

The Parent called as witnesses: [REDACTED], the student's mother; [REDACTED] pediatrician; [REDACTED], pediatric neuro-psychologist; [REDACTED], reading specialist; [REDACTED], [REDACTED], clinical psychologist; [REDACTED] Pediatrics; [REDACTED] case manager; [REDACTED] social worker; [REDACTED] school psychologist; [REDACTED], friend and the Student.

The District called as witnesses: [REDACTED] school nurse; [REDACTED] Special Education teacher; [REDACTED] social worker; [REDACTED] teacher; and [REDACTED] school nurse.

2. Issue Presented

- a. Based upon available records, the School District failed to provide an appropriate and comprehensive evaluation of the student which precluded the school district from developing an appropriate IEP.
- b. The School District failed to identify the Student's needs and design an IEP that appropriately and adequately addressed the Student's educational, emotional and social needs.
- c. The School District failed to provide the Student with an IEP despite the fact that he enrolled in the [REDACTED] with an IEP from [REDACTED]
- d. The School District violated the student's rights when it failed to determine eligibility and thereby denying him a Free Appropriate Public Education.
- e. The School District failed to provide an appropriate placement with sufficient therapeutic, academic and behavioral supports to make appropriate progress from 2007 to the present.

3. Relief Sought

- a. Hearing Officer to Order independent and comprehensive evaluation(s) of his psycho-educational needs;
- b1. Hearing Officer to Order the School District to implement the IEP from [REDACTED];
- b2. Hearing Officer to find eligibility based upon the existing data from the last case study data and evidence produced;
- b3. Hearing Officer to Order the School District to write a sufficient and appropriate IEP in light of the case study evaluation and to provide the necessary behavioral and educational supports for this IEP
- c. Hearing Officer to Order placement in a school capable of addressing the Student's educational, emotional and social needs;
- d. Hearing Officer to Order compensatory education for all periods during the last two (2) years.

4. Findings of Fact

Disclaimer: Hearing Officer was not provided the transcript in this case and had no access to it as it has not yet been transcribed. The recitations of the facts of this case were gleaned from a review of the documents and the Hearing Officer's notes as to the facts elicited or facts that could have been inferred from the testimony of the witnesses herein.

1. The Student was born on June 25, 2003 [REDACTED] Hearing Testimony].
2. He was enrolled in an early intervention program at [REDACTED] in speech/language and occupational therapy. By two years of age, she was aware of a speech delay [REDACTED] Hearing Testimony].
3. [REDACTED] Assessment: Student exhibited fine motor and visual motor delays of 14 - 29 %. He was also exhibiting sensory processing concerns, moderately delayed receptive and expressive language development including acquisition of phonological skills with a delay of roughly 30 % in relation to age and only very mildly delayed cognitive development. He was eligible for Early Intervention services due to a 30 % or more delay in one or more areas of development. Intervention was needed in cognitive development, physical development, language, speech and communication development and adaptive self-help skills development. He was to receive PT/Speech group services one time per week, occupational therapy one time per month and infant development one time per month. [March 30, 2005 [REDACTED] - PD 78 -85]
4. They moved to [REDACTED] in May, 2005 when the Student was 2. He was in school in [REDACTED] and had an IEP there for speech/language [PD71-80]. They moved to another township in [REDACTED] but he was not able to start school there as he was on a waiting list [REDACTED] Hearing Testimony].
5. Student was found eligible for Speech & Language Impairment in the [REDACTED] [REDACTED] The team found that the Student was a verbal communicator but due to poor oral motor control was difficult to understand. His expressive and receptive language skills appeared to be appropriate but due to imprecise articulatory movement, he was difficult to understand. He was able to imitate words and his intelligibility increases through imitation. He barely moved his lips when talking and also drooled quite a bit. Short term objectives were set out. He was to be in the general education curriculum but would receive Speech and Language services from 1 to 8 times a month for 20 to 30 minutes a session. [May 31, 2006 IEP - [REDACTED] - PD71 - 77]
6. The mother and the Student returned to the [REDACTED] area towards the end of 2007 or early 2008 and enrolled the Student at the pre-school program at [REDACTED]. She provided the IEP from [REDACTED] to [REDACTED], the pre-school teacher. [REDACTED] Hearing Testimony]
7. [REDACTED] authored a letter on behalf of the student requesting a full special education evaluation, including (but not limited to) a full speech/language pathologist's assessment, an occupational therapy assessment, full cognitive testing, and complete academic testing. She

further noted that the Student needed an evaluation for learning problems. [January 3, 2008 [REDACTED] Department of Pediatrics - Hearing Testimony and PD0068]

8. The Student didn't qualify for a full case study evaluation in January 22, 2008. One reason was that the mother noted outside resource help for social work and the school did not want to duplicate what was already being done. It seemed like the mother had a "good handle" on the situation and the school district should support the parent. [REDACTED] Hearing Testimony]

9. [REDACTED] as a School Based Problem Solving School (SBPS). SBPS team, student and parent will meet to discuss academic/behavior issues and design/assign interventions/modifications for 3 - 6 weeks and then meet to discuss progress - if unsuccessful, team may decide for full special education evaluation. [January 22, 2008 Notification of Referral Decision - PD67]

10. During kindergarten, the Student's behavior got out of control, not doing any work, only beginning part of the work, skipping work/problems and not doing work in sequence.

11. He was suspended 5 or 6 times in kindergarten. The mother didn't understand how a kindergartener could be suspended. [REDACTED] Hearing Testimony].

12. Student Referral based upon academic delays in oral reading fluency, comprehension, vocabulary and math skills and disruptive, aggressive, non-compliant behaviors and extreme emotions including not following directions, not transitioning activities and leaving room for lunch, specials, etc., crying/throwing tantrums daily, running, jumping on furniture, climbing window panes, pushing and hitting other students, grabbing things and pushing, hitting and kicking furniture. Current information as to reading, spelling, mathematics and written language indicated at a beginning level. His letter recognition was low and he remained unable to write his name. He recognized numbers in order but not out of sequence. Strategies/interventions include use of a Stars Behavior Chart as a visual reminder of classroom behavior which was to be sent home to parent daily, time out for negative behaviors, positive re-enforcement for good work and behavior through praise, stickers, treats, etc., conferences with parent and student daily/weekly, and small group instruction and one-on-one instruction with centers tailored to the Student's needs and homework. [September 5, 2008 Student Referral for Full and Individual Evaluation - PD 64-66]

13. Team declined a Full Individualized Evaluation (FIE) as the School District mandates SBPS first. [REDACTED] Hearing Testimony]

14. Multiple instances of grabbing things, out of seat, crying, playing, not following directions/rules. [September 28, 2008 to January 9, 2009 - Behavior Log - Kindergarten - PD166 - 189]

15. [REDACTED] had contact with the Student when he was in kindergarten as he would come to her class when he was exhibiting challenges for the classroom teacher. These challenges would include acting out, walking out of the classroom and making it difficult for the teacher to educate the other students This would happen two or more times a week. [REDACTED] Hearing Testimony]

