


ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

RECEIVED

DEC 22 2015

SPECIAL EDUCATION
SERVICES


Student

Case No. 2015-0498

v.

Marcia K. Johnson
Impartial Hearing Officer


School District

FINAL DETERMINATION AND ORDER

JURISDICTION

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

PROCEDURAL HISTORY

1. 3 June 2015 - Parents file Request For IEE
2. 8 June 2015 - District files Due Process Complaint
3. 8 June 2015 - Parents file Due Process Complaint
4. 9 June 2015 - IHO appointed
5. 11 June 2015 - Parents file Response to District's Due Process Complaint
6. 12 June 2015 - Initial Documents Sent to Parties
7. 18 June 2015 - District files Response to Parents' Due process Complaint
8. 25 June 2015 - 1st Status date- District to provide Parents minutes of 16 June 2015 resolution meeting; set new status date 8 July 2015
9. 8 July 27 July - to set prehearing date

10. 7 July 2015, the Parents filed *Parent's Motion for Interim Order Compelling District to Schedule Parent Observations of Proposed ESY Programs*.
11. 8 July 2015 - District response to Parents' motion due 20 July - *Parents Motion for Interim Order* taken under advisement
10. 20 July 2015 - The District filed a *Motion to Request an Order Denying Parents' Request for Observations*.
12. 20 July 2015 - The Parents filed a *Reply to District's Response to Parents' Motion for Interim Order Compelling District to Schedule Parent Observations of Proposed ESY Programs*.
13. 20 July 2015 - Joint Motion For Continuance
14. 22 July 2015- Order Granting Continuance to 8 September 2015
15. 27 July 2015 - Order - Prehearing Conference set for 5 Oct 2015. The Parties will each file a report by 7 August 2015 advising the IHO exactly what is taking place with the child presently; what testing, evaluations, procedures, etc.; the estimated amount of time needed for those activities, and what is planned specifically at the present time for the child's school placement in the Fall.
16. 11 August 2015 - Order Granting Parents' Motion, Denying District's Motion
17. 17 August 2015 - Order Granting Continuance to 16 Nov 2015.
18. 24,25 Aug 2015 - Orders changing hearing dates
19. 30 September 2015 - Notice of Prehearing/Subjects To Be Discussed served on Parties
20. 4 October 2015 - Order Clarifying Dates
21. 5 October 2015 - Order Rescheduling Prehearing to 9 October 2015
22. 27 October 2015 - Prehearing Order and Report filed
23. 27 October 2015 - Revised Prehearing Order and Report filed
24. 29 October 2015 - Order Changing Hearing Dates
25. 2, 3, 4, 5, 16, 23 November 2015, and 9 December 2015 - Hearing
26. 10 December 2015 - Order Granting Fourth Continuance

27. This matter was continued three times.

The prehearing conference was held 9 October 2015 by phone. The attorney for the Parents, the attorney for the District, and the IHO participated.

28. A closed Hearing was held on 2, 3, 4, 5, 16, 23 November and 9 December 2015. In attendance at the hearing were the parents, Mr. And Ms. [REDACTED]; their attorney, [REDACTED]; attorneys for the District, [REDACTED] and [REDACTED]; the undersigned; and the court reporter.
29. The Parties offered and cross examined 26 witnesses during the hearing .These witnesses were examined and cross-examined as was appropriate. The Parties' witness lists were identical and are part of the record.
30. The attorneys for the parties did not object to the admission of each other's documents and agreed that the witnesses testifying as experts were experts and did not have to be qualified on the record.
31. The following was entered into evidence:
- All documents contained in HO Exhibits A (District's Documents), B, and B1 (Parents Exhibits).
The Parties did not file joint documents or joint witness lists although the witness lists are identical. Further, most documents offered by both Parties separately are identical.
32. The matter was continued on the joint motion of the Parties to allow time for outlines of closing arguments . The record was closed upon the filing of the Closing outlines, 11 December 2015 at 6:00 p.m., the Decision Due date is 21 December 2015 at 6:00 p.m., and the period for requesting clarification closes 28 December 2015.

ISSUES

The issues to be determined are as follows:

DISTRICT ISSUES

- A. Were the District's evaluations of the child that were conducted during the statute of limitations period appropriate, and, if not, was the Parents' IEE appropriate?
- B. If the District's evaluations were not appropriate, are the Parents entitled to reimbursement for IEEs conducted in the areas of speech, AT, psychological, CAPD, Reading/Wilson?

Relief Requested:

1. The District requests that the Parents' request for relief be denied and that the Hearing Officer find that at all relevant times, the District provided [REDACTED] with a Free Appropriate Public Education in the least restrictive environment.
 - a. That the School District's request for relief be granted;
 - b. That the Parents' request for relief be denied; and
 - c. For any other relief that the Impartial Hearing Officer deems fair, equitable and just.

PARENTS' ISSUES

- a. Are there specific deficiencies in the child's IEP caused by the failure of the District to provide specific educational records to the Parents, thereby impeding the Parents' right to fully participate in the IEP process?
- b. Are there specific deficiencies in the child's IEP caused by the District's failure to provide an appropriate evaluation of the child?
- c. Did the District deny the child a FAPE by failing to develop an appropriate IEP for the child?
- d. Did the District make a FAPE available to the child in a timely manner; is the District's present placement for the child appropriate?
- e. Is placement at [REDACTED] an appropriate placement for the child, and, if so, are the Parents entitled to reimbursement at public expense for tuition and related costs?

{The Parents, in their closing outline, withdraw issue "f" and the relief requested pertaining to it, so this issue will not be addressed.

f. *Did the District impede the Parents' ability to fully prepare and prosecute their case during the Due Process Hearing by failing to provide educational records properly requested by the Parents?*

ff. *Specifically, the Parents contend: (i) That in spite of valid, continuing, and numerous requests, the District has failed to provide all of the educational documents requested by the Parents, which documents are necessary for the Parents to prove their complaints. The missing documents are listed on page 5 of Parents' And Student Amended Pre-Hearing Statement.}*

Relief Requested:

1. Parents request a finding that:
 - {a. *There are specific deficiencies in the child's IEP caused by the failure of the District to provide specific educational records to the Parents, thereby impeding the Parents' right to fully participate in the IEP process;}*
 - b. There are specific deficiencies in the child's IEP caused by the District's failure to provide an appropriate evaluation of the child;
 - c. That the District denied the child a FAPE by failing to develop an appropriate IEP for the child;
 - d. That the District did not make a FAPE available to the child in a timely manner; that the District's present placement for the child is not appropriate; and;
 - e. That placement at [REDACTED] is the appropriate placement for the child, and therefore;
 - f. That the Parents are entitled to reimbursement at public expense for tuition and related costs;
 - {g. *That the District impeded the Parents' ability to fully prepare and prosecute their case during the Due Process Hearing by failing to provide educational records properly requested by the Parents},*

and, therefore, for an Order:

- {2. Requiring the District to immediately produce all school records relating to the child.}
3. Requiring the District to reimburse the Parents (or providers of IEEs) for IEEs obtained by the parents including, but not limited to:

 - a. Speech/AT (school based) evaluation completed by a professional chosen by the Parents. \$1,800.00. The District has the report and the invoice.
 - b. Psychological (school based) evaluation by a professional chosen by the Parents: \$7,187.50 - discounted. The District has the report and the invoice.
 - c. CAPD (school based) evaluation by a professional chosen by the Parents: \$650.00. The District has had the report and the invoice since 6 September 2015.
 - d. Academic/multisensory program/reading/Wilson (school based) evaluation by a professional chosen by the Parents: \$1,400.00 The District has the report and the invoice.
 - e. Funding whatever other services are recommended by the IEE professionals and found to be appropriate at hearing
4. Requiring the District to place the child at [REDACTED] within 10 days of the order or, in the alternative, requiring the District to reimburse Parents' tuition and related costs, including all transportation costs --including tolls -- at the IRS rate for 4 trips daily, should the Parents unilaterally place the child at [REDACTED]
5. Requiring the District to convene an eligibility/IEP meeting at [REDACTED] within 30 days of the child's placement, to develop an IEP consistent with the IEEs obtained by the Parents.
6. Requiring the District to pay for – or reimburse parents for – the Parents' IEE providers to participate in the IEP meeting.
7. Requiring the District to provide compensatory education services as recommended by the IEE professionals and found to be appropriate at hearing, including the following:

