally guaranteed a FAPE.

The following are the Parents issues relating to the District's failure to provide a FAPE as presented in the Amended Due Process Complaint and the Hearing Officer Conclusions based on applicable law:

1. **The District's failure to conduct adequate assessments of all areas of potential disabilities, with the result that the student's educational program did not address or addressed inadequately the student's learning impediments and emotional/behavioral difficulties.**

An evaluation of the student is the mandatory first step in the provision of special education and related services to a student with a disability. School districts are required to abide with procedures to ensure the evaluation is legally compliant with the requirements of the IDEA. (See 34 CFR 300.301(a); 300.305; 300.306). It is the responsibility of the "state educational agency, other State agency, or local educational agency" to conduct a "full and individual" evaluation of the student. 20 USC 1414(a)(1)(A). By definition a free and appropriate education means at no cost to the parents. (See 34 CFR 300.17; see also Rowley, 458 U.S. at 188). It is accordingly neither the parents' responsibility to obtain nor the fund any evaluations delineated in the required domains. Illinois law requires that the IEP team identify and notify the parents of necessary assessments to evaluate the student in each of the eight domains or why none are needed. 23 Ill. Adm. Code 226.110(c)(3)(B).

The Illinois School Code places the burden on the school district to show it has "properly identified and evaluated the nature and severity of 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 free appropriate public education tot eh student in the least restrictive environment..." 105 ILCS 5/14-8.02a(g55)). 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. Per 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).

Congress imposes an affirmative obligation upon school districts to identify, evaluate and place potentially disabled students. 20 USC § 1412(a)(3)(A); S. 226.100. "An appropriate education specific to a disabled child's needs must begin with full recognition of the disability and assessment of its extent. School authorities cannot properly address problems which they do not understand." *Bd of Educ. of Oak Park v. ISBE*, 21 F. Supp. 2d 862 (N.D. Ill. 1998).

In the Spring of 2009, the Student was assessed in the areas of psychological (PD-130); social/emotional (PD-140); occupational therapy (PD-145); and nursing (PD-205). The Student was determined not to need a speech evaluation on the basis of a 30 minute observation. (TR579-80). The speech pathologist did not speak with the Student's teacher about the Student's ability to follow directions. (TR582). She did not speak to the Student outside of the classroom in which she observed him. (TR598).

The occupational therapist that assessed the Student, [redacted], did not address the extent or cause of the Student's handwriting difficulties or address his attention difficulties beyond a brief mention. (PD-148-49). [redacted] did not provide recommendations in her assessment of the Student with respect to accommodations, modifications, or methodology used to remediate his handwriting and attention difficulties. She used only a portion of the VMI, and did not identify any deficits in fine motor skills. (PD- 147). Assessment of the Student's sensory functioning included only informal "tactile" observation. (TR155). A handwriting goal was created for the Student in his 2009 IEP, but the present level of performance is vague and the goal itself does not provide for any methodology. (PD-83).

The District's school psychologist, [redacted] administered only a portion of the WIAT. She did not administer the section of the test measuring written expression, despite the fact that the area had previously been identified as an area of concern. (TR548). [redacted] also failed to administer the section of the WIAT measuring listening comprehension, despite the fact that the Student had noted difficulty following directions. (PD-186). The Student's third grade teacher reported clinically significant concerns in her response to the BASC about the Student's behavior in class, including concerns in hyperactivity, aggression, conduct problems, attention problems, all of which [redacted] failed to adequately address in her report or her recommendations. (TR563, 546; PD-136; 138).

According to the Parents, although the Student was finally found eligible for special education services in June 2009, evidence in the records shows that the team still did not have an adequate understanding of the nature or extent of the Student's disabilities. The 2009 IEP team determined that the Student was eligible under the categories of Other Health Impaired and Learning Disabled. The nature of the Student's learning disability, later determined by [redacted] to be in the areas of math and written expression, was not discussed in detail in the 2009 IEP. The Parents further believe, based on testimony at the Hearing that even the Student's special education teacher and case manager at the June 2009 and IEP meeting, and during the 2009-2010 school year provided "ambivalent" testimony, according to the Parents, regarding her understanding of how the IEP team concluded the Student's eligibility to be Learning Disabled and Other Health Impaired. (TR, 314-316). The team members could not explain the exact health impairment that resulted in the Student's classification as "Other Health Impaired," nor how his impairment impacted him in the school setting. Occupational therapist [redacted] and case manager [redacted] were able only to vaguely reference a "heart condition." (TR165; TR316). Despite the

seriousness of the Student's heart condition medically, and his frontal lobe injury from a stroke is unclear in the 2009 IEP or in the minds of the IEP team members, how the condition interfered with the Student's academic progress. In fact, school nurse [redacted] testified that the IEP team did not discuss how the Student's health conditions were impacting his functioning in the classroom. (TR989-90). The school nurse who did the 2009 evaluation, [redacted] testified that although she had noted that, "[an] MRI showed right frontal encephalomalacia in the area where the Student had his stroke," she did not actually know what that meant. (TR 377). It is clear that those who developed the 2009 IEP, and those charged with implementation of the IEP during the 2009-2010 school year had a very limited understanding of the Student's disabilities and the extent to which they impacted his academic, developmental, and functional progress.