16. [REDACTED] agreed that the Student had a difficult time in Kindergarten but no case study was initiated. She was aware in Kindergarten that the mother wanted the Student evaluated. [REDACTED] Hearing Testimony]
17. [REDACTED] (Kindergarten teacher) asked [REDACTED] to have him stay in her classroom for a little while to give him a break. This happened maybe 1 or 2 times a week. These visits would typically be 15 minutes or so. She understood that he was having difficulty adjusting to classroom, was crying, running down hallway, falling down in hallway, etc. Her intervention with Student during this time was to talk to him and calm him down. She would let him work on computer and puzzles as he liked puzzles. [REDACTED] Hearing Testimony]
18. The Student needed assistance in literacy: Oral Reading Fluency, Comprehension and Vocabulary/Word Knowledge; Math: Problem Solving & Computation; and Behavior: Disruptive and Aggressive. Instructional strategies to deal with the academic issues include small group instruction, centers, one-on-one and homework. -- Interventions as to behavioral issues include Stars Behavioral Chart, time-outs and conferences with the student & parent, positive reinforcement and rewards/incentives. [Sept 24, 2008 Request for Assistance - PD63]
19. Pushing over all classroom shelves, chart stands and running around trying to knock down the computer. Playing by outlets. [October 17, 2008 Misconduct Report -PD 145]
20. Pushing over furniture, kicking over chairs, grabbing things and not following directions/crying [October 28, 2008 Misconduct Report - PD 144]
21. Student had E.I. in [REDACTED]. [Nov 11, 2008 Record of Contact - PD17]
22. He was initially referred for School Based Problem Solving (SBPS) as the school district mandates this approach prior to other strategies. The purpose is to determine interventions for student. Once the interventions are determined, they are implemented and then reviewed. If the student is making progress under the interventions, no further action is needed. If the student is not making progress with the interventions, then the team would consider other options. [REDACTED] [REDACTED] Hearing Testimony]
23. Took from 09-24-08 to 11-18-08 for the Intervention Plan to be developed. [REDACTED] [REDACTED] Hearing Testimony]
24. A SBPS intervention plan was established for the Student. The expected performance is that the Student will follow verbal directions, remain on task and refrain from inappropriate behavior towards others. Tabled meeting due to pending MD appointment. Student is academically on target. [Nov 18, 2008 School Based Problem Solving (SBPS) - PD 59 - 61]
25. Mom brought in "old doc" (document) from early childhood (not good info). [Nov 25, 2008 Documentation of Parent/Guardian/Surrogate Contacts - PD17]
26. Crying, off task, pushing and kicking furniture. Won't follow directions, running away down hallway. [Dec 9, 2008 Misconduct Report - PD 143]

27. Consent for Evaluation given by lawyer - Legal Assistance Foundation of Metro Chicago [Dec 11, 2008 Documentation of Parent/Guardian/Surrogate Contacts - PD17]
28. Problem solving intervention introduced in late November, 2008 and continued to January, 2009 when the Student was suspended. No meeting was held to determine if the interventions were effective and no case study was initiated. [██████████ Hearing Testimony]
29. Cutting another student's hair. [January 6, 2009 Behavior Log - PD 188]
30. Student admitted after being suspended from school. He had destroyed property including kicking furniture and kicking over chairs. He was diagnosed with Attention Deficit Hyperactivity Disorder and Episodic Mood Disorder. [Jan 9 - 20, 2009 ██████████ [PD109 - 126]
31. After he was suspended, she took him to the day program at ██████████ [██████████ Hearing Testimony].
32. In her opinion, the Student's behaviors attributable to his ADHD caused considerable attentional difficulties which impeded his ability to comprehend information and to produce information. ██████████ Testimony]
33. ██████████ main focus has been on the Student's behavior. The Student was diagnosed with ADHD in January, 2009. He initially was considered moderate to severe. Since October, 2009, he has had longer periods of calmness and alertness. It was reported that he was not getting into as much trouble at school. Based upon the diagnosis of ADHD, the Student started a medication regime which has been modified to support the Student. Relation between the Student and the family was more congenial. ██████████ - Hearing Testimony]
34. Social/Emotional Status: Needed an initial social assessment; Academic Performance: school records indicate academic delays with need for individualized formal and informal achievement measures; Communication status: no assessment is warranted at this time. [February 9, 2009 Initial Consent for Evaluation - Assessment Planning - PD 43]
35. Legal Assistance is requesting an evaluation [April 16, 2009 - SD144]
36. Student not following directions, running, jumping, pushing and hitting other students. Punched the teacher in the back. [April 21, 2009 Misconduct Report - PD 141]
37. Non eligibility for special education [April 27, 2009 Notification of Referral Decision - PD 57]
38. Fighting, throwing crayons/pencils at people, pushing furniture around, running around room and out into hall, climbing in sand table, leaving lunch room, playing around all morning. [April 28, 2009 Misconduct Report - PD 142]
39. Letter from ██████████ Concern about Student's academic performance and school behavior. Notified of previous eligibility for Early Intervention Services and IEP from ██████████ Full case study is indicated. His EI was ██████████ and

he was assigned to [REDACTED] Most recent IEP was in Nov., 2005. In January, 2008, [REDACTED] denied request for full case study and instead assigned Student to School Based Problem Solving. Referenced April 16, 2009 correspondence. Student was due for re-evaluation due to prior eligibility and his special needs impact his academic performance. The Student has a diagnosis of ADHD. Parent is requesting immediate implementation of the [REDACTED] IEP and a full case study evaluation with IEP. [May 4, 2009 [REDACTED] - PD 40 - 42]

40. The Student's speech was difficult to understand as it often sounded if he was mumbling. [REDACTED] - Third Edition (WPPSI-III) was administered to show the Student's current level of general cognitive function. Overall intellectual functioning was in the low average range - a full IQ score of 89, falling in the 23rd percentile. Nonverbal visuoperceptual reasoning abilities were in the average range. Verbal comprehension and expression skills were in the borderline range, 7th percentile. The Student struggled on tasks requiring him to articulate word definitions. His receptive language skills were significantly stronger, 42nd percentile. In summary, this evaluation indicated low average cognitive functioning with nonverbal abilities stronger than verbal skills. While his receptive language is average, the Student struggles with expressive language, both in content and production. The Student will benefit from an IEP addressing issues of attention and speech. He requires classroom accommodations as well as speech and language therapy. [June 19, 2009 Neuropsychological Consultation Report - PD242-244]

41. The Student was administered various tests for a neuropsychological evaluation. The testing and observation confirmed [REDACTED] diagnosis of ADHD. The Student was in the upper clinical range for inattention and symptoms consistent with ADHD. [REDACTED] Hearing Testimony]

42. He had issues with word retrieval in terms of defining words and use of these words to share information. This would affect his reading as he will have difficulty in developing understanding of words which will lead to problems in reading comprehension. [REDACTED] Hearing Testimony]

43. The score of 7 shows borderline low average borderline and is below what is expected. The vocabulary scaled score of 5 shows mildly impaired performance. It shows that he is struggling with acquisition of words and has difficulty relating what he knows. This is significant and indicative of more significant difficulties for the Student in sharing knowledge verbally and effectively communicate it. As a result, the Student needs speech and language intervention. [REDACTED] Hearing Testimony - PD 232 - 244]

44. In his opinion, the Student needs speech and language services and needs monitoring in the classroom to see how he shares his knowledge. He has expressive language difficulties. He needs a structured setting and good monitoring of his work. He needs a multi-modal learning model as his taking in verbal information requires additional support. [REDACTED] Hearing Testimony]

45. [REDACTED] did reviewed [REDACTED] [SD45] neuropsychological report form [REDACTED] From her review of this report, she did not necessarily believe that he had a learning disability as there were no deficits in achievement. Although the Student's verbal score

was lower than average, this doesn't make her believe that the Student had a learning disability. Based on reports, she believed the Student's difficulty/disability was an emotional disturbance as defined in his diagnosis of ADHD. [SD47] She is not aware that Student had significant issues in writing, reading or spelling. [REDACTED] Hearing Testimony].

46. [REDACTED] wrote on May 4, 2009 re: Student and Parent concerns. Initially denied request for case study evaluation, did hold meeting on May 6, 2009. 1) Parent disagrees with denial of communication status based upon Early Intervention Services received in [REDACTED] and IEP in [REDACTED] 2) Failure to receive proper notice of May 6, 2009 meeting; 3) Need for completion of eligibility determination before start of next school year - 2009 - 2010. [July 14, 2009 [REDACTED] - PD 34 - 37]

47. [REDACTED] Psychological Test Age: 6 years 2 months; Grade: First; Reason: Referral for Behaviors

Educational Evaluation: Kaufmann Test of Educational Achievement, Second Edition, Letter & Word Recognition - K.8; Reading Comprehension - 1.0; Math Concepts & Applications - K.4; Math Computation - K.7; Spelling - < 1.0

Psychological Evaluation: K-BIT Verbal - Average; K-BIT Nonverbal - Average; I.Q. Composite - Average; VMI - Age Equivalent - 5 years 11 months; Devereux - Significant for Depression; Very Significant for Inappropriate Behaviors/Feelings, Physical Symptoms/Fears; Borderline for Interpersonal Problems; Total Scale - Very Significant

Interpretation: Unable to read or spell 2 and 3 syllable words; Emotional Behavior is overriding factor.