- a. 200 hours of compensatory services found to be appropriate at hearing, to be scheduled with [REDACTED] staff. To that end;:
- b. District shall contract with [REDACTED] to arrange for, and fund, all compensatory services to be provided by [REDACTED] staff;
- c. District shall provide appropriate transportation for all compensatory services including late bus service as required;
- d. District shall list all compensatory services in the IEP as after-school services until the completion of the compensatory services.
- e. District shall insure that compensatory services are provided on a continuous basis until completion and will not be interrupted in any way by the District;
- f. Parents and [REDACTED] staff shall determine how to allocate the 200 hours of compensatory services. Or, if [REDACTED] is not available to provide the compensatory services;
- g. Parents shall choose professionals to provide the compensatory services (Wilson) and the District will either provide transportation to the compensatory services or reimburse the parents at the current IRS rate, for 2 trips only;
- h. District shall pay the providers/vendors directly and timely for their services. The District will arrange for vendors where necessary;
- i. The District shall provide the compensatory services without interruption until the District's obligation to provide compensatory services ceases. Should compensatory services be interrupted, the amount of time of the interruption shall be added to the original period;
- j. The District shall provide 50 hours of compensatory direct speech and language services provided by a speech pathologist trained to administer the FastForward program;

8. Providing whatever additional relief the Hearing Officer deems to be appropriate after hearing to provide the Student with FAPE, including with specificity, the educational and related services to be provided to the child by the District, and the date and time by which the school district is to submit evidence to the ISBE demonstrating compliance with the hearing officer's decision. 105 ILCS 5/14-8.02a(h).

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this IHO's findings of fact are as follows:

The child is 14 years old, is in 9th grade, and has been a student in the District since kindergarten.

In addition to recent District and IEE psychological evaluations, the child has participated in District Speech/Language, Social Work, and Reading assessments, and IEE Speech/Language/AT and CAP evaluations.

The child is not making educational progress.

Since the child was in 1st grade, he has been evaluated three times: initially, in 3rd grade, again in 6th grade, and finally at the end of his 8th grade year. The child is of average to high average intelligence.

During the statute of limitations period, 3 June 2013 to the present, the District conducted only the special evaluation. The special evaluation was requested by the parents and completed primarily in May, 2015, just prior to the child's transition to 9th grade. That evaluation consisted of Social Work, Psychological, Speech, AT, and Multi-Sensory Reading assessments conducted by the District's experts. Other reading assessments (WADE and WIST, standardized reading tests) were conducted by the child's teachers. The parents had requested a cognitive evaluation, but no cognitive evaluation was conducted as the District deemed it unnecessary.

All of the evaluators from both sides testified to the comprehensiveness of their assessments; the validity of scoring and scoring results; their use of teacher input; observations; interviews of the child; and other assessment measures to get a view of the child's functioning in the educational environment. They all agreed that the child reads at the primer level and writes at the late 1st grade to early 3rd grade level.

The Parents assert that, during the statute of limitations period, and that no evaluation conducted by the District nor IEP developed for the child as a result of those evaluations was appropriate; thus, the child was denied a FAPE.

Since second grade, the child has had a history of difficulty with reading and writing . He was identified in 1st grade as having speech and language problems, particularly with articulation. Later, he had difficulty with decoding, fluency, spelling, phonics, and writing – he reversed letters, among other problems. He had trouble focusing, was easily distracted, and got frustrated when he couldn't complete an assignment. No trouble with math and listening comprehension was noted at the time, although he had low math computation scores on standardized tests

During 1st grade, the child, who, as an infant and toddler had a history of ear infections and had had pressure equalization tubes placed when he was in kindergarten, received a speech language evaluation on 30 January 2008. He was found eligible for direct speech services to address articulation deficits. In 2009, however -- after a speech, language evaluation -- the child was dismissed from speech/language therapy.

In 2009, due to concerns regarding the child's academic skills in reading (phonics, decoding, and fluency), writing and low math computation skills, the child was referred for an initial psychological evaluation. The child was then in 3rd grade. The child underwent an initial psychological evaluation in January, 2010; the report regarding that evaluation is dated 21 January 2010. (PD-574)

As part of the initial psychological evaluation, the Wechsler Intelligence Scale for Children - Fourth Edition, (WISC-IV), and the Kaufman Tests of Educational Achievement - Second Edition, (K-TEA), were administered. The child was making minimal or no progress in his reading or writing skills, but made average scores in verbal comprehension and expression abilities. The child's scores on a test of verbal concept formation (Similarities subtest) were in the low average range. In her January 2010 report, the school psychologist recognized that the child had a processing deficit with regard to "the ability to verbalize item commonalities." which references the Similarities subtest.

The child's WISC-IV scores on that initial psychological evaluation show the child having overall average intellectual abilities, scoring in the 42nd percentile. The child scored in the 12th percentile in math computation, the 3rd percentile in written expression, the 6th percentile in reading decoding, and the 2nd percentile in reading comprehension. The child was found eligible for special education services under the category of Specific Learning Disability. (PD-1011)

A District psychological re-evaluation was conducted 23 October 2014. At that time, the WISC-IV was administered. Again, the child's overall intellectual abilities were in the average range. The child's academic achievement skills were tested using the Brigance Assessment of Basic Skills. Only grade equivalents, not standard scores, were documented. His reading recognition was 2.1; his reading comprehension, 1.5; his vocabulary comprehension, 2.0; and math comprehension, 3.3. The child was in 6th grade.

The child's scores on tests administered in 2010 and 2012 showed that his language-based cognitive skills were not continuing to develop at the same rate as his same-aged peers; however, speech/language evaluation was not recommended to further determine language-related deficits in need of intervention, including, but not limited to, phonological processing skills. (PD- 574)

Neither reading fluency, nor spelling, nor written expression skills were formally assessed as part of the 23 October 2012 psychological evaluation. Assessments of these skills would be necessary to establish a baseline for the formation of appropriate goals and thus to the development of objectives targeting reading fluency, spelling, and written expression.

The District's psychological re-evaluation conducted 4 May 2015, (8th grade) did not include updated intellectual testing. The Wechsler Individual Achievement Test - Third Edition (WIAT-III) was administered, as were select subtests of the Comprehensive Test of Phonological Processing (CTOPP) - Elision, Blending Words, Rapid Digit Naming, and Rapid Letter Naming. The child ranked in the 1st percentile in basic reading; the 2nd percentile in word reading; the 2nd percentile in essay composition; the 2nd percentile in pseudoword decoding; the 8th percentile in spelling and the 3rd percentile in math problem solving.

The child underwent a central auditory processing evaluation with Dr. [REDACTED] on 21 August 2015; the report is dated 23 August 2015.

The child has adequate peripheral auditory function, as well as age appropriate binaural and temporal processing skills. However, the child has a Central Auditory Processing Disorder (CAPD), specifically, a deficit in auditory discrimination skills. That deficit was not

In her 4 May 2015 report, the District psychologist reported that the child "[w]as able to apply phonological word-attack and segmentation skills to read many unfamiliar words, typically compound and multi-syllabic words." (PD-188, Second Paragraph) Those comments are not supported by any current testing nor by the observations of the IEE neuropsychologist; the child's special education teachers; the child's general education teachers; the child's in-class special education co-teachers, the multisensory special education teacher who teaches reading through the Wilson method ; the school speech pathologist; the school audiologist; the IEE reading specialist; the IEE CAP assessment; or the parents. That the child can barely read was reported universally by the evaluators and the child's teachers.