The District is in the best position to gather all the necessary records to complete a full and individual evaluation. *Escambia County Bd. of Edu. v. Jarred Benton*, 406 F. Supp. 2d 1248, P21 (S.D. AL 2005) (Court found "unacceptable and in violation of" of IDEA-district's disregard for minimum practices of keeping meaningful records); *NG v. DC*, 2008 U.S. Dist. LEXIS 25302, P15 (D.C. 2008) (district not justified in making an eligibility determination "based on what it had" as the district failed to gather relevant functional, developmental and academic information per 20 USC 1414(c)(1)).See also Federal Commentary: "Section 300.304(c)(4) requires the public agency to ensure that the child is assessed in all areas related to the suspected disability. This could include, if appropriate, health, vision, general intelligence, academic performance, communicative status and motor abilities. *This is not an exhaustive list of areas that must be assessed*...if a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted. No further clarification is necessary." 34 CFR Parts 300 and 301, 46642-3, issued August 14, 2006. (emphasis added). The Parents allege that the 2009 IEP team did not adequately consider the nature or extent of the Student's disabilities, and those charged with providing services to the Student did not understand his needs which is, therefore, a denial of FAPE.

The District relies on the "seminal case" defining FAPE, *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In the *Rowley* case, the Supreme Court states that in assessing the appropriateness of an IEP:

> A court's inquiry in suits brought under Section 1415(e)(2) is two-fold. First, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Rowley*, 458 U.S. at 206-207.

The Supreme Court in *Rowley* indicated that deference is due to the State and local educational agencies, and that since courts "lack the `specialized knowledge and experience' necessary to resolve `persistent and difficult questions of educational policy,'" "courts must be careful to avoid imposing their view of preferable educational methods" upon the educational agencies. *Id.* at 207-08. As is outlined above, the District maintains that it has provided the Student with FAPE in that his IEP was developed according to the procedures set forth in the IDEA and that the IEP was reasonably calculated to enable the Student to receive educational benefit.

While the District did not necessarily drop the ball totally in its efforts to convene 504 meetings and develop related plans, it should have become obvious to the District that something more in regards to addressing the Student's "academic" shortcomings was needed. The testimony and evidence produced at Hearing bear the conclusion that the District's assessments were incomplete and therefore amount to a denial of FAPE.

2. **The District withheld information regarding evaluation reports and recommendations completed in June 2005.**

3. **The District did not provide Parents with notice of their procedural safeguards in 2005.**

4. **The District's arbitrary and wrongful denial of eligibility for special education services, despite substantial evidence that emotional/behavioral, attention deficit, and other impairments limited the student's educational, functional and developmental progress.**

In the course of his 2006 psychological evaluation, [redacted], the school psychologist, did not interview the parents or the school staff. (PD 115; TR43). He did not review the Student's 504 plan. *Id.* [redacted] did not observe the Student in the classroom, nor did he consult with anyone who had observed the Student in the classroom. (TR52-53). [redacted] testified that he did not review the Student's school records from the Student's previous schools. (TR51). Despite his limited knowledge of the Student, [redacted] ruled out a behavior disorder "because of the things that was going on with the Student health wise " and a learning disability because of "medical concerns" and also because "we didn't have a chance to do any curriculum base, any – interventions." (TR55). The Parents highlight the fact that [redacted] "didn't have too much to say" with respect to the possibility that the Student was eligible under the category of "Other Health Impaired" because "I am not the school nurse." (T.55). The Parents' aver that the definition of Other Health Impairment includes such conditions as attention deficit disorder or attention deficit hyperactivity disorder and is in no way outside the scope of a school psychologist's expertise. 34 CFR 300.8(c). Having thus ruled out the potentially relevant eligibility categories, the team found the Student eligible for a 504 plan instead of an IEP. (TR56). The Student was also denied eligibility on the basis that the school he was attending at the time, the [redacted] already had an individualized curriculum. (TR1603).

Less than two months prior to his evaluation at [redacted] the Student had experienced difficulty with keeping up with his classmates, transferring information from the blackboard to his paper, and bullying. (TR1595-96). These academic and social/emotional concerns appeared to have been disregarded by the [redacted] EP team. [redacted] found the Student's performance in the District's 2006 psychological evaluation to be "really concerning." (TR1450). [redacted] noted that there were some areas of the Student's "programming up until [February 2010] hadn't been especially intensive in terms of special education services" and was surprised that the Student had just had a 504 plan early on. (TR1445). As a result of the 2006 IEP team's arbitrary and wrongful denial of eligibility, the Parents' aver, the Student did not receive needed services throughout the 2006-2007, 2007-2008, and 2008-2009 school years.

The District's explanation in reference to the Parents allegation of the District withholding information from the parents as enumerated in the Facts stated above, pages 7 through 11, is plausible and understandable. The Hearing Officer is not of the opinion that the District was acting intentionally or willfully in not getting the assessment material to the parent or as suggested, withholding it from them, particularly in light of the Parents' circumstances relating to them having to leave their residence suddenly. The curious aspect of this scenario, however, is why it is there doesn't appear to be a better system of checks and balances so as to provide assurances that the required and pertinent information catches up with the child once the student presents himself/herself in another school located within the District. Surely in this age of computers, record keeping should be enhanced and readily accessible to the appropriate school personnel. The question becomes why then the District has to wait for a request from a parent when they already should have some form of tracking of what occurs with each and every student that it educates? Evidently, this was not possible or someone from the District didn't take the necessary steps and/or time to track the assessment information that had been performed prior to the Student withdrawing from one school and later enrolling in another school within the same District. While the District may not have followed the letter of the law with respect to procedural safeguards dating back to 2005, the District's efforts looking forward to the 2006, 2007 & 2008 school years through its attempts to address the medical needs of the student in the development of 504 plans were reasonable under the circumstances. Therefore the alleged violation is considered "de minimus" to finding the

District in violation of providing a FAPE.

