

**ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

FRANK H.)	
Student,)	
)	
v.)	CASE NO. 2007 - 0182
)	
CITY OF CHICAGO SCHOOL)	Mary Schwartz
DISTRICT 299,)	Due Process Hearing Officer
Local School District.)	

DECISION AND ORDER

Jurisdiction

This matter is before the undersigned hearing officer on the parent’s request for a due process hearing. This hearing officer has jurisdiction pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. § 1400 *et. seq.*, 105 ILCS 5/14-8.02a *et. seq.*, and 23 Il. Adm. Code § 226.600 *et. seq.* The parties have been fully advised of their rights pursuant to these statutes and regulations.

Procedural Background

The parent filed a due process request on February 26, 2007. The district received the parent’s request on March 1, 2007, and forwarded it to the Illinois State Board of Education (“ISBE”). The ISBE appointed the undersigned as hearing officer on March 6, 2007, via appointment letter. The hearing officer was notified of her appointment on March 6th and sent the parties a preliminary scheduling order that same day. The district filed its response on March 26, 2007. Both parties were represented by counsel throughout these proceedings.

The hearing officer held an initial telephone status conference call on March 22, 2007, and set dates for the pre-hearing conference and due process hearing at the time. The pre-hearing conference was scheduled for April 12, 2007, via conference telephone call, and the due process hearing was set for May 14 and 15, 2007. Both the pre-hearing conference and due process hearing were held as scheduled.

The hearing officer issued a pre-hearing conference report on April 16th. Since that report provides comprehensive details of what transpired at the pre-hearing, the conference details are not reviewed here, with one exception. The district requested that the parent provide specifics as to their requested relief, particularly with regard to the

requests for related services and compensatory education. The parent filed a supplemental request for remedies on April 16, 2007.

The hearing officer held a status telephone call on May 1st to discuss final arrangements for the due process hearing. Because of her schedule, the hearing officer asked the parties for their consent to extend the ten day timeline in which a hearing officer must issue a decision from May 15th to June 1st. The parties agreed to extend the time in which a decision is to be issued and followed their verbal agreement with written agreements. On May 7th, the hearing officer received a request for subpoenas from the parent and issued them upon request.

The hearing was conducted on May 14 and 15, 2007. On May 23rd, after considering the testimony and documents introduced into evidence, the undersigned ordered an independent educational evaluation ("IEE) to assess the student for learning disabilities, particularly in regard to reading. The IEE was ordered because evidence showed that the student read below grade level and his IEPs consistently noted reading problems. On May 29th, the district filed a Motion to Strike Parent's Independent Educational Evaluator. The parent filed a response on May 29th. On May 31st, the undersigned ordered that the IEE should proceed with the parent's selected evaluator. The evaluator's initial report was tendered to the district and hearing officer on July 23rd. Shortly thereafter, on August 1st, the district requested that the evaluator conduct further testing, specifically a full scale cognitive evaluation, a silent reading comprehension assessment, and a full battery of mathematic academic assessments. The additional evaluations were conducted, and the final IEE report was provided on August 14, 2007.

On September 4, 2007, the district filed a Motion for Continuance or For Exclusion of Evidence. In that motion, the district asked for time to hold an IEP meeting to consider the IEE report and recommendations or, should that be denied, that the IEE recommendations be stricken from the parent's evidence and the evaluator be prohibited from testifying. The parent filed a response on September 5th, requesting that the hearing officer deny the district's motion and issue an interim order transferring the student to Acacia Academy pending further hearing and issuance of a decision. On September 6th, the undersigned ordered that the IEP meeting proceed as scheduled on September 10th. The IEP team determined that the student's primary eligibility was learning disability, and secondary was emotional disturbance, but did not agree with the IEE evaluator's recommendations regarding placement. The parent wrote a dissent to the September 10th IEP, which framed the issues for the final day of hearing.

The hearing office held a conference call with the parties to discuss the arrangements for the final hearing day. The hearing officer overruled the parent's argument that the burden of proof had shifted to the district, which was disputing the IEP recommendations, and held that the parent maintained the burden of proof on issues presented in the final day of hearing.

During the first day of hearing, testimony by the student's teacher revealed that

she had additional anecdotal reports, attendance reports and a reading assessment that had not been provided to the parents. These documents were provided the following day and became part of the evidentiary record.

Toomey Reporting provided a court reporter throughout the hearing.

Issues Presented and Remedies Sought

Because the hearing was conducted in two parts - the initial hearing on May 14 and 15, 2007, and then an additional day on September 17, 2007 - two sets of issues are presented by the parent.

Issues presented in the parent's February 26th due process complaint

The parent contends that the district did not provide the student a free appropriate public education ("FAPE") from February 26, 2005, through the present time in that the district:

1. Failed to conduct adequate assessments for learning disabilities and other academic limitations, with the result that the student's educational program for the stated time period did not address, or addressed inadequately, the student's learning impediments and emotional difficulties;
2. Failed to provide essential related services in areas of assistive technology and social work services;
3. Failed to develop an effective functional behavior analysis and behavior intervention plan for the student;
4. Failed to individually tailor the curriculum and curricular materials to meet the student's needs and enable him to make progress commensurate with his cognitive skills; and,
5. Failed to offer a complete curricula in areas of reading, language arts, math, social studies and science, with the result that the student did not make academic progress.