No formal assessment of reading fluency was administered; yet the 4 May 2015 psychological report says the child's reading fluency is poor. A direct assessment of reading fluency would ascertain the extent of the child's reading fluency deficit in comparison to his peers, provide present levels of performance , and inform the development of IEP goals and objectives. (Dr. R at PD-1017, #3)

The Wilson Method is an intensive intervention program for students grades 2-12 and adults with dyslexia or other language-based learning disabilities. Although the child had been getting reading instruction with his 8th grade special education teacher using the Wilson method, the use of the Wilson method is not mentioned in the recommendations in the District's 4 May 2015 psychological report. The District's 23 March 2015 reading evaluation consisted of only two tests that did not indicate Wilson level; no assessment of student's Wilson level or the Wilson program implemented at [REDACTED] Elementary;

Although the child attends the Wilson classroom every day, the child does not get Wilson instruction every day. The amount of Wilson instruction the child is getting is not sufficient.

The child has a history of low scores relating to math calculation skills. The District's most recent assessment did not include an assessment of the child's math calculation skills. That portion of the WIAT-III, a standardized achievement test, was not administered. A direct assessment of math calculation skills would ascertain the extent of the child's math calculation skills deficit in comparison to his peers, provide present levels of performance, and inform the development of IEP goals and objectives.

The IEE neuropsychological report indicates it is concerning that the scoring of the WIAT-III Essay Composition subtest is questionable, as it was not scored in the customary manner; and, if the scores are not correct, that calls into question the validity of the test results. As a consequence, the IEP developed using such invalid scores is not appropriate. The test in question is generally scored by photocopying the student responses to the test protocols, and to use colored pens and markers to mark "Reasons Why," and "Elaborations in different colors, to circle transitions, and to mark correct and incorrect word sequences using different symbols. Notwithstanding the District's access at hearing to the IEE neuropsychologist's report; the neuropsychologist herself; the District's own psychologist and her report, no evidence that this procedure was or was not used was offered by the District. (PD-1011)

Although requested by the parents, updated intellectual testing was not conducted as part of the District's 2015 reevaluation. (PD-1011) There were weaknesses reported in prior intellectual testing. Updated intellectual testing could have shown if those same weaknesses were still present, and, if so, could have informed appropriate interventions to be implemented in the child's IEP.

Given the continuing language-related processing deficits identified by the school psychologist in her January, 2010 report, according to the IEE neuropsychologist suggests that more comprehensive speech/language testing should have been recommended. Prior testing showed that phonological processing was one of the child's deficits and contributed to the child's poor reading and spelling skills. Neither the school psychologist nor the school speech/language pathologist assessed the child's phonological processing skills. (PD-1011)

Phonological awareness is a skill that should have been and could have been addressed through speech/language therapy, had his needs in this area been identified in a timely manner. (PD-1011)

The CTOPP tests for Dyslexia. Dyslexia is a brain-based (i.e., neurobiological) learning disability that inhibits a person's ability to read. The child scored in the 16th percentile, the below level range on the Rapid Naming subtest. Children who score in the below level range on the Rapid Naming subtest commonly have problems with their reading fluency. An outdated form of the CTOPP was administered. The child is Dyslexic.

In her 4 May 2015 report, the District's psychologist did not recommend a central auditory processing evaluation to rule out Central Auditory Processing Disorder, a condition related to Dyslexia, and none had been conducted until that conducted by the IEE audiologist.

The recent – and the only school-conducted – assessment of phonological skills was made with an outdated version of the CTOPP (i.e., CTOPP and not CTOPP-2). An IEE speech/language evaluation, using TAPS-3, indicates that the child has deficits in phonological awareness skills that are in need of intervention. The child has a Central Auditory Processing Disorder and is Dyslexic. Although the CTOPP and The TAPS-3 indicated that the child had a deficit that interfered with his reading fluency. The IEP indicates that the deficit is being address by special education services; yet, there is no goal addressing reading fluency in the latest IEP or in any IEP developed for the child.

Neither reading fluency, nor spelling or written expression skills were formally assessed as part of the District's 23 October 2012 psychological evaluation. Assessments of these skills would be necessary to establish a baseline for the formation of appropriate goals and thus for the development of objectives targeting reading fluency, spelling, and written expression.

The report of the District's psychological re-evaluation dated 4 May 2015 shows that, having been administered the Wechsler Individual Achievement Test - Third Edition (WIAT-III), the child scored below average in essay composition, below average on reading comprehension and spelling, extremely low range on tests of word reading, and pseudoword decoding.

The school psychologist goes on to report that the child's reading fluency is poor, although no formal assessment of reading fluency was administered. Direct assessment of reading fluency "[s]hould have been conducted to ascertain the extent of the child's reading fluency deficit in comparison to his peers to provide present levels of performance to inform development of goals and objectives." (PD-1017)

The District psychologist did not complete the required IDEA classroom observation (34 CFR 300.310);

No OT evaluation was conducted during the District's 4 May 2015 evaluation. The child is reported to have low average processing speed; concerns regarding visual tracking abilities and other concerns were mentioned in the District's psychological evaluation reports. These concerns give rise to a suspicion of a disability. Such a screening would have been necessary to rule out fine motor and/or visual processing concerns as contributing to factors to the child's academic difficulties.

On 27 May 2014, the end of 7th grade, an initial AT technology evaluation was finally completed by district staff. The "Date of Referral" was 30 January 2014. Assistive Technology is required, and the Assistive Technology devices available to the child at school are: word prediction software with auditory discrimination; dedicated school iPad; reading pen; and Dragon, Read2Go, In2Words, and CoWrite apps.

The 21 October 2014 IEP indicates that assistive technology (AT) is required for the child to access the curriculum, but there is not recommendation for AT by a special education teacher or related services provider. The IEP states that an assistive technology evaluation has not been completed but that a referral was made on 10/30/2013 (the date of the IEP meeting). Per the IEP assistive technology devices that EC could utilize and are available at the school are: "access to computer" and "access to books online/on CD. Language Arts/English/Reading; the accommodations only list a scribe for "provide scribe for lengthy writing assignments.

Now at the beginning of 8th grade, on 10/21/2014, the district completed an annual review. Section 7 is essentially the same statements except for the addition of the Assistive Technology evaluation. The same is true of the proposed IEP for the 2015-2016 school year.

The fees and costs shown on the invoices of the IEE evaluators are not excessive.

[REDACTED] is an appropriate placement for the child.

The child is at risk for meeting the speaking and listening demands of a high school environment without intervention.

The child was never recommend for ESY. There is expert testimony indicating that he should have been early on.

The District's evaluations are not appropriate for the reasons set out below.

DISCUSSION

The standard of proof in impartial hearings under the IDEA is preponderance of the evidence. See 20 U.S.C. §145(i)(2)(C)(iii). Under this standard, the party seeking relief must establish that the fact sought to be proved is more probable than not.

The District asserts that each evaluation of the child conducted during the statute of limitations period was appropriate. This IHO disagrees.

“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 5/14-8.02a(g-55)(ii)

“If at issue, the school district shall present evidence that it has properly identified and evaluated the nature and severity of the student's suspected or identified disability....” 105 ILCS 5/14-8.02a(g-55)(ii)(5).

Elements making up an appropriate evaluation are found at 34 C.F.R. §§300.304300.306. The District is required to: (1) Use a variety of assessment tools to gather relevant functional, developmental, and academic information about the child including information from the parent that may assist in determining ...; (ii) The content of the child’s IEP ...; [A]nd must insure that ...; (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. C.F.R. §300.304(b)(1)(ii), (c)(7).

For a special education evaluation to be appropriate, it need only comply with the IDEA. The District cites *Great Valley School District*, 114 LRP 4927. (Great Valley). In *Great Valley*, the Hearing Officer found that the District’s evaluation was appropriate as it met each aspect required by the IDEA, that “The District's evaluation did what it was supposed to do: it assessed Student in all areas of suspected disability ... and it provided ample data upon which an appropriate IEP can be based.” That is not the case here.