Conclusions: Due to ADHD, needs accommodations and modifications which are best addressed in a 504 plan. [August 21, 2009 [REDACTED] Psychological Test - [REDACTED] - PD 5 - 7]

48. One of the tests administered was the Devereux - emotional rating scale. The teacher [REDACTED] was the "informant". As to the various categories, the following were shown: interpersonal problems were deemed borderline, depression was considered significant and inappropriate behavior/feelings and physical symptoms/fears are very significant. This shows very significant issues. [PD 15 and [REDACTED] Hearing Testimony]

49. She did a social work assessment of the Student [PD 0010 - 0012]. This was on August 28, 2009. That assessment noted the following: "The classroom teacher reports that the Student is doing better than he did last year but continues to have difficulty. He makes loud outbursts and hits other students. Student did not know how to process or problem solve to get correct answer" [PD 0011 and [REDACTED] Hearing Testimony].

50. [REDACTED] Social Work Assessment Age: 6 years 2 months; Grade: First Grade

Perceptions of Student's Problems: Behavior problems at school including that he was destroying the classroom, getting under the desk and ultimately hitting other children.

Educational Experiences: Classroom teacher reports that the Student is doing better than last year. Continues to have difficulty with loud outbursts and hitting other students. During observation, Student did not seem to know how to process or problem solve to get correct answers. He demonstrated poor adaptive skills in kindergarten. She also noticed a slight drool.

Recommendations: She felt that the Student could benefit from a strong classroom structure, a desk chart to remind him of classroom expectations and an incentive program to provide clear direction and rewards for appropriate behavior. He was determined to be eligible for social work services on a consultative basis for 15 minutes per month. A decision on special education services will be made at the FIE. [August 28, 2009 [REDACTED] Social Work Assessment - August 38 and 31, 2009 - [REDACTED] - PD 10 - 12]

51. Based on her observations, [REDACTED] did not gather that he had any significant social or emotional difficulties. He appeared to be fitting in and attempting to cooperate. She found the Student to be a "delightful little boy". [REDACTED] Hearing Testimony]

52. The Student exhibited poor adaptive skills in kindergarten. The Student's history is significant for poor progress and behavioral acting out in kindergarten. During her observation, she noted that the Student seemed to have a problem with processing information and problem solving [PD 0012]. She felt that the student was showing some slight improvement after a year of inappropriate social and adaptive behavior exhibited by his immature approach to problem-solving and processing social cues. The Student was found eligible for social work services on a consultative basis only for 15 minutes per month." [REDACTED] Hearing Testimony]

53. [REDACTED] is currently the Student's 1st grade teacher and has him in her classroom. Her observations as to the Student are that he is easily distracted, has days when he won't do any work, likes to play with objects and then have to re-engage him. [REDACTED] Hearing Testimony]

54. Eligibility and IEP Academic Performance - Per Kaufman Test of Educational Assessment, achievement is in the average range in major tool areas. Scores ranged from beginning of Kindergarten to beginning of 1st Grade. Mild delay was noted in spelling skills. Teacher reported that Student functions satisfactorily in the classroom in all areas. He does require extra time on tasks especially if a written reply is necessary. Report to [REDACTED] indicated low average cognitive functioning with non-verbal reasoning stronger than verbal reasoning. Difficulties in expressive language. Noted ADHD and depressive symptoms. Student would benefit from an IEP to address issues of attention and speech with classroom accommodations as well as speech and language therapy. Student may also benefit from psychotherapy from an outside source. Summary& Conclusions: Referred due to emotional-behavior difficulties that were very disruptive last school year. Current academic data indicated average cognitive functioning in both verbal and nonverbal modalities. School progress is satisfactory and achievement per testing is within average range in reading and math. As no disability identified, Student is not eligible for special education and related services- 504 plan suggested [September 15, 2009 Eligibility and IEP - PD 44 - 52]

55. There was an eligibility meeting on or about September 15, 2009 [SD62]. The team found the Student not eligible for Special Education but, based upon the diagnosis of ADHD, determined that he was eligible for a 504 plan [SD58]. This was based upon the information that

the Student was academically on target, exhibiting no behavior concerns and doing what the teacher requested. [REDACTED] Hearing Testimony]

56. A September 15, 2009 Initial eligibility conference decided that Student's needs could be met through the development of a 504 plan. He was found not eligible for Special Education services. The basis for this decision was that the student was diagnosed with ADHD which does not necessarily, without other disorder, qualify him for Special Education services. [SD62 and [REDACTED] Hearing Testimony].

57. On September 15, 2009, they held a meeting which she assumed was an IEP for the Student. They had the report of [REDACTED] and reviewed it. Her concerns for the Student were reading, spelling, letters and behavior. At some point, she understood that they wanted to develop a 504 plan for his Student. She only understood that it was part of an IEP. They never showed her a 504 plan [REDACTED] Hearing Testimony].

58. The mother received the notice of a meeting for a 504 plan only 4 days prior to the meeting and she couldn't meet then. She tried to follow up with [REDACTED] when she would see her but [REDACTED] wouldn't say anything to her [REDACTED] Hearing Testimony].

59. Purpose of conference is "504" plan [October 15, 2009 Parent/Guardian Notification of Conference - SD72]

60. The Student was not tendered a 504 plan even though they found him eligible for one. It was her understanding that the mother was not present when requested to develop the plan. [REDACTED] Hearing Testimony]

62. [REDACTED] believes a 504 plan would be insufficient based upon the disabilities seen. [REDACTED], Hearing Testimony]

63. His reading level is low. By mid-September, he was not achieving at a competent level and as well on his way to earning an "F". He has received "F's" through the first three quarters in reading. [Report Card - 1st Grade - PD13 & 14A]

64. Report Card: Reading - 1st quarter = F & 2nd quarter = F; Writing Standards - 1st quarter = F & 2nd quarter = F; Listening Standards - 1st quarter = D & 2nd quarter = D; Speaking Standards - 1st quarter = C & 2nd quarter = B; Mathematics Standards - 1st quarter = D & 2nd quarter = F; Science Standards - 1st quarter = D & 2nd quarter = B; Social Science Standards - 1st quarter = D & 2nd quarter = D. [January (??), 2009 Report Card - 1st Grade - PD13 & 14]

65. April 13, 2010 IEP. The factor(s) for determination of eligibility at this time (April, 2010) was based on teacher report(s) - 30 wks of failure in reading and math to bring IEP back together. In April, 2010, eligibility for an IEP was determined without using any other studies including no further psychological evaluation. For April, 2010 meeting, the only new data brought to table was the teacher reports. They did not do any further assessments [Beverly Bailey Hearing Testimony].

66. The student did not have an IEP until April 13, 2010, approximately two (2) weeks prior to the Due Process Hearing. The team considered the same evaluations as used in the September

15, 2009 meeting. Based upon the teacher report(s) as to academic delays, concerns about his medical management and the social/emotional concerns, the team found the Student eligible under Other Health Impairment (OHI). However, as to assessments and testing, the same data was used. [REDACTED] agreed that the form used to determine eligibility was that for Learning Disability and not OHI [SD 78 - 80 and [REDACTED] Hearing Testimony]

67. He is making progress but it is slow. At the time of the hearing, the student was still struggling with reading and writing. He was not yet reading and struggled to complete his words. He can read a few words but is not a fluent reader. He is not reading complete sentences. He should be able to read sentences with long vowel letters and can't although he can read short vowel words - three letter words, etc. His reading level is at a primer level. He can recognize 36 of 40 of pre-primer words and is able to read these (short vowel words). He is able to sound out short vowel words but will struggle with two syllable words. His listening comprehension is satisfactory. [REDACTED] Hearing Testimony]