5. Failure to conduct a timely full individual evaluation and make an eligibility determination on a timely basis despite repeated requests by Parents and private providers.

20 U.S.C. § 1412(a) imposes an affirmative obligation on LEAs 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, (34 CFR 300.111(c)) even though a student is advancing from grade to grade. A parent's failure to make such a request for evaluation does not relieve the district of its child find obligation. *Robertson County Sch. System v. King*, 24 IDELR 1036 (6th Cir. 1996); *Dept. of Educ. v. Cari Rae S.*, 35 IDELR 90 (D. Hawaii 2001); *Lakin v. Birmingham Pub. Schs.*, 39 IDELR 152 (6th Cir. 2003); *N.G. v. District of Columbia*, 50 IDELR 7 (D.D.C. 2008); *Newman-Crows Landing Unified Sch. Dist.*, 108 LRP 45928, 6 ECLPR 24, page 10 (SEA CA 2008)("the threshold for suspecting that a child has a disability is relatively low. A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services."). The Student's Parents' requested an evaluation at [redacted] when the Student started Kindergarten, but they were informed by the case manager that 30 weeks of "anecdotals" would be needed before she could do anything. (TR1581-83). [redacted] continued to request testing for the Student throughout the 2005-2006 school year. (TR1592). The Student was not evaluated until he transferred to [redacted] in Fall, 2006. In 2007-2008, the Student's parents provided the school with the Student's 504 and expressed concern about the Student's behavior in school. (TR1616-19). [redacted] "attempted to hold a conference" for the Student during the 2007-2008 school year but was told multiple times by the nurse that "we didn't have what we needed." (TR232; 234-37). As a result, a conference was never held for the Student during the 2007-08 school year. (TR1621-23). The Student's parents continued to request a conference for the Student in the 2008-2009 school year. (TR1622). Finally, on January 30, 2009, Ms. [redacted]s requested an evaluation in writing. (TR1635; PD-39). [redacted]s signed a consent to evaluate form on March 4, 2009. (PD-48). An IEP meeting was finally held on June 11, 2009, more than 60 school days after the consent for evaluation was signed, apparently according to the Parents, in violation of 23 Ill. Adm. Code 226.110(d). (PD-67).

The District turns to the Federal Regulations as providing "clear guidance" in the above-described scenario. Regarding the determination of eligibility, the IEP team will only determine whether a child is a child with a disability per the IDEA "upon completion of the administration of assessments and other evaluation measures." 34 CFR §300.306(a) (emphasis added). Further, a public agency should provide the parent with a copy of the evaluation report and documentation of eligibility, again, "upon completion" of the assessments. *Id.* The law also directs that "information obtained from all of [the variety] of sources is documented and carefully considered. 34 CFR §300.306(c)(i)and(ii)(2) (emphasis added) Such comprehensive documentation and consideration was not possible in the Student's case when the Parents did not return to [redacted] with the Student and did not inform [redacted] or anyone in the District of their move or new contact information. Additionally, with respect to documents related to the determination of eligibility, the Commentary to the Federal Regulations states that "it would not be appropriate for a public agency to provide documentation of the determination of eligibility **prior to discussing a child's eligibility for special education and related services with the parent.**" F.R., Vol.71, No. 156, at 46645. (emphasis added) The Commentary continues with the opinion that "providing documentation of the eligibility determination to a parent prior to a discussion with the parent regarding the child's eligibility would indicate that the public agency made its determination without including the parent and possibly, qualified professionals, in the decision." *Id.*

The Hearing Officer finds that the District's self imposed requirements of "30 days of anecdotals" and numerous District requests of the Parents' to obtain medical documentation/records, many of which

were redundant, without taking the initiative to assist the Parents' in obtaining records the District stated it required to be burdensome and unreasonable. If the District had questions about the medical records provided by the Parent at the District's request, the appropriate District staff person should have called the Medical Provider personally to obtain the information sought. Instead, the District placed the full responsibility on the Parents' to obtain the information, thus delaying the decision process unduly. The District actions, or lack thereof, amount to a denial of FAPE.

6. The District's failure to provide an appropriate educational placement for the student from June 2005 through the present.

In *Forest Grove Sch. Dist. v. TA*, the US Supreme court has recently stated that 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." 2009 U.S. LEXIS 4645, page 7 (June 22, 2009). In *Forest Grove*, the court emphasized 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. *Id.* at page 7. The Parents' allege that this is such a case: the District did not identify the Student with a disability and therefore did not provide him with FAPE. Consequently, the Parents believe that an order providing placement at Acacia, a private therapeutic day school, would merely require the District to belatedly pay expenses that it should have paid all along. *Id.* at page 7. See also *Carter v. Florence County Sch. Dist.*, 950 F.2d 156, page 3 (2nd Cir. 1991) (affirmed by U.S. Supreme Court) ("preference for mainstreaming was not meant to restrict parental options when the public schools fail to comply with the requirements of the Act"). A district is not excused in cases where it failed to identify and may not "await parental demands" before providing special instruction. *Reid v. DC*, 401 F.3d 516, P2 (D.C. Cir. 2005); *Scott v. DC*, 2006 U.S. Dist. LEXIS 14900 (D.C. 2006) (no authority that parent must request an evaluation first); *Draper v. Atlanta Ind. Sch.*, 108 LRP 13764, P9 (11th Cir. 2008) (family is not blamed for not being experts about learning disabilities).