Here, the District did not present sufficient evidence at hearing to show that it had met the elements required by C.F.R. §300.304(b)(1)(ii), (c)(7), in that the District, especially, failed to appropriately determine by its evaluations the nature and severity of the child’s disability and thus develop IEPs for the child that provided appropriate interventions and goals to address his disability.

Further, the District did not prove by a preponderance of the evidence that the special education needs of the child had 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.

The child is 14 years old, in his freshman year of high school, is described universally in the testimony of the witnesses at hearing who know him as a cooperative, very nice, very social, very hard-working, quiet child, who doesn't like attention drawn to him. This description of the child appears in every report in evidence relating to him.

It has been clear since the child was in the second grade that he struggled with academic skills in reading (phonics, decoding and fluency) and writing, and not correlating the sound with the correct letter. The child has not made any progress in spelling, and minimal progress in reading and writing.

It is telling that all of the testing of the child over the years has produced virtually the same results. It is not necessary to reiterate all of the test scores here. The child, from second grade to the most recent tests, scored in the following pattern:

Intelligence - average; cognitive process abilities - average; (3rd grade) (PD-574); average rate of mental growth, (6th grade); no concerns relating to general intelligence (8th grade), (PD-186);

Works below grade level (6th grade), (PD-578)

Processing deficits noted; (3rd grade), (PD-574), (6th grade), (PD-578)

Reading - below average, far behind his peers, significantly delayed, difficulty with decoding with comprehension; (3rd grade), (PD-574);

Reads and spells at second grade level, reading recognition, 2.1, reading comprehension, 1.5, vocabulary comprehension 2.0 (6th grade), (PD-578);

NWEA (2/20/2015), Rank, 1st percentile, Wechsler Individual Achievement Test - Third Edition

(WIAT-III), Reading Composite - Rank, 1st percentile, Word Reading - Rank, 1st percentile (Beginning 2nd grade level), Pseudoword decoding, Rank, 1st percentile; Spelling subtest, Rank, 2nd percentile, an area of concern, 1st to second grade level (8th grade), (PD-186)

Writing skills - significantly delayed, math computational skills - lower than peers; (3rd grade), (PD-574);

Limited by low spelling vocabulary (6th grade), (PD-578);

Essay Composition, subtest Word Count, Rank, 12th percentile (Below average); Theme Development and Text Organization, Rank, 12th percentile (below average) (8th grade), (PD-186);

Listening Comprehension - (3rd grade) (PD-574); verbal comprehension, low average (6th grade) (PD-578);

(WIAT-III) Rank 47 percentile (8th grade), (PD-186); (WISC-V) - 18th percentile (PD-1011);

Receptive Vocabulary - (WIAT-III) - 50th percentile (8th grade), (PD-186);

Expressive Vocabulary - (WIAT-III) Rank -58th percentile (8th grade), (PD-186);

Oral Discourse Comprehension - (WIAT-III) Rank - 37th percentile -(PD-1011);

Math Reasoning skills - strong. (3rd grade); Math Computation, 3.3 (6th grade);

NEWA (2/20/15) Rank, 53rd percentile (8th grade), (PD-186);

Math Problem Solving - (WIAT-III) - rank - 16th percentile (Average) (8th grade), (PD-186);

Fluid Reasoning - The Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V) - Rank - 88th percentile (high average), (PD-1011);

Visuospatial abilities - (WISC-V) - 50th percentile (average) (PD-1011);

Quantitative Reasoning - (WISC-V) - very superior range (PD-1011);

Psychomotor processing speed - (WISC-V) -50th percentile - average (PD-1011);

Working memory- (WISC-V) - 95th percentile - superior range (PD-1011);

(3rd grade District psychological report, PD-574)

(6th grade psychological report, PD-578)

(8th grade psychological report, PD-186)

(IEE Neuropsychological report, 17 October 2015, PD-1011)

This is a child with normal intellectual abilities who has not made any progress in reading, writing, or math calculation skills, in spite of what special education services were made available to him. It seems clear that when what is written and implemented in the IEP is not working, the District had, or should have had, a suspicion that the child had an undiscovered disability that the District, by law, was to identify and determine the severity of. (The threshold for "suspicion" of a disability is relatively low and the inquiry is not whether or not student is actually eligible. Dept. of Educ. v. Cari Rae S., 35 IDELR 90, P4-5 (D. Hawaii 2001)).

EVALUATIONS

The Parents assert that evaluations must assess the student in all areas related to the suspected disability, including academic performance and related services, central auditory processing (CAP), AT, speech/ language, all areas of reading (fluency, phonemic awareness, phonological awareness), writing, math calculation, cognitive abilities. 34 CFR. 300.304(c)(4). The evaluations must be sufficiently comprehensive to identify all of the child's special education and related services needs. 34 CFR 300.304(c)(6); CFR 300 300.304 (b), (c)(4).

The District did not complete an appropriate speech language evaluation in May 2015, as the evaluator relied on 2009 limited testing results (almost 6 year old data) and one out of date CTOPP that did not include all the subtests. Dr. F testified that all subtest should , have been administered. Dr. [REDACTED] testified that outdated test results are not reliable or valid data. (PD-1018.)

Dr. [REDACTED] completed a current TAPS-3 and CELF-5 prior to the May, 2015 IEP meeting that disclosed significant speech/ language deficits. The district did not complete a CAP evaluation at any time.

The May 2015 District psychological evaluation relied on misinterpreted previous District psychological results rather than completing a cognitive assessment (incorrect visual processing: (PD574, PD578. PD1015 thru 1018); The District did not assess math calculation; did not assess reading fluency; did not assess emotional overlay (even though the school psychologist had previously provided student consultative services for "social-emotional overlay related to learning difficulties" (R-739 1/22/2014 entry); did not address visual processing concerns; did not complete a full and adequate written language assessment; did not complete the required IDEA classroom observation (34 CFR 300.310); relied on outdated and incomplete speech test; CTOPP (PD-1016-1018). (34 CFR 300.304(c)(1)(iii) requires valid and reliable data.

WILSON PROGRAM

The Wilson Program structures the program through the use of books divided into sections. The first level for instance, is Book 1, level 1.0. The child had been working on his reading with his special education teacher using the Wilson Program. The District's 23 February 2015 reading evaluation consisted of only two tests, neither of which included ascertaining the child's current or appropriate Wilson level. There was no assessment of the effectiveness of the Wilson program implemented at the grammar school with regard to the child. The evaluator did not include an observation of the child in the Wilson program or in any class.

The IEE reading specialist observed the Wilson classroom at the high school; the child attends the Wilson classroom daily. The Wilson teacher, [REDACTED] is a certified Wilson instructor and was a very impressive witness. [REDACTED] testified as to how the Wilson program is structured in her classroom, and the IEE reading specialist testified that the Wilson classroom is structured just as it should be. The IEE reading specialist testified that for the Wilson program to be effective, the child must have instruction daily. [REDACTED] testified that she breaks the class into two groups; one gets instruction from her one day and then gets practice with a paraprofessional the following day, and vice versa. [REDACTED] testified that on some days there is no Wilson instruction at all, that there are other activities planned. There was testimony that given the child's severe reading problems, he should be getting 90 minutes of Wilson instruction per day for the method to be successful. The child was at level 1.3 at the time of hearing. Most of the other students are in the various levels of Book 6.

Very important is the fact that the District never conducted a central auditory processing evaluation (CAP). Dr. [REDACTED] the IEE educational audiologist, testified that the student's Central Auditory Processing Disorder (CAPD) should have been tested for and identified in 1st or 2nd grade as the child had articulation deficits, history of ear infections, and he wasn't learning to read. Dr. [REDACTED] testified further that identifying a CAPD early is critical because, when present, it is a major hindrance to a child's ability to read.