68. He does have problems with articulation and will drool. [REDACTED] Hearing Testimony]

69. April 13, 2010 IEP Student found eligible under diagnosis of Other Health Impairment (OHI). Parent and her attorneys and school personnel and their attorney participated in meeting. School progress has been noted as satisfactory based on teacher reports. Achievement as measured by the KTEA - II is within average range. Slight improvement in inappropriate social and adaptive behaviors. Emotional - behavioral concerns are overriding factor that has caused much disruption in the past. Student receiving medication to treat ADHD. Very significant concerns per the Devereux Scale. The team used a Learning Disability form to determine eligibility. The team found that the Student's disability adversely affects his educational performance and the Student requires and is eligible for special education and/or related services. The team found that the student needs a program targeted to enhance his academic delays primarily in phonetic decoding so that he can read fluently unknown words. Student is an oral learner and does best when work is modified to his level and presented in repeat stages. Emotionally, the student has "good days and not so good days". He continues to make outbursts and will hit other students and then deny what he has done. The team found no communication concerns. The remainder of the IEP was labeled "Draft" with little information, plans, goals, etc. entered. Those draft items included: As to accommodations and modifications, the team found that the Student's behavior does not impede the learning of others; Social Worker will collaborate/consult with the General Education teacher for 15 minutes monthly; No accommodations were recommended for District and State Assessments; Functional performance notes that he is frequently not able to work independently in spite of accommodations (seating, peer tutor, oral assessment); the general education teacher will provide for his functional needs in terms of demonstrating self-control. The proposed least restrictive environment for the Student was in the general education classroom with supplementary aides and services. [April 13, 2010 IEP - Initial Eligibility - SD 74 - 106]

5. Burden of Proof

The Supreme Court in *Schaffer v Weast*, 546 U.S.49 (2005) has held that the party filing the request for due process bears the burden of persuasion. "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief" *Id.* at 537. However, per *Schaffer*, the states may, if they wish, put the burden on the school district.

“[T]he IDEA framework in Illinois provides that ‘the school district shall present evidence that the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate and available’. 105 ILCS 5/14 - 8.02 (h) states only that a district's obligation is to present evidence, it does not place a burden of proof on the district. See *Schaffer*, Id. at 533-534 (distinguishing burden of production from burden of persuasion). As such, section 8.02(h) does not contain the explicit burden of proof language necessary to override the default rule the plaintiff, as a party challenging the IEP, bore the burden of proof.” *Kerry M & Kristine M v Manhattan Sch. Dist. # 114*, 106 LRP 58547, 46 IDELR 194 (7th Circuit, No. Dist. IL, 2006).

Putting it in different fashion, it is the parent's burden to present sufficient evidence to support their allegations that the school district failed in its obligation to provide the student with a free appropriate public education (FAPE).

6. Conclusions of Law

[Hearing Officer has re-ordered the issues as delineated above]

A. Whether the School District failed to provide the Student with an IEP despite the fact that he enrolled in the [REDACTED] with an IEP from [REDACTED]

34 C.F.R. Section 300.323 (f), provides as follows:

“IEP's for children who transfer from another state

If a child with a disability (who had an IEP that was in effect in the previous public agency in another state) transfers to a public agency in a new state, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency – (1) conducts an evaluation... and (2) develops, adopts and implements a new IEP, if appropriate ...”

In the instant case, on or about May 31, 2006, the student was found eligible for an IEP in the [REDACTED] public schools on the basis of a speech and language impairment. Thereafter, and the record is unclear as to the exact timeframe, but certainly towards the beginning of the 2007 - 2008 school year, the student's mother enrolled him in the preschool program at [REDACTED]. The significance of the timing is important as the statute only requires the public agency to implement the prior IEP if it was with in the same school year. Here, it is a separate and distinct school year. The [REDACTED] IEP was done during the 2005 - 2006 school year. The student then is enrolled for the 2007 - 2008 school year at [REDACTED] while outside of the same school year requirement of 300.323 (f).

As the district court noted in the case of *Maynard v. District of Columbia*, 110 LRP 20289 (Dist. Ct. – D.C., 2010), 34 C.F.R. Section 300. 323(f) governs the transfer relative to an IEP for disabled children who transfer among different states. In that case, the parent registered her student in mid July, 2008 in a new different state school district. Previously he had an IEP from a different

state. The hearing officer held that there was no denial of FAPE "because pursuant to 34 C.F.R. Section 300.323(f), DCPS was entitled to provide [the student] with a FAPE by providing services comparable to those described in his IEP from the private school, which is located in another jurisdiction, until such time as DCPS either conducted evaluations for [the student] if it determined that evaluations were necessary, or it developed, adopted, and implemented a new IEP for [the student]." The court in *Maynard* found that the statutory section at 34 C.F.R. Section 300.323(f), was "inapposite because (i) ... and (ii) [the student] transferred schools during the summer, not "within the same school year.". As such, the school district was required to develop its own IEP for the student prior to the commencement of the coming school year. The district court further found that the school district's failure to timely convene and conduct an IEP meeting denied [the student] a FAPE".

Similarly, here, the student's IEP was developed over a year prior to his enrollment in the preschool program at ██████████ for the academic year 2007 -- 2008. As such, under the authority of 34 C.F.R. Section 300. 323(f), the school district was not required to implement the Sturgis IEP. Under this section though, if the school district knew or reasonably should have known of the prior IEP, it was required to conduct an evaluation and develop, adopt, and implement a new IEP for the student.

The operative inquiry here is the point at which the school district knew or should have known of the prior IEP. As to this question, the record is very unclear. Per the student's mother, when she enrolled her student at either the end of 2007 or the beginning of 2008 at ██████████ she gave an initial interview and provided the Sturgis IEP to ██████████ the preschool teacher. She further testified that when the school requested it again, she resubmitted it. Subsequently after his preschool, she provided ██████████ with a copy. [See Finding of Fact # 6] This is disputed, to an extent, by a ██████████ in that her record of contact discloses that she was given some record but not necessarily an IEP and that this was old data [See Finding of Fact # 25]. The inference was that what had been provided by the student's mother was not sufficient to determine the student's need for an IEP. However, to the extent that the mother's testimony is uncontroverted as to her providing this document to the preschool teacher in 2007 or 2008, hearing officer will accept her testimony and will start the period at which the school district, under its child find obligations, knew or should have suspected that the student was a student with disabilities and was potentially in need of special education. This entry was their obligation to evaluate, if necessary, and to conduct an eligibility meeting to make a determination whether or not the student qualified for special education services. The record is devoid of any evidence that this inquiry and/or any such evaluation and IEP's were discussed or even considered during that portion of 2007 - 2008 academic year in which the student was enrolled in the preschool program at ██████████ Further, the record and the testimony is silent as to what, if any, evaluations etc. were done for the student and whether or not there was any type of meeting for him.

As such, the school district committed a procedural violation by failing to conduct its own evaluation, if necessary, and convening an IEP meeting to make a determination on whether or not the student continued to be eligible for special education services. However, this point is moot as the appropriate limitations for this due process complaint commences on January 12, 2008 and the record is unclear as to the precise date that this document was provided to the school district as it may well have predated the appropriate limitations. As such, Hearing Office enters a finding in favor of the School District on this issue.

B. Whether the School District violated the student's rights when it failed to determine eligibility and thereby denying him a Free Appropriate Public Education?

However, the inquiry as to eligibility for the student does not end with the above inquiry relative to interstate transfer. The school district has an ongoing responsibility to determine whether or not a student may qualify for special education services. In *Board of Education of the Hendrick Hudson School District v. Rowley*, 428 U. S. 176(1982) the United States Supreme Court established a two prong test for determining whether a free and appropriate public education has been provided to a qualifying student, *Id.* at 200. The first inquiry under *Rowley* is whether or not the school district has complied with the procedures set forth in IDEA. Those procedures include having in affect policies and procedures for all children with disabilities residing in the state,... and who were in need of special education and related services are identified, located and evaluated... 34 CFR section 300.111.

Among those disabilities as defined in 34 CFR section 300.8 are:

(9) other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that – (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder...

(10) a specific learning disability – (i) general. The specific learning disability means a disorder in one or more of the basic psychological processes involved an understanding or using language, spoken or written that may manifest itself in the imperfect ability to listen, think, speak, read, write, and spell or to do mathematical calculations...