The Parents claim that since kindergarten, the Student has experienced behavioral problems in the classroom that have significantly interfered with his academic progress. Although the Student has "some solid assets and some real strengths," according to [redacted] (TR1501), he has failed to meet academic standards year after year and required academic support and accommodations in the classroom even before he was found eligible for an IEP:

- The Student received a modified grading scale as much as "10 to 20 percent below what the other children were doing," according to [redacted] the paraprofessional assigned to the Student's classroom (PD-186; TR867-68);
- The Student's workload was modified such that "he wasn't expected to complete as much as everyone else" (TR869); and
- The Student was pulled out of his third grade classroom to receive additional academic support by the special education teacher [redacted] (TR869).

The Parent's believe that [redacted] testimony as to the nature of her provision of academic support during the Student's third grade year was vague and inconsistent. (TR285-89). The Parents further believe that these interventions clearly show that the District was aware that the Student was not able to function in the classroom without significant supports and even specialized instruction, long before he was made eligible for services under the IDEA.

Per the Student's 2009 and 2010 IEPs, more than 85% of his instruction occurs in a regular education classroom. [redacted] testified that for the Student to spend approximately 90% of his day in a regular education classroom would not be an appropriate level of support in light of the Student's degree of attention and organization problems, and that the Student should spend a greater portion of the

day in more structured environments. (TR1549). Despite [redacted]s findings, the IEP of September 14, 2010 decreased the Student's overall academic minutes in the Resource room from his IEP of June 11, 2009. The current 2010 IEP does not provide for any Reading/Language Arts minutes in a separate class, and rather provides 150 minutes of direct services in a regular class. This is an inadequate level of support given [redacted]'s finding that the Student's writing represents a specific area of academic deficiency, and his finding that there is support for a specific learning disability in written expression.

[redacted] found that the Student's current functioning on formal math testing is much poorer than was previously evident. (TR1558). Although the Student's minutes in the area of Mathematics were increased from 120 mpw to 150 mpw to be provided in a separate class, this is insufficient given [redacted]s findings that Mathematics represents an area of specific academic deficiency, requiring at least 200 minutes a week of math. See, (TR1494). The Student failed to meet almost half of his academic standards during the 2008-2009 school year, and the extent to which he did meet standards, it should be noted that he received a modified grading scale as much as "10 to 20 percent below what the other children were doing," according to [redacted] the paraprofessional assigned to the Student's classroom. (PD-186; TR867-68). Additionally, the Student's workload was modified such that "he wasn't expected to complete as much as everyone else." (TR869).

While the District's position is they have been providing for the needs of the Student through a series of 504 Plans developed since the 2006 school year, the fact remains that the Student has not progressed academically even with an IEP developed as late as the 2009 school year. This Hearing Officer agrees that looking back from 2007, the District has failed to adequately provide an educational placement for the Student where reasonable academic gains could be achieved.

7. **The District's failure to convene an IEP meeting in a timely manner in response to a request made by the Parents of the student in January, 2009.**

The Hearing Officer previously found a denial of a FAPE, see number 5 above.

8. **The District's failure to provide essential related services in the areas of assistive technology, speech/language, psychological and social work services; and transportation.**

Despite the Student's ongoing deficits in handwriting and organization, and [redacted] recommendations with respect to "decreased demands on handwriting" and "consistent utilization of structural supports such as webs and graphic organizers," the Student was not referred by the District for an assistive technology evaluation by the 2009 nor the 2010 IEP team. (Report, P.18; T-1482-83). Neither IEP fully addresses the Student's handwriting nor organizational assistive technology needs.

[redacted]estified that, as of October 15, 2009, she had only used a graphic organizer once or twice, and had "not used it as much as I should." (TR310). The Student required transportation due to reduced problem solving skills and his medical condition, including limited endurance. (PD-89). Due to the fact that he was not found eligible for an IEP until June, 2009, the Student did not receive transportation services from 2005 through the 2008-2009 school year. Despite the fact that the Student's 2009 IEP provided him with transportation, he did not receive transportation while attending summer school in summer, 2010. (TR1652). The Parent had to pay out-of-pocket in the amount of $85 per week from June 28 to August 13, 2010. *Id.* The evidence and testimony provided at the Hearing supports a finding that the District failed to provide a FAPE in not providing AT and for transportation services for attending summer school in June—August 2010, even though transportation services were provided for in the Student's IEP.

9. The District's failure to develop an effective functional behavior analysis and behavior intervention plan for the student.