Dr. [REDACTED] conducted a hearing evaluation and determined the child to be 4.5 standard deviations below the norm on the Low Pass Filtered Speech and Time Compressed Speech, indicating a severe deficit in auditory discrimination. (PD-974-5).

Up until the CTOPP evaluation the District conducted and the development of the current, proposed, IEP, there have been no CAP goals in the child's IEPs.

Dr. [REDACTED] testified that the proposed 20 October 2015 CAP goals/objectives/services were not appropriate as the student required at least 10 hours alone on the first Benchmark of the phoneme discrimination goal (PD1089) that the second goal requires 30 minutes per week to implement, and that the Benchmarks are not clearly written. The district is proposing only 30 minutes per week to implement both CAP goals.

Dr. [REDACTED] also testified that the student required computer assisted intervention such as the Sound Auditory Training or FastForward to address auditory discrimination deficits. Dr. F testified that appropriate auditory discrimination services are necessary for the student to learn to read. Dr. [REDACTED] testified that she currently has a student at the Cove school that receives 30 minutes daily of auditory discrimination services. Dr. [REDACTED] reviewed all the student records including CPS speech evaluations.

Dr. [REDACTED] is the IEE speech and language pathologist who conducted a TAPS evaluation of the child. Dr. [REDACTED] testified that the child does not understand high level language such as inferencing, making predictions, comprehending, storing, recalling and integrating information. (PD-100). [REDACTED] testified as to the use of AT vis-a-vis the child. At the grammar school, the child had an iPad. The iPad was not particularly useful as the child had no training on the iPad; the programs on the iPad had passwords that the child did not know. The iPad had programs designed to help the child but the child had little access to them. There were no goals for the use of the iPad in the AT portion IEP, and the iPad was clearly not working for the student. The child's grammar school special education teacher said the child's use of the iPad was somewhat successful.

The proposed IEP notes under "Academic Needs" that an AT evaluation was done at the end of the child's 8th grade year. That evaluation resulted in a recommendation for a dedicated iPad with reading support software, as well as a Reading Pen for word/phrase support. The text goes on to say: "Observation indicates that using the iPad to listen to text is supporting the child in his learning." That statement is not borne out by the testimony of the child's mother who says the iPad he had at grammar school was not very useful, since the child had not been trained to use the iPad, and that the programs on the iPad had passwords that he did not have access to.

The child was to be assigned an iPad by his high school. School started in September; as of the first day of this hearing, the child did not have an iPad, in spite of the best efforts of his teachers and the school AT department. It seems that the school iPads owned by the District have locks so programs cannot be downloaded into them. The high school had to purchase an iPad from the Apple store. The process took from September until the very first day of this hearing, 2 November 2015.

Testimony from Dr. [REDACTED] revealed that when the iPad arrived, the person who was responsible for delivering it to the child (a child who did not like to stand out) brought the iPad into the classroom and tried to teach him to use it then and there. The same information was testified to by the classroom teacher. The impression the adults got was that he didn't want to use the iPad.

During the hearing, the child's mother testified that the child had not been taught to use the programs, and that the iPad was not much help to him.

Dr. [REDACTED] testified that the iPad was not useful as it did not have the programs installed that appear in the IEP, and the program that are loaded have passwords.

PSYCHOLOGICAL EVALUATIONS AND IEPs

The child's initial psychological evaluation is dated 3 December 2009 (Third Grade). The Kaufman Tests of Educational Achievement - Second Edition (K-TEA) was administered. His scores were in the average range for the most part; however his overall reading scores were in the Below Average range, much lower than the scores of his peers. His math computation skills were also in the Below Average range. He was struggling with the regular education curriculum. He showed no progress in spelling, minimal progresses in reading and writing. Interventions were noted as: Sight word flash cards, small group instruction at his instructional reading level, reduced work requirements, peer buddy for reading, sounding out, and chunking strategies used in small group settings.

The report of the second psychological evaluation of the child dated 12 October 2012, indicated that the child was evaluated using the Wechsler Intelligence Scale for Children - Fourth Edition. (WISC-IV). He was in the average range in intelligence. At that time, he read and spelled at second grade level; his reading recognition was 2.1 (2nd grade and 1 month); reading comprehension was 1.5 (1st grade, five months); vocabulary comprehension was 2.0 (2nd grade). He was in the 6th grade and was 11 years and 4 months old.

His IEP for the 2012-2013 school year indicates that he reads and spells at the second grade level and that "In math, he can add and subtract multiple numbers including decimals with regrouping. This year, in sixth grade, he has kept up with all the math concepts given thus far: adding and subtracting decimals; using data and graphs; finding the mean, median, and mode; solving simple equations, and finding and describing number patterns. [The child] enjoys math and does very well as long as there is little reading involved. He is doing grade level work on math as of today (Nov2, 2012) [sic]. "

Per the Language Arts/English/Reading goal in 11. Specialized Instruction; the child's reading level was about 3rd grade. He was still struggling with decoding and writing. The goal is: "Given a passage appropriate to his age, [the child] will use the decoding strategies read [sic] new words, will use glossaries, use the Letter Sound information to increase his word recognition to improve reading vocabulary with 80% accuracy." The Benchmark for the first quarter is: "Given a passage appropriate to his age, [the child] will use the decoding strategies read to read new words and comprehend the reading passage. The Benchmark for the second quarter is: "Given a passage appropriate to his age, [the child] will use the decoding skills and vocabulary development to read with fluency. The third Quartely Benchmark is: "Given a passage appropriate to his age, [the child] will use the decoding and fluency for reading comprehension with 80% accuracy. The Evaluation Procedure in each Benchmark is Oral/Written test; weekly.

Per the Mathematics goal in 11. Specialized Instruction: [The child] will be able to increase his math vocabulary with 80% accuracy. There is no sort of score in the PLOP. The Benchmark for the first quarter is: "Use algebraic and analytical methods to identify and describe patterns and relationships in data, solve problems and predict results." The Benchmark for the second quarter is: "Investigate, represent and solve problems using numbers, facts, operations (addition, subtraction, multiplication, division) and their properties, algorithms and relationships."

The Benchmark for the second quarter is: "[The child] will be able to demonstrate knowledge and use of numbers and their representations in a broad range of theoretical and practical settings with 80% accuracy. The Math Benchmarks don't seem to be connected to the goal in any meaningful way.

On 30 October 2013, an annual review IEP meeting was convened by the district.

Section 7 of the 30 October 2013 identifies Academic Needs in the area of reading and writing. Statements from the District's psychological report are repeated regarding "deficit in processing speed that makes it difficult for him to coordinate visual tracking with ordering." His class grades are reported, but the IEP does not note that the grades are based on a significantly modified grading scale. 6th grade ISAT scores for math and reading and, NWEA math and reading scores are reported. The NWEA scores are very low in both reading and math (1st percentile).

Under "Developmental/Functional Needs" is written: "Because his letter formation and general writing skills are not developmentally age appropriate, he benefits from support with pencil/paper writing in the form of a scribe, visual models, or the option to use a word processing program on the computer." Per the IEP, the parent is very concerned regarding [the child's] reading ability and that this affects every other subject. The IEP indicates that assistive technology (AT) is required for [the child] to access the curriculum, but there is no recommendation from a special education teacher or related service provider for AT.

The IEP states that an assistive technology evaluation has not been completed but that a referral was made on 30 October 2013 (the date of the IEP meeting). The IEP assistive technology devices that [the child] could utilize and are available at the school are: "access to computer" and "access to books online/on CD. The accommodations only list a scribe for Language Arts/English/Reading: "provide scribe for lengthy writing assignments."

Accommodations/modifications include "reduce homework load 50%" or reduce homework load problems 50%" was written as an accommodation for math and reading only. Testing accommodations for Language Arts/Reading, Mathematics, Biology & Physical Sciences, Social Sciences include: administer in small group; administer in separate location; reading directly orally; extend time allotted by 25 percent; allow 1 stop-the clock-breaks (for reading only); assign scribe for extended response writing; read entire test orally (Biology & Physical Science).