(11) speech or language impairment means a communication disorder, such as stuttering, impaired articulation, language impairment, or a voice impairment, that adversely affects a child's educational performance.

Putting aside the question of whether or not the school district knew or should have known that potentially this student suffered from a disability based upon the early intervention services that were provided to him or from the [REDACTED] IEP, the school district still has an obligation when the student exhibits behaviors or problems that should put them on notice that this student may have a disability.

In the instant case, there were numerous markers that this student should have been evaluated as to a disability.

Although seven days prior to the appropriate limitations in the instant case, [REDACTED] the student's pediatrician, authored a letter on behalf of the student requesting a "full special education evaluation including but not limited to a full speech language pathologists assessment, and educational therapy assessment, full cognitive testing, and complete academic testing". [See findings of fact #7] Within the appropriate limitations though, the school district consider this request and determined that the student did not qualify for a full case study evaluation as of January 22, 2008. As a basis for this determination, the school district did not want to duplicate the services that they understood the mother had from an outside resource. [See findings of fact #8] What the school district did was to notify the parent that [REDACTED] was a School Based Problem Solving school and that the school based problem solving team, the student and

the parent will meet to discuss academic and behavior issues and design and assign interventions and modifications for a 3 to 6 week period and then meet to determine the student's progress. [See findings of fact # 9] However, from January 2, 2008 through the end of the school year, 2007 - 2008, and up until September, 2008, it does not have appeared at any meeting took place or that any plan was developed much less implement.

The mother testified that during kindergarten school year (2008 -- 2009), the student's behavior got so out of control that he was suspended five or six times. He was not doing any work was doing only part of his work was not doing his work in sequence and hit other difficulties. [See Findings Of Fact # 10 & 11] the fact that the student was suspended this many times should have put the school district on notice that a functional behavioral analysis and/or behavioral intervention plan should have been developed or, at a minimum, some type of intervention should have been planned for the student. As early as September 5, 2008, a student referral was submitted based upon academic delays as well as behavioral concerns [See Findings Of Fact # 12]. Even after this referral, the parent school based problem solving team declined a Full and Individualized Evaluation (FIE) [See Findings Of Fact # 13]. A request for assistance dated September 24, 2008 noted that the student needed assistance in (a) literacy: oral reading fluency, comprehension and vocabulary/word knowledge, (b) math: problem-solving computation; and (c) behavior: disruptive and aggressive. It appears that pursuant to this request some instructional strategies and interventions were developed but no evaluations were conducted. [See Findings Of Fact # 12]. However, it took from September 24, 2008 to November 18, 2008 to develop an intervention plan. [See Findings Of Fact # 23]. During this time, the student's behavior log noted multiple instances of grabbing things, being out of his seat, crying, playing, and not following directions and rules [See Findings Of Fact #19, 20 & 26]. Misconduct reports from October 17 and 28 noted that the student was pushing over classroom shelves chart stands taking over chairs grabbing things not following directions running around trying to knock down the computer playing by the out left etc. During this time, the student's behavior log noted multiple instances of grabbing things, being out of his seat, crying, playing, and not following directions and rules [See Findings Of Fact #19, 20 &26]. Both [REDACTED] and [REDACTED] were used as resources for the kindergarten teacher to place the student in their classrooms to allow some time for him to calm down from exhibited behaviors in the kindergarten teacher's classroom [See Findings Of Fact # 15 & 17]. The developed intervention plan was introduced in late 2008 and remained in place until the student suspension on or about January 6, 2009. [See Findings Of Fact # 28]. The student was suspended as a result of behavior and his mother took him the day program at [REDACTED] [See Findings Of Fact # 30 & 31].

In January, 2009, the student was diagnosed with attention deficit hyperactivity disorder [hereinafter ADHD]. [See Findings Of Fact #33]. Shortly thereafter, an initial consent for evaluation -- assessment planning was signed relative to social emotional needs as well as academic performance. However no assessment was warranted as to communication status [See Findings Of Fact #34]. Misconduct reports continued in April for similar issues as to those in October, i.e., not following directions, running, jumping, pushing and hitting other students punching the teacher in the back, fighting, throwing crayons at people, pushing furniture around, running around the room and out to the hall, leaving the lunchroom and playing around all morning [See Findings Of Fact #36 & 38]. Again on April 16, 2009, legal assistance foundation of [REDACTED] requested an evaluation and again on May 4, 2009. In that May 4, 2009 request, the attorney representing the parent noted continuing concerns about the student's academic performance and school behavior, noted his previous eligibility for early intervention

services and his IEP in [REDACTED] and believed that a full case study was warranted. The letter further noted that the parent was requesting immediate implementation of the Sturgis IEP as well as a full case study evaluation with an IEP [See Findings Of Fact #35 & 39]. Apparently, some type of meeting was held on May 6, 2009 relative to the student with the parent disagreeing with the district's denial of services for his communication status, the failure to receive proper notice of that meeting and the need to complete and eligibility determination before the start of the 2009 -- 2010 school year [See Findings Of Fact # 46].

The parent presented to the school district a neuropsychological evaluation from the [REDACTED] and a psychological assessment [REDACTED] noting that the student needed help with speech as he was difficult to understand and was often mumbling. The Wechsler preschool and primary scale of intelligence showed that the student's current level of cognitive functioning was in the low average range and that his verbal comprehension and expressive skills were in the borderline range at the 7th percentile. The evaluation showed low average cognitive functioning with the student struggling with expressive language both in content and production. It was felt that the student would benefit from an IEP addressing issues of attention and speech and require classroom accommodations as well as a speech/language therapy [See Findings of Fact # 40]. [REDACTED] in discussing those test noted that the student had issues with word retrieval in terms of defining words and how to use these words to share information. This difficulty affected his readings as he had difficulty in developing understanding of the words which will lead to problems ultimately in reading comprehension [See Findings Of Fact # 42]. A score of 7 shows borderline low average intelligence and below what is expected his vocabulary skills core of 5 showed mildly impaired performance and show that he was struggling with acquisition of words and has difficulty relating what he knows. The scores were significant and indicative of more significant difficulties for the student and sharing knowledge verbally and effectively communicating it. As such, [REDACTED] felt that the student needed speech and language intervention [See Findings Of Fact # 43].

Even given the substantial concerns as to the students academic performance, [REDACTED], the school psychologist, did not necessarily believe that the student had a learning disability as she did not perceive deficits in achievement. Although his verbal scores were lower than average, this did not lead her to believe that the student had a learning disability. Rather based on reports from teachers etc. she believes that the student's difficulty and/or disability was an emotional disturbance as defined in his diagnosis of ADHD. She did not perceive that the student had any significant issues in writing, reading or spelling [See Findings Of Fact #45].

The school district had its personnel administer a psychological test as well as a social work assessment. [REDACTED] concluded that the student difficulties were attributable to his ADHD and that his needs and modifications could best be met with a 504 plan [See Findings Of Fact # 47]. As to the social work assessment, even though the student continued to have difficulties with loud outbursts and hitting other students, the teacher reported that he was doing better. During [REDACTED] observation of the student, she observed that he did not seem to know how to process or problem solved to get the correct answers he had shown poor adaptive skills in kindergarten and she also noticed a slight drool. Her recommendations were a strong classroom structure, a desk charts remind the student of the classroom expectations and an incentive program to provide clear direction and rewards for appropriate behaviors. She also determined that he was eligible for social work services on a consultative basis for 15 minutes per month area [See Findings Of Fact # 50]. Based upon her assessment, she did not believe that the student had

any significant social or emotional difficulties and appeared to be fitting in and attempted to cooperate even though this assessment conflicted with what the teacher had told her as to the students continued difficulties with loud outbursts and hitting other students [See Findings Of Fact # 49 & 51].