One Federal District Court has stated that "[E]valuations must take into account a holistic perspective of the child's needs..." *Harris v. District of Columbia*, 50 IDELR 194, Page 4, 561 F. Supp. 2d 63 (D.C. 2008) (court overturned administrative hearing decision that Functional Behavior Analysis ("FBA") was not an evaluation and determined parent had a right to request an IEE). The court further opined that the "FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Id.* page 4. The Court also states that [T]he FBA's fundamental connection to the quality of a disabled child's education compels this Court's determination that an FBA is an "educational evaluation" for purposes of Section 300." *Id.* at pages 4-5. The Parents' point out that the *Harris* court also notes that the district did not complete a FBA for over two years and did not respond to the Parents' IEE request violating the clear mandate of IDEA and the Supreme Court as well as constituting a "deprivation of FAPE" for the student. 50 IDELR 194, page 5 (DC 2008). (See also *Danielle G. v. NYC*, 50 IDELR 247, Page 10 (E.D. N.Y. 2008) (holding that the district "was required to conduct an FBA to determine the factors that contribute to the [student's] interfering behaviors). A functional behavioral assessment is an evaluation by definition, per IDEA and OSEP/OSERS interpretive rulings as well as the August 14, 2006 commentary and court rulings. See also *DC v. CPS* , page 17 (SEA IL June 28, 2010)("The functional behavior assessment is important because it enables the IEP team to understand "functions" of the behavior(e.g., escape, avoid an unpleasant task or situation) and is part of the IEP process that enables the team to develop a behavior intervention...that teaches and supports replacement behaviors...").

In June, 2009, the IEP team determined that the Student did not need a Functional Behavioral Analysis or a Behavioral Intervention Plan. (PD-76). The Student's 6/09 IEP lists as an accommodation that the Student should be monitored for pica, but [redacted] testified that she was not sure, as of the time she testified, whether the Student still had pica. (PD-79; TR234). [redacted], the paraprofessional assigned to the Student's classroom in the third and fourth grade, testified that she did not know what pica was. T.866. She was informed "at some point in time in the third grade" that she should make sure that the Student wasn't "chewing and biting on different things," but there was no formal plan. ((TR866-68).

The IEP of September 14, 2010 does not contain a positive behavior management program to reinforce the Student for effective on-task focus, efficient work completion, and appropriate self-regulation. (Report, P.17). The IEP team failed to adequately address or implement this recommendation made by [redacted] despite ample evidence that the Student's off-task behaviors impact his academic performance, including the Student's 2010-2011 school year second trimester report card indicating that the Student was failing to complete assignments in class and needs frequent reminders to stay focused, (PD-433); and [redacted] testimony that the Student needs "a lot of motivation," redirection and rewards in order to work independently. (TR298-300).

The District has failed in its lack of determining whether or not the behaviors of the Student affected his ability to learn. At a minimum, the District was remiss in not concluding that that a FBA was warranted given the Student's history of pica. While the incidences of behavior may not have been considered "significant" by some of the professionals the Student had been interacting with, the District has nothing to lose by conducting a FBA so as to rule out whether or not any negative behaviors may be affecting his learning. Hence, the Parents aver that the conclusion of a denial of FAPE is warranted. The Hearing Officer concurs with the Parents and so finds.

10. The District's failure to identify and utilize effective teaching methodologies at a sufficiently intensive level that would enable the student to make progress commensurate with cognitive skills.

As in the case *TH*, the Parents' aver that the District cannot articulate a specific methodology for reading, math and written language. 55 F. Supp. 2d 830, page 6 (N.D. IL 1999). The court held in *TH* that *Lachman* did not apply and parent can request specific methodology. *Id.* ("if the school district's IEP is not substantively appropriate, *Lachman* is irrelevant.") (citing Comm. Consol. School Dist. No. 21, 938 F.2d at 717). In the case at hand, the school psychologist did not know what methodologies were being utilized with the student. (TR1096-1100). [redacted] testified that she did have a reading or written language program to teach the Student. (TR 297). Instead, she was using "student generated text." *Id.* Per testimony of [redacted] and objective assessments the Student has a General Ability Index in the Average range. Based on student's objective cognitive skills the district has not utilized effective teaching methodologies as the student is performing in school behind his intellectual ability. When the district cannot articulate a particular methodology they prefer, the IEPs are inappropriate and the student has not made progress, the parent's request for a particular methodology is not barred. *TH. Id.* Page 6.

[redacted] found that the Student "definitely struggles on tasks that are visual construction." (TR1469). According to [redacted], "a picture is worth a thousand words, but for a kid like the Student, probably the thousand words is better than a picture. So he is a kid where you want to talk things through as much as possible because you're really playing to his strengths rather than just having him look at something and visually process." (TR1485). [redacted] recommended "additional personalized support for the enhancement of his math skill acquisition. (TR1488). Special education teacher [redacted]'s approach, however, was more generalized than personalized. She justified her use of "manipulatives" for the Student due to "having trouble with math" because "sometimes they can access the information visually better than just hearing it read orally." (TR.250). [redacted] testified that she has her students "work on base ten blocks... cubes that you link together." (TR313). This generalized approach, the Parents avers, runs afoul of [redacted]'s finding that the Student possesses a verbal/auditory-linguistic learning style and that the Student "struggles on tasks that are visual construction... visual motor in nature... So when he's taking a pencil and drawing *or when he has blocks in front of him to put together*, those kinds of things are more difficult for him ..." ([redacted] Report, P.16; (TR1469). (emphasis added).