The first Language Arts goal states: "Using strategies such as discussion, one on one instruction, and specialized reading intervention software, [the child] will analyze the meaning of words and phrases in their context. Given 10 selected vocabulary words used in context, he will demonstrate an understanding of the words verbally and in writing with 80% accuracy."

The benchmarks are exactly the same, starting at 60%, then 70% and for the 3rd benchmark 80% accuracy.

The present level of performance (PLOP) states that he has a strength regarding identifying the main ideas and supporting details in a passage as well as identifying cause and effect, compare and contrast, making inferences, and responding to questions requiring him to display an accurate understanding of the text.

The Functional Performance section of the PLOP states that he has a "[d]eficit in processing speed that makes it difficult for him to coordinate visual tracking with ordering...difficulty in analyzing symbols...this deficit interferes with his decoding and therefore his comprehension ability...reading is slow and laborious...writing is difficult and [the child] prefers to avoid it...processing speed and difficulty coordinating visual tracking with ordering ... impact his writing...letters are not well formed, and his writing is difficult to read...may reverse letters...words may be difficult for others to decipher...may abandon the task when he becomes fatigued."

Under Other Considerations it states: "The child's] processing deficits affect his involvement and progress in the general education curriculum...difficulty with decoding makes it very challenging for him to read and comprehend grade level text...generating decipherable written responses also poses a challenge for him."

This goal is not measurable as written, as the PLOP does not address his ability to analyze the meaning of words and phrases in their context, since it appears that the issue is decoding, not understanding and analyzing; and the goal does not address the deficit areas, as he cannot read the words.

The second Language Arts/English/ Reading goal states: Using strategies such as discussion, one on one instruction, and modeling, [the child] will write a paragraph that includes a variety of sentence types; appropriate use of the eight parts of speech; and accurate spelling, capitalization, and punctuation...provided with a prompt, [the child] will write a paragraph with a topic sentence and 3 supporting details with accurate usage, spelling, capitalization, and punctuation according to a standard rubric with 80 accuracy or better. The benchmarks are the same as the goal except that it starts at 60% accuracy, then 70% accuracy, and the 3rd benchmark is 80% accuracy, like the goal.

The PLOP contains the exact same statements as the first Language Arts goal. The PLOP does not specifically address the goal, but does state that his writing is difficult to read. This goal is not measurable as written as there is no baseline and the PLOP does not address the real issues of decoding and encoding deficits.

The math goal contains the exact same statements in the PLOP as in the Language Arts goals. Other than ISAT and NWEA score reports for math, the PLOP does not state anything about his current functioning in the area of math. The goal states that [the child] will apply ratios and proportions to solve practical problems...will demonstrate mastery of this goal when presented with 10 problems, by solving them with 80% accuracy or better.

The benchmarks are exactly the same as the goal except that the first benchmarks starts with 60% accuracy, then 70% accuracy, and the third benchmark is 80% accuracy like the annual goal.

The Least Restrict Environment (LRE) section indicates: 200 mpw of direct services in separate class for Language Arts; and direct services in regular class in Language Arts for 60 mpw and Mathematics for 60 mpw.

Under Cognitive Abilities it states: "Has emerging literacy skills; reading approximately on the 1st grade level; struggles to decipher written words; unable to use phonics skills to decode; struggles to write his thoughts down; writing is difficult to decipher; uses a scribe for testing and lengthy writing assignments. Per the report, [the child] can read a 2nd grade unstandardized text and his comprehension score was eighty percent."

"When listening to a 7th grade reading text, [the child's] comprehension score was ninety percent. Per the report: "Letter formation was below an age appropriate level and rather large...many lower elementary level words were misspelled and some words were written out of order within a sentence...Student could type slowly using the hunt and peck method."

The evaluator recommended an iPad from his current school, with App-Read 2 Go; App-into Words; Dragon; App-CoWriter; Reading Pen; and headphones. The student reports that the iPad he was provided does not have the Apps or Dragon. He has never used the recommendations. He does have the Reading Pen. On 6/13/2014 the district completed a revision to the 10/30/2013 IEP to add the recommendations from the AT evaluation.

Now at the beginning of 8th grade, on 21 October 2014, the district completed an annual review. Section 7 contains essentially the same statements except for the addition of the Assistive Technology evaluation (AT evaluation was done at the end of the last school year, he uses iPad independently, data is being collected to determine the effectiveness, etc.). The statements regarding academic functioning are the same as stated in the 30 October 2013 IEP.

The NWEA scores are reported from 2013/2014, but a date is not provided. The scores indicate very low functioning in reading and math.

The AT recommended in the May, 2014 evaluation is listed under AT devices that the student could utilize and are available at school, but not the AT services/devices that [the child] will actually be provided.

The accommodations/modifications are the same as from the previous IEP revision of 13 June 2014 except that physical education now has accommodations listed. Test accommodations are the same as the previous IEP, except that under Biology/Physical Sciences and Social Sciences, "scribing or Speech-to-Text" is listed; PE has been added: "[read] entire test orally, allow computer or other word processing device, scribe as needed.

The PLOP on the first Language Arts goal states that seventh grade NWEA scores are in the 151-170 range which is 15 points lower than the 6th grade NWEA scores (185). The PLOP states that "He is in the learning stage with this assistive technology." Basically, however, the PLOP, is exactly the same as the PLOP in the 30 October 2013 IEP.

The October 2014 goal expects that [the child] "Will read text independently to identify key ideas and details...focus will be increasing phonemic awareness... When given a passage, [the child] will identify the key idea and 3 supporting details independently with at least 80% accuracy." The first benchmark expects [the child] "will read text independently to identify the key ideas and details... When given a passage, [the child] will identify the key idea independently with at least 80% accuracy." The 2nd benchmark expects [the child] will read independently, identify the key idea independently and 1 supporting detail with at least 80% accuracy.

The third benchmark again expects [the child] to read independently, identify the key idea independently and 3 supporting details with at least 80% accuracy.

The goal does not indicate at what grade level [the child] will read to complete this goal. The PLOP does not indicate his current grade level reading. The 7th grade NWEA score range of 151-170 stated in the PLOP, according to the NWEA has the child reading at Kindergarten to 1st grade level.

This goal/benchmark is not measurable as the PLOP does not provide a baseline for measurement, and the goal is too vague regarding expectations; the child could complete the goal reading a 1st grade passage.

The second Language Arts goal is for writing. The PLOP is exactly the same as the 1st Language Arts goal and the same as that on the 30 October 2103 IEP. The goal does not state whether [the child] met the 30 October 2013 goal to write a paragraph with a topic sentence and 3 supporting details when given a prompt.

The goal in the October, 2014 IEP appears to expect less of [the child] than in the 30 October 2013 IEP (Write a paragraph with 3 supporting sentences, correct punctuation, etc.) since the expectation in the October, 2014 IEP is that [the child] "Will independently compose a written response to a prompt that answers a question in complete sentences with correct usage and punctuation with at least 80% accuracy according to a teacher made rubric." The parents' copy of the IEP printed on 10/21/2014 does not have any benchmarks stated on the form, and it is assumed that this is a high school goal (the IEP report cards received by the parents do not address this goal).

The math goal PLOP is the same as the Language Arts goals PLOP. Other than the 7th grade NWEA math scores listed as 181-190 range (second grade level), there are no statements regarding EC's math functioning level.

The math goal appears to address Geometry. There is no information provided in the PLOP that this is even a deficit for the child. This goal/benchmarks are not measurable as written. A second mathematics goal has the same PLOP as the Language Arts goals and the third Math goal. The goal expects [the child] "Will read and solve linear equations...When presented with 4 equations, [the child] will use suggested strategies to read, solve, and explain his steps with at least 80% accuracy." There are no benchmarks stated for this goal in the 21 October 2014 IEP, and it is assumed that this is a high school goal. The IEP report cards received by the parents do not list this IEP goal.