It was not until September 15, 2009 that the IEP team met to discuss the student. Even though the discussion included reports that the student required extra time on task especially were a written reply was necessary. The records from ██████████ indicated low average cognitive functioning with his nonverbal reasoning stronger than his verbal reasoning and with difficulties and expressive language. The team felt that the student would benefit from an IEP to address his issues of attention and speech. The way to accomplish this was through classroom accommodations as well as speech and language therapy. The team did not feel that they had identified any disability and therefore the student was not eligible for special education and related services. Rather a 504 plan was suggested [See Findings Of Fact # 54]. The parent, not being conversant with the terminology being used and the reference to a "504 plan", thought that this was part of an IEP. However at no time was the parent ever presented with a 504 plan [See Findings Of Fact # 60]. The reason for the failure of the presentation of a 504 plan is contested each party claiming that the other party would not cooperate [See Findings Of Fact # 58 & 60].

Ultimately, the IEP team met again for a determination of eligibility in April, 2010 and within a week and a half of the due process hearing. The change referenced for this IEP eligibility determination was based on teacher reports of this didn't 30 weeks of failure in reading and math [See Findings Of Fact # 65]. However, as conceded, the IEP team used the same reports as were available at the September 15, 2009 eligibility meeting and the only new data brought to the table was the teacher reports [See Findings Of Fact # 65 & 66]. There was even testimony that the eligibility determination meeting at this point in time was as a result of the imminent due process hearing.

Rowley, supra at 206, indicates that any substantial denial of procedural safeguards that resulted or impact on the parents participation or the student's education which results in a loss of educational opportunity may be construed as a denial of faith. "Procedural violations can be held to deny a student a FAPE only if they (I) impede the child's right to a free appropriate public education; (II) significantly impede plaintiff's opportunity to participate in the decision making process regarding the provision of a free appropriate public education to plaintiff's child; or (III) cause a deprivation of educational benefits" *James and Lee Ann D v Board of Education of Aptakisic-Tripp Community Consolidated SD # 102*, 52 IDELR 281, 109 LRP 45050 and 20 U.S.C. 1415 (f)(3)(E)(ii).

Here, the district has a procedural obligation under its child find obligations as well as under FAPE when presented with the possibility of a disability to make an eligibility determination. In the instant case, at least since January 12, 2008, the district has been or should have been on notice that the student was a student with a potential disability. As noted above, there were significant markers both from correspondence from the parent's legal counsel as well as from a medical and educational perspective to suggest that the student should be evaluated for a disability. These include the numerous letters that were sent on the student's behalf by his physicians and attorneys his behavior in the classroom, his ruling, his inability to articulate correctly and his academic deficiencies all of which should have triggered the school district obligation to evaluate the student.

In *Forest Grove School District v. T. A.*, 557 U.S. ---- (2009), in a similar fact pattern as here, the student suffered from ADHD and was determined not eligible for special education services based upon the school psychologist evaluation as his ADHD did not substantially impact on his school experience. As such, no IEP was established for the student and the parents chose to place him privately. Although that case was determined on a reimbursement issue, the Supreme Court noted that "a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP". Similarly here, the school district did not create a complete IEP for this student and did not even contemplate one until a week and one half before the due process hearing. Here, the student's behaviors under his ADHD sufficiently impacted his educational opportunities and also impacted the educational opportunities of other students, i.e., hitting other students, hitting the teacher, running around the room, knocking over file cabinets etc.. All of these had a negative effect in the classroom.

Whether or not the school's mandated School Based Problem Solving would have been sufficient to meet this obligation depends upon the outcomes. Certainly, if the School Based Problem Solving team had attempted to devise interventions as suggested within a short period of the initial meeting and then assessed whether or not those interventions were successful within the 3 to 6 week time frame suggested, that might have met with at least a threshold that the district was doing something to determine a disability. Here, though, even though the School Based Problem Solving team met, [See Findings Of Fact #9 & 18], whatever interventions were designed and implemented were insufficient to change the student's behavior and insufficient to meet his academic needs even in kindergarten. This should have suggested to the School Based Problem Solving team that their interventions were not assisting the student and should have put them on further notice that something more needed to be done. However, it did not. In fact, there were two School Based Problem Solving opportunities for the district to identify correctly the student's disability. In both instances, they failed. And in failing, the student went from January 2008 up to and through April 2010 without any substantial determination as to his disability and/or disabilities and no plan in place to deal with these disabilities. This was a substantial loss of educational opportunity for this student.

In addition, the mother has also referenced that at least on one, if not more, occasions, she was not given appropriate and/or sufficient notification of meetings etc. However, courts have noted that not all procedural errors, including the failure to give notice, result in a denial of FAPE. So long as this is failure to give appropriate notice does not deny the parents an opportunity to meaningfully participate in the student's education and that the student has not suffered any loss of educational opportunity as a result, this violation can be construed as to *de minimis*. See, e.g., *Tennessee Dept of Mental Health & Mental Retardation v. Paul B.*, 24 IDELR 452 (6th Cir., 1996). In the instant case, although the parent did not receive the appropriate notice relative to the meeting for their proposed 504 plan, as the parent was constantly at school and involved in her son's education, this violation here also can be considered *de minimis*.

Based upon the procedural violations documented above (other than the notice issue), hearing officer determines that the school district committed a procedural violation and holds in the parents favor.

C. Whether, based upon available records, the School District failed to provide an appropriate and comprehensive evaluation of the student which precluded the school district from developing an appropriate IEP?

The responsibility to conduct evaluation is set forth in the IDEA at 34 C.F.R. Sections 300.301 (a) and 300.303 (a) and implemented in Illinois at 23 Illinois Administrative Code, Section 226.110 evaluation procedures. Under the IDEA, a school district is required to assess a student in all areas of suspected disability. The district "shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program..." 20 U.S.C. 1414 (b) (2) (A). Further, the local educational agency shall (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" 20 U.S.C. 1414 (b) (2) (B). To this end, a district must ensure that it completes a full and individualized evaluation. *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 36 IDELR 153 (N.D. IL 2002). The failure to fully evaluate a student potentially leads to an incomplete and inadequate development of a program for the student. *Bd. of Ed. Of Oak Park & River Forest HSD No. 200 v. Kelly E.*, 21 F. Supp. 2d 862, at 862 (N. D., IL, 1998). In order to meet the second prong of the *Rowley* standard, an IEP must respond to all significant facets of the student's disability, both academic and behavioral.

"An IEP that fails to address disability related actions of violence and disruption in the classroom is not 'reasonably calculated to enable the child to receive educational benefits'. Nor does it address an important aspect of the student's disability. It also does not reflect the IEP team's consideration of whether the students 'behavior impedes his or her learning or that of the others' in the classroom." 20 U.S.C. Section 1414 (d) (3)(B)(i).

Without re-stating much of the testimony and/or documentation referenced above in section 6 B, the parents have presented to the school district various requests for evaluation and reports relative to the students functioning. These include (a) [REDACTED] [See Findings Of Fact # 27, 39 and 46], (b) [REDACTED] concerns as to the student functioning and disabilities [See Findings Of Fact # 7], (c) the [REDACTED] discharge summary and associated records [See Findings Of Fact #30, 31 and 32] and (d) the neuropsychological consultation report [See Findings Of Fact #40]. In addition, the school was aware through its own assessments and reports from preschool as well as kindergarten that a need for certain evaluations to include, at a minimum a speech and language evaluation and a psychological evaluation were necessary [See Findings Of Fact # 12 & 18].

As early as January, 2008, evaluations in the area of speech/language, occupational therapy, full cognitive testing and complete academic testing were requested for the student. [See Findings Of Fact #7]. Yet, after all of above, the school district completed only two significant assessments, a social worker assessment [See Findings Of Fact #50] and a psychological assessment [See Findings Of Fact # 47 – both in August, 2009]. Even though the district had been advised from a multitude of sources that the student had speech/language difficulties, no assessment was ever completed in this area. Additionally, the assessments and the observations performed by the Chicago public school evaluators and teachers all noted weakness in reading, especially as to the student's expressive language. And yet no reading evaluation was suggested or recommended. Neither was a speech/language evaluation recommended much less completed.