The testimony and evidence produced at the Hearing supports the conclusion that the District has failed to identify and utilize effective teaching methodologies at a sufficiently intensive level that would enable the Student to make progress commensurate with his cognitive skills. Hence a denial of a FAPE is confirmed.

B. **The Parent contends that the student's IEP:**

1. **Contains statements of present levels of performance that do not accurately and objectively state the student's skills and functional levels; The Student's present levels of performance in his 2009 IEP were based on an evaluation that failed to adequately capture the Student's academic and social functioning in school. (See, TR559-63).**

2. **Provides goal statements that are vague and not measurable, and where the goals set an increase in skill level, the goal is not commensurate with the student's potential for development.**

According to [redacted] the Student was functioning at a second grade level in math and at a

second grade level in reading comprehension at the beginning of his fourth grade year. (TR302; TR296). The Student's 6/11/09 IEP sets his Measurable Annual Goal in the area of Mathematics at the fourth grade level. In February 2010, [redacted] by found the Student to be functioning at between a 2.2 grade level in Problem-Solving and a 3.7 grade level in Numerical Operations. Additionally, the Student's Mathematics goal is confusing and too low to measure adequate mastery. The goal states that he must solve 4th grade problems "with 70% accuracy in 3 out of 5 trials," or, put another way, achieve70 percent accuracy approximately 60 percent of the time. (PD-80. TR304).

3. **Fails to address adequately academic, functional, developmental, communication and emotional limitations of the student;**

[redacted] noted "deficiency in the Student's fine-motor skillfulness, with functional consequence for his handwriting and developmental drawing skills." (Report, P.16). [redacted] recommended "occupational therapy support directed at enhancing the Student's fine-motor and graphomotor skills," as well as "consistent utilization of structural supports such as webs and graphic organizers." (Report, P.18). A meaningful level of OT support would be 40 minutes to an hour per week. (TR1482).

The Student's 2009 IEP provided 8 minutes a week of occupational therapy services. (PD-85). Although his IEP specified that the services were to be delivered in a "separate class," [redacted], school occupational therapist, testified that all of the services had been delivered within the classroom setting. (TR170). The Student's 2010 IEP provides eight minutes a week of occupational services in the regular classroom.

[redacted] testified that, as of October 15, 2009, she had only used a graphic organizer once or twice, and had "not used it as much as I should." (TR310).

Neither the IEP of 2009 nor of 2010 contains a formal training program to address the Student's deficits in the area of study, active learning, and organization skills, as recommended by [redacted] (TR1481). Neither IEP allows for the provision to the Student of class notes, which [redacted] recommended to reduce demands on the Student's handwriting, to permit him to focus his full attention on lecture materials, and to ensure that he has good quality notes for test preparation. Neither the 2009 nor the 2010 IEPs address the Student's written language impairment.

4. **Provides for an inadequate level of related services, specifically:**
   - i. **social work services were not offered with sufficient intensity based on evidence of frustration and anxious behaviors;**
   - ii. **fails to provide support for use of assistive technology resources, and lack provision of adequate levels of assistive technology equipment and software;**
   - iii. **failed to offer occupational therapy services that addressed sensory processing difficulties which interfere with the student's ability to participate effectively in class;**

Despite the Student's ongoing deficits in handwriting and organization, and [redacted] recommendations with respect to "decreased demands on handwriting" and "consistent utilization of structural supports such as webs and graphic organizers," the Student was not referred by the District for an assistive technology evaluation by the 2009 nor the 2010 IEP team. Report, P.18; T-1482-83. Neither IEP fully addresses the Student's handwriting and organizational assistive technology needs.

5. **Failed to extend school year services despite substantial evidence that the student was**

not making adequate academic, functional and developmental progress.

The Student's promotion to the fourth grade was made conditional upon summer school, as he had not met standards in math or reading performance, although it was determined at an IEP meeting held subsequent to the Parents' filing of their initial due process complaint that the Student would be promoted without attending summer school. (TR1214-17; PD-186). At the end of the 2009-2010 school year, the Student's fourth grade year, the Student had failed to meet standards in Mathematics and Reading and had to attend summer school. (TR1651).

6. Failed to offer appropriate compensatory educational services for delays and disruption in the provision of necessary services and supports for the student.

In support of this issue, the Parents focus on the Least Restrictive Environment placement. ("LRE"). The Seventh Circuit has opined that the LRE mandate was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements including parent's rights and is applicable only if the IEP meets IDEA minimums. *Board of Educ. of Murphysboro Comm. Unit School Dist. No. 186 v. Illinois State Board of Educ.*, 41 F.3d 1162, 1169, P6 (7th Cir. 1994) The district must ensure that the placement it proposes will not be regressive for the student. *T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830 (N.D. Ill. 1999). Here, the District has not offered to provide appropriate special education services and school placement. [redacted] and [redacted] have testified that [redacted] a private therapeutic day school, is an appropriate placement for the Student. As the 7th Circuit discussing in *Murphysboro*, if the district has failed to offer FAPE and did not present any alternatives, the only option is the alternative offered by the parent, in the instant case, [redacted]. The Parents' state that 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. In the instant case, the Parent avers that the District has not offered any special education services/program that is appropriate for the student. See *IC v. CPS*, page 18 (SEA IL May 15, 2010)("Where the educational program proposed by a school district is inadequate, and District does not present evidence of any appropriate alternatives, the only option is the placement proposed by parents, if evidence proves that their proposed placement can meet the child's needs, even when it does not provide mainstreaming with typically developing peers").