The Least Restrictive Environment (LRE) section is the same as the 30 October 2013 IEP: 200 mpw of direct services in separate class for Language Arts; and direct services in regular class in Language Arts for 60 mpw and Mathematics for 60 mpw. Significantly modified grading criteria and grading scale continue, as well as the denial of extended school year (ESY) services.

The Least Restrict Environment (LRE) section for 2015-2016-high school is the same as for elementary school: 200 mpw of direct services in separate class for Language Arts; and direct services in regular class in Language Arts for 60 mpw and Mathematics for 60 mpw. A transition plan is included, and apparently, on 16 October 2014, transition questionnaires were completed, but they are not attached to the IEP.

The child's English teachers say: "[The child] has shown difficulty with several components of the curriculum, notably inferencing, grammar, and summarizing material...does not have access to any AT support in class...speech and language needs, as well as his auditory processing deficits have not been adequately addressed...written language and reading deficits have also not been appropriately supported...currently has no speech and language supports, despite test results indicating that he has significant deficits with higher language and auditory processing...recent IEP does not adequately provide for the deficits identified with testing." None of the IEPs have speech language goals for the speech deficits identified by Dr. [REDACTED]. The District **refused** to provide needed speech language services on 10/20/2015. See PD1423-1424: (PD1424)

Dr. [REDACTED] the IEE educational audiologist and AS, the IEE reading specialist, testified that the proposed IEP was inappropriate.

It is apparent that the plans for the child, except for the addition of AT, are the same as always. Nothing has changed to address the fact that this child is 14 years old and can't read and write, and that these deficits are affecting his other school work.

ANALYSIS

In *Hendrick Hudson Dist. Bd. of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court set the standard to determine whether a child has been given a free appropriate public education (FAPE) under the IDEA. The Rowley standard requires that an IEP must be "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206,7." *T.H v. Board of Education of Palatine Community Consolidated School District 15*, 55 F. Supp. 2d 830,841 (N.D. 1999).

A FAPE is defined as:

[S]pecial education services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA... include an appropriate preschool, elementary school, or secondary school education in the State involved and are provided in conformity with the individualized education program (IEP) 34 C.F.R. §300.17.

In *Rowley* the United States Supreme Court has articulated a two-prong test to determine whether a child has been given a free appropriate public education under the IDEA. The first prong is whether the school district complied with the procedural requirements of the IDEA. Second, the Hearing Officer must determine whether the IEP was reasonably calculated to enable a child to receive an educational benefit. That determination is based on whether the District's IEP for the Student identified his needs/eligibility and offered services to address those needs as required by statute.

With regard to the first prong, the Parent asserted procedural violations in the IEP development that precluded access to a FAPE for the Student. However, even if violations occurred, only "procedural inadequacies that result in the loss of educational opportunity constitute a denial of FAPE." *Evanston Community Consol. School Dist. No. 65 v. Michael M.*, 356 F. 3d 798, 804 (7th Cir. 2004); *Board of Ed. Of Township High School District No. 211 v. Michael R.*, 2005 WL 2008919 (N.D. Ill. 2005). IDEA-2004 which became effective on July 1, 2005, also requires that where a procedural violation is alleged, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (I) impede the child's right to a FAPE; (II) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE; or (III) cause a deprivation of educational benefits. 34 CFR 300.513(a)(2)(ii).

The parents have withdrawn their allegations of procedural violations, thus the first prong on the Rowley two-prong test will not be addressed here.

A hearing officer may order an independent evaluation at public expense if the district cannot "show that its evaluation is appropriate. See *Jack B. v. Council Rock Sch. Dist.*, Civ. A. 06-1968, 2008 WL 4489793, E.D. Pa. (2008).

Districts have a duty to revise IEPs as appropriate. *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205*, 36 IDELR 153 (N.D. Ill. 2002) The applicable regulations, at 34 CFR Sect. 300.324, provide that a District must revise the IEP to address any lack of expected progress toward the annual goals, to address the results of any reevaluation, to address information about the child provided to, or by, the parents, to address the child's anticipated needs; or to address other matters.

The applicable regulations, at 34 CFR Sect. 300.324, provide that a District must revise the IEP to address any lack of expected progress toward the annual goals, to address the results of any reevaluation, to address information about the child provided to, or by, the parents, to address the child's anticipated needs; or to address other matters.

The *Rowley* court did not set out the elements of what would constitute a FAPE. The court noted that children have different abilities and, therefore capable of different achievements. *Rowley* at 202. The court adopted an approach that would take into account the potential of the disabled student but noted that the school need not "maximize each handicapped child's potential. *Rowley* at 199. However, to satisfy the Rowley reasonableness standard, the school must offer more than "mere token gestures or a trifle." *Nein*, 95 F.Supp at 973. (Citations omitted), and where the student "display[s] considerable intellectual potential, [the] IDEA requires a great deal more than a negligible [benefit]." *Ridgewood Bd. of Ed. V. N.E.*, 172 F.3rd 238, 247 (3rd Cir. 1999). See also *Hall v. Vance County Bd. Of Ed.*, 774 F.2nd 629, 636 (4th Cir. 1985). ("Rowley recognized that a FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children.") "Therefore, in determining whether a school

district has provided a FAPE, the court must analyze the student's academic progress." *Ridgewood Bd. of Ed. V. N.E.*, 172 F.3rd at 247 (reversing the trial court, for failing to analyze the student's academic potential.)

With that in mind, the child in this case is intelligent; nice; hard-working; has expressed on many occasions – as recorded in the various psychological reports and IEPs admitted into this record – and reported by his parents – that he wants very much to learn to read and write. He has had IEPs and yet he has failed to make academic progress. In fact, he has regressed. He was reading at 3rd grade level in 6th grade; he reads at the primer level now. Further, although the child is excellent in his current Math class, he is still at a primary grade level in Math calculation without a calculator. The child is in a co-taught English class. There is a full-time special education teacher co-teaching with the general education teacher. Even with that help, the child is failing the class.

There was testimony from the IEE neuropsychologist that as the child stays at these low levels in reading, writing, and Math calculation, his peers are moving up academically to more difficult schoolwork and, as the gap between the child and his peers increases, soon the child will be so far behind that it will be unlikely that he will ever catch up.

Having carefully reviewed the child's IEPs, I find that the IEPs contain almost identical goals, objectives, and present levels of performance. The District is required to review and revise the child's IEPs annually to determine if the current IEP goals and objectives are sufficient to confer an educational benefit on the child. *See* 20 U.S.C. §1414(d)(4)(A); 34 C.F.R. §300.346(b); *Nien*, 95 F. Supp.2nd at 975.

The child's parents, the IEE neuropsychologist, the IEE educational audiologist, and the attorney for the parents attended the most recent IEP meeting to discuss their recommendations for the child's IEP. The IEE neuropsychologist and the educational audiologist recommended placement at Cove School, a therapeutic day school specializing in just the sorts of deficits the child suffers with and using the Wilson program. Those recommendations were not accepted by the District. The District maintained that the child would be successful on the program made for him at the high school.

School districts are required to ensure that ESY services are "available as necessary to provide a FAPE." 34 C.F.R. §300.309(a)(1). Schools are only required to provide ESY services to children who will suffer significant regression of skills without ESY services, "so as to seriously affect [the student's] progress towards self-sufficiency." *Cordrey v. R.J. Eukert*, 917 F.2nd 1460, 1470 (6th Cir. 1990). To show that the student will suffer significant regression, the student must show empirical evidence that regression occurred in the past or put on expert evidence that such regression will occur. The child has offered that expert testimony in this case.

Compensatory education is “a legal term used to describe future educational services” which courts awarded to a disabled student under the IDEA “for the school district’s failure to provide a [FAPE] in the past.” Brett v. Goshen Com. Sch. Corp., 161 F.Supp. 2nd, 930, 942 (N.D. Ind. 2001). The District did not provide Kevin with a [FAPE]. Therefore, to cure that violation, the District will be ordered to provide the child with compensatory education.