In addition, the student's emotional and behavioral problems are well documented throughout his school records from the earliest days of kindergarten forward and yet no functional behavioral assessment or behavioral intervention plan was ever adopted for the student. As to a functional behavioral assessment and behavioral intervention plan, the court in *Alex R., v Forrestville Valley Com. Unit Sch. Dist. # 221*, 41 IDELR 146, 104 LRP 33610, noted that

“a behavioral intervention plan could be warranted occurs when the disabled student exhibits behaviors that impede the learning of himself or others. Although it does not use the term “behavioral intervention plan”, 20 U.S.C. 1414 (d)(3)(B)(i) requires a school districts IEP team, “in the case of a child whose behaviors impedes his or her learning or that of others, [to] consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.”

As in the *Alex R.* case, the student's behaviors herein began to impede his education in kindergarten and, at that point, the school district was obliged to consider whether to implement a behavioral intervention plan, a consideration that this School Based Problem Solving team and/or IEP team did not consider. It is clear from the reports, teacher testimony, and the parent report that the student's behaviors in the classroom not only impeded his own education but also impeded the education of others. As noted above, behavior such as hitting other students, punching the teacher, knocking over file cabinets, book shelves, running around the classroom and running out of the classroom are all behaviors that both impede the student's own learning as well as that of his peers.

The school district has not provided the student a full and individualized evaluation. Significant evaluations in speech and language, occupational therapy as well as reading have not been done. Those that were done, especially the social worker assessment, seemed to minimize the teacher reports in favor of the social worker's observation. Given the student deficits as noted by his physicians and other experts as well as the school district's own anecdotal notes, records and assessments, these evaluations/assessments, at a minimum, are necessary in order to provide a full and individualized education plan for the student. To the extent that the district has failed to appropriately identify and administer evaluations to determine all of the student's disabilities, they are in violation of the second prong of the *Rowley* standard.

During the hearing, the parent's attorney addresses several of the [REDACTED] personnel relative to the eligibility form that was used in both the September 15, 2009 and April 13, 2010 eligibility meetings. The form used by the IEP team in both cases was for a Learning Disability and not Other Health Impaired. While hearing officer acknowledges the difference between the two, as the courts have long pointed out, the label that is placed on the student is not the thrust of the IDEA. As the court in *Heather S. v. State of Wisconsin*, 26 IDELR 870, 26 LRP 4349, stated, “the IDEA concerns itself not with labels but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child. *Rowley*, 458 U. S. At 181; *Board of Education of Murphysboro Community Unit Sch. Dist. Number 186 2. Illinois State Board of Education*, 41 F 3 1162(7th Cir, 1994) ... the IDEA charges the school with developing an appropriate education, not coming up with a proper label with which to describe [the student's] multiple disabilities. Likewise here, although the school district utilized forms for determining a learning disability in their determination of

eligibility, they ultimately arrived at eligibility under Other Health Impaired. Under the criteria as noted above for Other Health Impairment, this is an appropriate "label" for a student with a diagnosis of ADHD. However, in addition to this impairment and/or eligibility, the student may well have one or more other "labels" including speech language impairment and learning disability. This is what further evaluations will need to determine. Given the limited evaluations performed by the [REDACTED] at [REDACTED] the IEP team has insufficient information with which to prepare an IEP.

Based upon the failure to appropriately evaluate the Student, Hearing Officer determines that the school district failed to provide an appropriate and comprehensive evaluation of the student which precluded the school district from developing an appropriate IEP

D. Whether the School District failed to identify the Student's needs and design an IEP that appropriately and adequately addressed the Student's educational, emotional and social needs?

[Introductory Note: To the extent that the school district undertook to write an IEP on April 13, 2010 which was not completed at that time and remained incomplete at the time of the due process hearing as well as a fact that the parents submitted a report from Lisa Hannum which was completed only a short time prior to the due process hearing and neither party had the opportunity to review and evaluate these documents in detail, the hearing officer has assigned little weight to either of these. This does not mean that no weight was assigned to either though]

Based upon the determination as noted above at Sections B and C, certain evaluations are still needed to make a determination as to the student's disabilities. Without a full and individualized evaluation, the IEP team was unable to adequately address the student's educational emotional and social needs and was unable to write an appropriate IEP. In fact, as of the time of the hearing, there still was no completed IEP. The only document prepared was labeled as a "draft" IEP.

As the *Alex R.*, *supra*, case further notes,

"under the IDEA., local educators enjoyed latitude in developing the IEP most appropriate for disabled student and may apply their professional judgment. *Hartmann v Loudoun County Bd. of Educ.*, 118 F. 3d 999, 1001 (4th Cir., 1997). An IEP passes muster provided that it is "reasonably calculated to enable the child to receive educational benefits" or, in other words that it is "likely to produce progress, not regression or trivial educational advancement." *Cypress-Fairbanks Indep. Sch. Dist. V. Michael F.*, 118 F. 3d 245, 248 ... the reasonable degree of reasonable, likely progress varies, depending upon the student's ability ... objective factors, such as regular advancement from grade to grade, and achievement of passing grades, usually show satisfactory progress *Walczak v Florida Union Free Sch. Dist.*, 142 F3d 119, 130 (2d Cir., 1998).

In the instant case, until April 13, 2010, or 1 1/2 weeks before the due process hearing, the student still did not have any IEP and at the time of the due process hearing had only a draft IEP. However, in reviewing that IEP (incomplete as it is), and based upon the lack of evaluations, that draft IEP is not reasonably calculated to lead to educational progress or educational benefit to the

student. That IEP is directed minimally to his reading deficits. However, these strategies and goals for the student will most likely not provide him significant educational benefit. Although the school district was provided the reading report of [REDACTED] at approximately the same time that it was developing its IEP, the modifications and accommodations and teaching strategies for reading do not encompass the concerns that [REDACTED] related nor do they address, in large part, his deficits as set out in her report [See PD 330 – 343]. In fairness to the school district, they did not have [REDACTED] report at the time that the draft IEP was authored.

To compensate for the period of time from which the student should have had an IEP to the present, the parent asked that the student be provided with compensatory education to assist in making up for the deficits that he has experienced. To this end, the parent is seeking 120 minutes of speech per week by an independent speech therapist, 60 minutes of therapy per week by an outside social worker, 300 minutes per week for an independent tutor.

As to Compensatory Education, although not specifically provided for in IDEA, the IDEA does “authorize the court to ‘grant such relief as the court determines is appropriate’”. *Bd of Educ. Of Oak Park & River Forest High Sch. Dist. 200 v Todd A.*, 79 F. 3d 654, 656 (7th Cir., 1996). Accordingly, our “Seventh Circuit has recognized that courts have discretionary authority to grant compensatory education as a remedy for past violations” *Petrina W. v City of Chicago Public Sch. Dist. 299*, 2009 Lexis 116223 (Dist. Ct, 2009). In fashioning such a remedy as compensatory education, the 7th Circuit has seemingly embraced the D.C. Circuit Court of Appeals “qualitative approach”. This approach looks to a fact – specific determination of an amount “reasonably calculated to provide educational benefits that likely would have accrued from special education services the school district should have supplied in the first place”. *Reid v Dist. Of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005).

Based upon the record established at the Due Process Hearing, the Student should have been evaluated for and received speech language services to deal with his observed deficit as noted by most of the experts and teachers. These services should have been provided no later than September 5, 2008 to deal with this deficit. The 3rd Circuit approach, *Mary T. v School Dist. of Philadelphia*, 575 F. 3d 235, 248 (3rd Cir. 2009), under the duration test, would allow speech and language compensatory education for a period of 18 months. However, under the approach as suggested by *Petrina, supra*, this would not avail the student of an amount reasonably calculated to provide educational benefit. Because of his speech-language deficits, the student will need intensive remedial work to allow him to become a more expressive speaker and will need intensive remedial work to deal with his language deficits. In addition to his regular school, an award of 120 minutes per week for one year for speech and language as suggested would be an intensive amount to allow the student to receive education benefit and attempt to place him to a point where he should have been by the beginning of 1st Grade. Thereafter, a less intensive award of 60 minutes per week for one year for speech and language in addition to his regular academic program should allow the student to receive an educational benefit and to be at a level that he should be at that point in time. Because the Student has now been identified as ADHD and is on a medication regime for its treatment which is providing improved classroom demeanor, an award of therapy is not as critical as it was previously. However, to the extent that the Student is still experiencing behavioral issues in the classroom and in conjunction with his medication, an award of 30 minutes per week for one year for social work should allow the student the opportunity to deal with these issues and conform his behavior to that appropriate for the classroom setting. To the extent that the speech – language compensatory education will assist the Student in

reaching his age potential and improve his academic abilities, no award for tutoring services is necessary as math and the other academic areas did not show a severe deficit.