The Parents' maintain that the District has had the opportunity to provide FAPE since the Student was in kindergarten. He was identified as having a learning disability by a District psychologist in 2005 but the evaluation report was not transmitted to the appropriate school staff nor the parents and was first revealed in a records request in May, 2009. [redacted] testified that he was surprised the Student had not received an IEP until 2009. [redacted] also testified the appropriateness of [redacted] for providing the services the Student requires for education. [redacted] the director of [redacted] having met with the family and the student and considering the student's behavioral and academic needs, testified that [redacted] has determined that its programs would meet the Student's needs. (TR1159, PD-284).

In the alternative, the Parents request that the Student be placed at [redacted] as a compensatory service, in light of the persistent failure of the District to provide needed services and an appropriate placement for the Student. The IDEA regulations recognize compensatory education services awards. 20 USC § 1415(i)(2)(C)(iii). 34 CFR 300.151(b)(1). Courts have long recognized compensatory education as necessary to ensure a student's right to FAPE, and that Congress certainly did not intend to limit that right to children whose parents could "front" the costs of alternative services. *Meiner v. Missouri,* 558 IDELR 123, 800 F.2d 749 (8th Cir. 1986). The Seventh Circuit affirmed Judge Julia Quinn Dempsey'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 (7th Cir. 2004). The Seventh Circuit states that "Compensatory services are well-established as a remedy under the IDEA." An award of

compensatory education is appropriate under IDEA for an inappropriate education in addition to residential placement. *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, P6 (3rd Cir. 1996); *Edwin K.*, 37 IDELR 63, P16 (N.D. Ill. 2002)(enlarged IHO's compensatory social work services to the entire period of time not provided); *Reid*, 401 F.3d 516, P6 (D.C. Cir. 2005)(ordinary IEPs need only provide "some benefit," compensatory awards must do more-they must compensate"); *Draper*, 108 LRP 13764, P9 (11th Cir. 3/6/08)(upheld District Court award as "reasonably calculated to provided educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"): *Kevin T.*, 2002 U.S. Dist LEXIS 4645, Page 10 (N.D. Ill. 2002)(2002 U.S. Dist. LEXIS 4645)(award of 2 years beyond graduation for denial of FAPE).

The Parents agreed to participate in an IEP meeting the District convened on September 14, 2010. The District had the opportunity to address the IEEs and revise the student's IEP in accordance with the recommendations. The District did not address the documented lack of progress in the district's special education programs. The District recommended the same special education program for 2010-11 which has not been an effective program for the student in the past.

> The District counters by acknowledging that parents clearly have the right to attend IEP meetings and participate in the development of their child's IEP. 20 U.S.C. §1415(b)(1). The procedural requirements of the IDEA were implemented by Congress to allow for participation of "concerned parties" in the development of the student's IEP. *Rowley*, 458 U.S. at 206. However, parents do not have veto authority in the IEP process. If parents disagree with the IEP, their recourse is to file a request for a due process hearing.

The District avers that all credible evidence in this Hearing over the past year demonstrates that the process by which the Student's IEP was developed was reasonable and proper. This fact is significantly bolstered by [redacted]'s IEE and testimony. The Student's Parents were provided proper notice for the domain and IEP meetings, and they were fully involved in the development of the Student's IEPs. Finally, as long as the IEP developed by the District is reasonably calculated to allow the student to make some educational benefit, hearing officers and courts can look no further. As stated by the Seventh Circuit Court of Appeals:

> The issue is whether the [district's] placement was appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education or the placement the Parents prefer. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997) (emphasis added).

The Seventh Circuit also stated in *Heather S.* that since the issue is the appropriateness of the educational program offered by the school district, evidence of the appropriateness of an alternative educational program proposed by the parents is "legally irrelevant." *Id.* As is set forth in detail above, the educational program provided to the Student has been appropriate. His educational program was designed to allow him to gain educational benefit, and he has and continues to gain educational benefit. The analysis stops there, and no further inquiry is required into the appropriateness or inappropriateness of the educational programs proposed by the Parents in this matter.

The District believes that it has provided the Student with an appropriate educational program and, therefore, must be afforded deference concerning the educational methods and theories used to educate the Student. The Student's Parents' proposals were considered throughout his education and at his two most recent IEP meetings. The District has put forth credible arguments in support of its efforts to provide an education that will impact the Student positively. Frankly, this Hearing Officer believes that the District is capable of making the Student's current attending school placement work. With the proper educational planning, services and supports, the Student is more than capable of achieving at

grade level over time. [redacted]s report and findings support this conclusion. Unfortunately, the evidence and testimony presented at the Hearing support the Parents' allegations with respect to the District's development, or lack thereof, of an IEP that would accomplish this goal, at least not in a timely fashion to the benefit of the Student. The Parents correctly point out the failures of the Student's IEPs and therefore support the conclusion that a denial of a FAPE has occurred.

Federal (34 CFR 300.320) and State (23 Ill. Admn. Code 226.30) regulations provide the parameters of an IEP.