Vazquez v. Puerto Rico, 64 IDELR 244, P6 (DC Puerto Rico); see also Sch. Dist. of Phila. V. Williams, 115 LRP 54719, P8 (ED PA 2015)(“A student has “only one childhood, one education,” and therefore it is critical to ensure that school districts appropriately implement the IDEA in a timely manner, so the student may achieve as many education gains as possible while in public school”). The child in this case is in this situation.

In *Nein*, 95 F. Supp.2nd at 975, the court said: “[w]here a child with a severe learning disability but significant potential ma[kes] no transferable progress in three years, and where there was no indication the public school was ready and able to change directions, the limits of ‘due weight’ and judicial deference to school authorities have been exceeded.”

The Parents requests that the child be placed at Cove School at public expense, with transportation provided. AS, the IEE reading specialist, recommends placement at Cove School, as does Dr. JM-J.

Dr. [REDACTED]’s recommendation appears as exhibit (PD-1028). In summary, she tells us that the child is not going to succeed in a large urban high school, that because of his age and the severity of his disabilities and lack of academic progress – and his regression in certain reading and writing skills – impact all of his academic subject areas. Going on, she says that the child needs a much more intense level of reading and writing instruction that cannot be provided by the District, to be provided in a small class setting in a very structured environment. Her statement of recommendations is long, includes substantial enlightening information relating to the child’s potential for success at Cove School, and warns that without ESY services, the prospect for regression is overwhelming. She also says that , due to inappropriate levels of academic support, lack of progress – and regression in academic some skills – , the failure of the District to provide ESY, compensatory academic instruction is warranted. Finishing, she says that the recommended placement at Cove School is based on the child’s present needs and should not be considered compensatory services.

AS mirrors the recommendations of Dr. [REDACTED] and adds the advanced assistive technology, among other strengths, provided by Cove School

Testimony from the Principal of Cove School assures that there is a place open for the child in January, 2016.

School districts are required to ensure that ESY services are "available as necessary to provide a FAPE." 34 C.F.R. §300. 309(a)(1). Schools are only required to provide ESY services to children who will suffer significant regression of skills without ESY services, "so as to seriously affect [the student's] progress towards self-sufficiency." *Cordrey v. R.J. Eukert*, 917 F.2nd 1460, 1470 (6th Cir. 1990). To show that the student will suffer significant regression, the student must show empirical evidence that regression occurred in the past or put on expert evidence that such regression will occur. The child has offered that expert testimony in this case.

The IHO has authority to order the placement of a child in a private facility if the District has failed to provide a FAPE. *Bd. of Edu. of Murphysboro v. Community Sch, Dist No. 186, et al.*, 41 F.2nd 1162 (U.S. Court of Appeals, 7th Cir., 1994; *Floreny County School District 4, et al.*, 510 U.S. 7, 114 S. Ct. 361(1993)

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

The standard of proof in impartial hearings under the IDEA is preponderance of the evidence. *See* 20 U.S.C. §145(i)(2)(C)(iii). Under this standard, the party seeking relief must establish that the fact sought to be proved is more probable than not.

"During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses ." *Great Valley* at 5. (citations omitted)

The testimony of the all the witnesses was credible.

The District has failed to present sufficient evidence to show that the special education needs of the child were appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate and available as required by 105 ILCS 5/14-8.02a(g-55)(ii).

The District has failed to present sufficient evidence to show the school district evidence that it properly identified and evaluated the nature and severity of the student's suspected or identified disability...." as required by 105 ILCS 5/14-8.02a(g-55)(ii)(5).

Therefore, the District has failed to pass the *Rowley* test. In *Hendrick Hudson Dist. Bd. of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court set the standard to determine whether a child has been given a free appropriate public education (FAPE) under the IDEA. The *Rowley* standard requires that an IEP must be "reasonably calculated to enable the child to receive educational benefits.' 458 U.S. at 206,7." *T.H v. Board of Education of Palatine Community Consolidated School District 15*, 55 F. Supp. 2d 830,841 (N.D. 1999). The District's evaluations were not appropriate, thus the child was denied a FAPE.

The IHO finds as follows: The Parents prevail and the relief they requested is granted. The District's request for relief is denied.

- A. There are specific deficiencies in the child's IEP caused by the District's failure to provide an appropriate evaluation of the child;
- B That the District denied the child a FAPE by failing to develop an appropriate IEP for the child;
- C. That the District did not make a FAPE available to the child in a timely manner; that the District's present placement for the child is not appropriate; and;
- D. That placement at Cove School is the appropriate placement for the child, and therefore;
- E. That the Parents are entitled to reimbursement at public expense for tuition and related costs;

IT IS HEREBY ORDERED:

1. The District is ordered to, within 30 days of this Order, reimburse the parents or pay directly to the IEE providers as follows:
 - a. Speech/AT (school based) evaluation completed by a professional chosen by the Parents. \$1,800.00. The District has the report and the invoice. (PD-1800)
 - b. Psychological (school based) evaluation by a professional chosen by the Parents: \$7,187.50 - discounted. The District has the report and the invoice. (PD-1037)
 - c. CAPD (school based) evaluation by a professional chosen by the Parents: \$650.00. The District has had the report and the invoice since 6 September 2015. (PD-979)

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- d. Academic/multisensory program/reading/Wilson (school based) evaluation by a professional chosen by the Parents: \$1,400.00 The District has the report and the invoice. (PD-968)
- e. FastForward Licensure, \$750.00 and \$150.00 per hour for \$50.hours , Lindamood Bell, \$875 initial fee, 112/per hour for 25 hours. (Testimony, Dr. █ and Dr. █, █ say necessary computer assisted, in-home program)
- f. Placement at █ beginning 4 January 2016 and transportation to and from school on school days and after school if the child has after school activities. The parents are ordered to advise the District immediately if late bus service will be required, immediately being within 7 days of the need arising.
- g. If the District cannot or will not provide transportation as noted in part "e" of this order, the District is ordered to reimburse the parents for travel costs at the IRS rate for 4 trips daily. The District is ordered to pay that transportation within 10 days of receipt of the parents invoice.
- h. the District shall convene an eligibility/IEP meeting at █ within 30 days of the date of the child's enrollment at █ to develop an IEP consistent with with the IEE's obtained by the parents.
- i. The District shall pay for or reimburse the parents for the fees and costs required to have the IEE evaluators appear at the IEP meeting.
- j. The District shall provide 200 hours of compensatory services to be scheduled with █ staff as recommended by the IEE providers and agreed to at the to-be-scheduled IEP meeting
- k. District shall contract with █ to arrange for, and fund, all compensatory services to be provided by █ staff;
- k. District shall provide appropriate transportation for all compensatory services including late bus service as required;
- l. District shall list all compensatory services in the IEP

as after-school services until the completion of the compensatory services.

- m. District shall insure that compensatory services are provided on a continuous basis until completion and will not be interrupted in any way by the District;
- n. Parents and █ staff shall determine how to allocate the 200 hours of compensatory services. Or, if █ is not available to provide the compensatory services;
- o. Parents shall choose professionals to provide the compensatory services (Wilson) and the District will either provide transportation to the compensatory services or reimburse the parents at the current IRS rate, for 2 trips only;
- p. District shall pay the providers/vendors directly within 10 days of the date of the provider's invoice. The District will arrange for vendors where necessary;
- q. District shall provide the compensatory services without interruption until the District's obligation to provide compensatory services ceases. Should compensatory services be interrupted, the amount of time of the interruption shall be added to the original period;
- k. The District shall provide 50 hours of compensatory direct speech and language services provided by a speech pathologist trained to administer the FastForward program;

21 December 2015
/s/ Marcia K. Johnson
Marcia K. Johnson, Impartial Hearing Officer

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█ (Office)
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