Without the appropriate evaluations, the school district's proposed/draft IEP is inadequate to provide reasonable educational benefit to the student as to all of his disabilities. As the student still did not have an IEP at the time of the hearing, the school district failed to identify the Student's needs and design an IEP that appropriately and adequately addressed the Student's educational, emotional and social needs. Hearing Officer holds in favor of the parent as to this issue. An award of Compensatory Education is appropriate.

E. Whether the School District failed to provide an appropriate placement with sufficient therapeutic, academic and behavioral supports to make appropriate progress from 2007* to the present.

[*Although the parent phrased the issue in this time frame, the appropriate time frame is from January 12, 2008 and not 2007]

The parents have requested placement in a private therapeutic day school such as the [REDACTED]. However, in this case, this "puts the horse before the cart". Most of the expert witnesses who testified on behalf of the parent and student suggested that supports and accommodations/modifications for the student would be appropriate to address his deficits. Other than [REDACTED] no other parent expert or medical expert, suggested that a private therapeutic day school was an appropriate placement.

Without sufficient evaluations, the school district is unable to formulate an appropriate IEP along a continuum of appropriate placements for the student. However, having said that, the school district based upon its own internal assessments, believes that the current placement - that being the general education population with some minimal supports (said supports being less than 20% of his time) is the appropriate placement for the student.

The school district believes that the least restrictive environment for the student is the general education population in which he is currently failing. Even though there have been some minimal supports and interventions crafted for the student from the school based problem solving team, the student's education continues to suffer as shown by his grade report reflecting "F's" through the first three quarters of 2009 -- 2010 school year in reading.

Hearing officer acknowledges that the IDEA obligates the school district to educate the student in the least restrictive environment (LRE). Under 34 C.F.R. Section 300.550 (b) (2), a child may only be removed from a regular classroom if the nature of severity of the disability is such that education in a regular class with the use of supplementary aids and services cannot be achieved satisfactorily. Our Seventh Circuit has not yet adopted a specific test for determination of LRE because, as noted in the *Beth B* case, *Beth B. v Van Clay*, 282 F. 3d 493 at 499, the IDEA provides enough of a framework. That case contemplates that to the maximum extent possible, a student must be mainstreamed. However, it does not restrict a school district where appropriate from providing other alternatives for a student on a continuum of services to include pull out services, separate special education classes with inclusion during part of the day, special education classes without inclusion, private therapeutic day schools and residential placement.

Here, the parents argue for a private therapeutic day school - a more restrictive environment than envisioned by the school district. The school district argues for the general education population. Neither one is based upon a full and individualized evaluation of the student.

What is obvious is that the Student is not progressing in the general education setting. His grades reflect this. His behavior reflects this, even with medication. As such, the general education setting to which the Student is currently assigned will not serve him well. Based solely on the record in this matter, the general education classroom where the Student is currently assigned is not the appropriate setting for him. Although the Student has significant issues and deficits, what is also clear is that a private therapeutic day school is not the Student's least restrictive environment. Although it may be an optimal environment per [REDACTED] or, put another way, the best environment for the Student, IDEA does not mandate that. *Rowley*, supra. What IDEA mandates as interpreted by *Rowley* is that the school district provide a "basic floor of opportunity" in the form of specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. *Supra* at 201. The purpose is to "open the door of the public education...", not to educate a child to her highest potential. *Murphy'sboro*, *Supra* at 116. The IDEA maintains a strong preference in favor of educating the student in the less restrictive environments (see above).

As noted in the various reports, the Student will need a structured environment. In conjunction with the LRE analysis above, the Student would be better served in a self-contained classroom with supports and inclusion in the general education population for a portion of the day so as to be involved with his non-disabled peers. Only if this does not provide benefit to the Student should a private therapeutic day school be considered as an option.

The School District failed to provide an appropriate placement with sufficient therapeutic, academic and behavioral supports to make appropriate progress from January 12, 2008 to the present. This issue is found, in part in favor of the School District, and, in part, in favor of the Parent. A private therapeutic day school is not warranted at this time.

ORDER

1. The School District is Ordered to provide and pay for Independent Educational Evaluations in the areas of Speech/Language and Occupational Therapy. The School District is Ordered to provide a Central Auditory Processing evaluation conducted by [REDACTED]. These evaluations to be completed within 60 days of this Order.

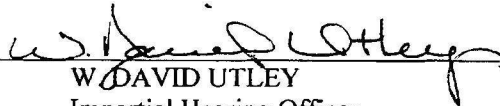
2. The School District does not have to implement the IEP from [REDACTED].

3. The School District has found the Student eligible under Other Health Impairment. Therefore, to an extent, this issue is moot. However, upon completion of the Evaluations noted in 1 above, the School District is to schedule an IEP meeting within 30 days to consider the findings and conclusions of the Independent Educational Evaluations and to determine if the Student qualifies under any other areas.

4. Upon completion of the Evaluations noted in 1 above, the School District is to schedule an IEP meeting within 30 days to consider and implement the findings and conclusions of the

Independent Educational Evaluations and to provide necessary behavioral and educational supports consistent with those Evaluations.

5. Upon completion of the Evaluations noted in 1 above, the School District is to schedule an IEP meeting within 30 days to determine placement in accordance with this Decision.
6. An award of compensatory education as follows:
 - a) In addition to his regular school education, an award of 120 minutes per week for one year for speech and language commencing within 30 days of the Speech/Language Evaluation. Thereafter, an award of 60 minutes per week for one year for speech and language in addition to his regular academic program;
 - b) An award of 30 minutes per week for one year for social work;
 - c) No award for tutoring services.
7. District to provide proof of compliance with this Order to the Illinois Board of Education, Compliance Division, 100 N. First Street, Springfield, IL 62777-0001 within one hundred twenty (120) days or on or before September 5, 2010.


W. DAVID UTLEY
Impartial Hearing Officer

Dated this 8th day of May, 2010

Post Office Box 681487
Schaumburg, IL 60168
(847) 321-1044

FINALITY OF DECISION

This Decision and Order shall be binding upon all parties.

RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned Hearing Officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the party and to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777. **The right to request such a clarification does not permit a party to request reconsideration of the decision itself and the Hearing Officer is not authorized to entertain a request for reconsideration.**

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14.8.01 (I), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision was mailed to a party.

THE EFFECTIVE DATE OF THIS DECISION IS THE DATE OF RECEIPT OF ANY CLARIFICATION OF THIS DECISION. THE REQUEST SHALL OPERATE TO STAY IMPLEMENTATION OF THOSE PORTIONS OF THE DECISION FOR WHICH CLARIFICATION IS SOUGHT, PENDING ACTION ON THE REQUEST BY THE HEARING OFFICER, UNLESS THE PARTIES OTHERWISE AGREE. (105 ILCS 5/14-8.02)


W. DAVID UTLEY
Impartial Hearing Officer

Dated this 8th day of May, 2010

Post Office Box 681487
Schaumburg, IL 60168
(847) 321-1044

CERTIFICATE AND AFFIDAVIT OF DELIVERY BY MAIL

Under penalties as provided by law, pursuant to 735 ILCS 5/1-109, the undersigned certifies that he/she served the foregoing document by mailing a copy certified to the above named attorney(s) at the address(es) indicated above and to the Illinois State Board of Education, 100 N. First Street, Springfield, IL 62777-0001 by depositing the same in the U.S. Mail at the United States Postal facility at Schaumburg, IL on May 8, 2010.

[REDACTED]

Illinois State Board of Education
[REDACTED]
Office of the Due Process Coordinator
100 N. First Street
Springfield, IL 62777-0001

Via First Class Mail – Certified Only



W. DAVID UTLEY
Impartial Hearing Officer

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