"a) Each IEP shall include:
1) A statement of measurable annual goals that reflect consideration of the State Goals for Learning and the Illinois Learning Standards (See, 23 Ill. Adm. Code), as well as benchmarks or short-term objectives developed in accordance with the child's present levels of educational performance.
2) A statement regarding the child's ability to participate in State and district-wide assessments.
3) A statement as to the languages or modes of communication in which special education and related services will be provided, if other than or in addition to English.
4) A statement as to whether the child requires the provision of services beyond the district's normal school year in order to receive FAPE ("extended school year services") and, if so, a description of those services that includes their amount, frequency, duration, and location.

b) The IEP of a student who requires a behavior intervention plan shall:
1) Summarize the findings of the functional behavioral assessment;
2) Summarize prior interventions implemented;
3) Describe any behavioral interventions to be used, including those aimed at developing or strengthening alternative or more appropriate behaviors;
4) Identify the measurable behavioral changes expected and methods of evaluation;
5) Identify a schedule for a review of the interventions' effectiveness; and
6) Identify provisions for communicating with the parents about their child's behavior and coordinating school-based interventions.

Consequently, it is the Hearing Officer's opinion based on the evidence and testimony provided by the Parents that the Student would benefit greatly if placed in a more restrictive setting as is suggested and requested by the Parents and supported by [redacted]s IEE. The placement at [redacted] with the appropriate supportive services, including AT and OT, can reasonably assure the Student's future needs are addressed so as to hopefully make up for the delays in educational/academic programming the District failed to address and provide since July 2007.

Given the almost two year period of time that incomplete assessments were either performed or the lack of assessments to identify needs were omitted ...i.e. AT assessment or OT assessment, offering ESY services is not unreasonable under these circumstances. *Kevin T., W.T., and K.T. v. Elmhurst Community School District No. 205*, 36 IDELR 153, 102 LRP 9030, (U.S. Dist. Ct. N.D. Ill. 2002)

A hearing officer is empowered to provide compensatory education as a remedy. Compensatory Education is a term used to describe future educational services which courts award to a disabled student under the IDEA "for the school district's failure to provide a FAPE in the past." See *Kevin T.*, infra. When an IEP fails to confer some (more than de minimis) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by the IDEA. Therefore, the right to

compensatory education should accrue from the point that the school district knows or should know of the IEP's failure. *M.C. and G.C. v. Central Regional School District,* 81 F.3rd 389, 397 (3rd Cir. 1996). *Evanston Comm. Cons. S.D. No. 65 v. Michael M. and Christine M.*, 356 F.3d 798 (U.S. Dist. Ct. of Appeals 7th Cir. 2004), The Hearing Officer believes, given the academic lag the Student is experiencing that Compensatory Education is an appropriate remedy in this case.

ORDER

A. The District is to provide placement in [redacted], a private therapeutic day school, with particular attention paid to the following:

1. Related services in sufficient intensity including:
   a. social work services and/or psychological counseling at least 60 minutes per week;
   b. support for assistive technology software and equipment (including a lap top computer) for at least 30 minutes per week;
   c. direct speech language services at least 60 minutes per week;
   d. direct occupational therapy services at least 60 minutes per week, and consultative services for 30 minutes per month

B. The District is to provide compensatory education services for loss of FAPE from July 2007 to the present, including

1. additional social work and or/psychological counseling services of 30 minutes per week for two years
2. tutoring by a certified special education teacher selected by the parents, at a site selected by the parents, for two hours per week for two years;
3. such additional services as may be recommended by any ordered IEE's (including AT, OT evaluation and a FBA, all paid for by the District);
4. two hours per week of additional services after school hours, with provider and location to be selected by the parent, for a period of two years (areas of services may include speech , OT, tutoring, or counseling, at parent option).

C. The District shall pay for independent educational evaluations in areas identified need where the District has conducted an inadequate assessment or failed to conduct assessments as indicated by the student's circumstances; These shall include but are not limited to:

1) assistive technology;
2) speech/language;
3) occupational therapy to assess organization and attention deficits;
4) sensory processing disorder assessment
5) neuropsychological functioning.

D. The District shall provide transportation services to and from the private therapeutic day placement, [redacted], and reimburse the parents for school related transportation expenses incurred for the summer 2010 ESY program.

E. Direct[redacted] to convene an IEP meeting at its earliest convenience that will consider results of evaluations and implement the relief specified within this Order;

F. Within forty-five (45) days of receipt of this Order, [redacted]hall submit proof of compliance to:

ILLINOIS STATE BOARD OF EDUCATION
PROGRAM COMPLIANCE DIVISION

100 NORTH FIRST STREET
SPRINGFIELD, ILLINOIS 62777-0001

Right to Request Clarification:

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

Right to File Civil Action

This decision is binding on the parties unless a civil action is timely commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i),that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

Dated this 1st day of November, 2010.

HARRY A. BLACKBURN
HEARING OFFICER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **DECISION AND ORDER** was sent Sarah O'Connor and Laura M. Boedeker, via Certified Mail and directed to the following addresses:

[redacted]

[redacted]

Mr. Andrew Eulass
Due Process Coordinator
Illinois State Board of Education

100 North First Street
Springfield, Illinois 62777-0001

before 5:00 p.m. on November 1, 2010.

HARRY A. BLACKBURN
P.O. BOX 34
JOLIET, Illinois 60434
(312) 401-2236
(815-254-3658 (FACSIMILE)
hblackburnlaw@sbcglobal.net