As relief for the above, the parent requests that the district provide:

1. Private therapeutic day school placement at public expense;
2. Payment for an independent educational evaluation ("IEE") in areas of identified need, including cognitive and academic skills and social/emotional status;
3. Related services in sufficient intensity to allow the student access to educational opportunity, including
 - a. at least 60 minutes per week ("mpw") of social work services and

- prompt access to counseling assistance on an ad hoc basis as needed during the school day; and,
- b. psychological counseling, because of the student's history of admissions to mental health facilities and his intensive behavioral problems in the school setting.
4. Compensatory education services for loss of FAPE during the past two years, including:
 - a. 60 mpw additional social work services after the regular school day for two years;
 - b. tutoring for two hours per week for two years, to address deficits in reading and writing; and,
 - c. such additional compensatory services as may be appropriate based on evidence presented at the hearing.
 5. An Individual Education Program ("IEP") meeting to consider the results of evaluations and implement the above relief; and,
 6. Other relief that will be determined after receipt of additional school records or testimony during the hearing.

The district asserts that it has provided the student a FAPE in the least restrictive environment ("LRE"). An IEP meeting was held on November 2, 2006, at which a behavior plan was developed and 30 mpw of social work services was recommended. The district asserts that the student had no misconduct reports during fourth grade and, according to his class work, was grasping material presented in reading comprehension, math computation, word analysis and math applications.

Issues presented regarding the September 10, 2007 IEP, which was developed to address the IEE report and recommendations

The parent contends that the September 10, 2007, IEP developed by the district does not offer a free appropriate public education for the student because the IEP does not respond adequately to the IEE reports by Dr. Rosen and Dr. Marsden-Johnson. Specifically, the parent contends that:

1. The placement decision by the IEP team is inconsistent with the recommendations in Dr. Rosen's report in the following ways:
 - a. The IEP provides for a combination of self-contained classroom and regular education classroom, which is directly contrary to Dr. Rosen's recommendation that the student not be placed in a regular education classroom at this time; and,
 - b. The IEP provides for placement in a self-contained classroom, where the student will be the only student after four current students are transferred to regular education classes, as reported by the IEP team participants. Although the student needs extensive 1:1 attention in class, placement in a self-contained classroom in which the student is the only student for 600 minutes

per week is not appropriate.

2. The parent further contends that the September 10th IEP does not offer the student a FAPE because it ignores Dr. Rosen's recommendations that the student needs a systematic phonics program in which there is explicit instruction in letter-sound relationships to address remediation in reading, decoding and spelling. None of the IEP team members, with the exception of district's counsel, was familiar with any of the specialized instruction programs recommended by Dr. Rosen.
3. The IEP team wrote a single assistive technology device into the IEP and declined to adopt numerous AT recommendations by Dr. Rosen and Dr. Marsden-Johnson. Although the IEP team requested a formal AT assessment by the district, that request is not an adequate response to the IEE reports. Additionally, a representative of the district's AT unit should have participated in the IEP meeting.
4. The district did not respond to Dr. Rosen's recommendation that the student receive a central auditory processing disorder assessment to identify or rule out additional factors that may contribute to the student's academic weaknesses.
5. The September 10th IEP includes the same behavior intervention plan as in the prior IEP, although Dr. Rosen made recommendations for positive behavior intervention strategies. A functional behavioral analysis should have been completed prior to the IEP meeting.
6. The IEP provides present levels of performance that do not accurately reflect the findings of Dr. Rosen's report. The goal statements do not provide objective means to measure academic progress nor do they respond in a meaningful way to the student's weaknesses in reading, decoding, spelling, and written language that were identified in Dr. Rosen's report.

As a remedy for the above alleged violations, the parent requests that the student be placed in a therapeutic day school that can address both his learning disability and emotional/behavioral problems.

Burden of Proof

The parent has the burden of proof as she filed the due process complaint. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Under Illinois law, the school district must provide evidence that it has appropriately identified the student's educational needs and that the special education and related services are adequate, appropriate, and available. 105 ILCS §14-8.02a(g).

Findings of Fact

Kindergarten - First Grade: School Years 2002-03 and 2003-04¹

The student, who is currently an eleven year old fifth grader, began attending New Sullivan School in kindergarten.² (PD3). He has a record of behavioral problems at school since the beginning. In kindergarten and first grade, he received disciplinary reports for destroying property (PD 193), aggression toward other students, (PD 192, 170, 171, 174, 177-179, 183), not following teacher's instructions (PD 173, 181, 182, 184, 189), swearing and walking away from his group (PD 188), and not returning to class. (PD 180). He was suspended for a total of twelve days for such behaviors. (PD 175, 177, 180, 183, 194).

The student's first psychiatric hospitalization occurred when he was in first grade. He was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and Disruptive Disorder and prescribed psychiatric medication. (PD 65). The student began weekly individual, family and group therapy at Metropolitan Family Services ("MFS") shortly after being discharged from the hospital. (PD 57).

Approximately two months after the student was discharged from the hospital, his mother requested a Case Study Evaluation ("CSE"). Her request, dated May 4, 2004, included information on the student's psychiatric history and counseling services. The request stated that the student had academic problems. (PD 253). On May 11, 2004, the district refused to conduct a CSE because it had not gone through school based problem-solving to determine the student's academic needs. (PD 259).

Second Grade: School Year 2004-05

The district began a CSE in November 2004. (SD 66). On December 3, 2004, the student's therapist sent New Sullivan's case manager a report on the student's psychiatric and therapeutic history and recommended that the district conduct a CSE to determine if the student was eligible for special education. (PD 56-66, SD 143-156). The CSE included assessments by the school nurse, social worker, and psychologist. The social worker's report indicated that the student was referred for "academic and behavioral concerns" and that his teacher reported that he was below grade level in reading. (PD 104, 105). Behavioral problems, including frequent suspensions and physical aggression, were noted in reports by both the nurse and social worker. (PD 105, 117). The nurse's report states that the student's behaviors impact his school performance and attendance. (PD 117).

The school psychologist's assessment included an achievement screening test,

1 The limitations period in this case accrued on February 26, 2005, two years prior to the date on which the parent filed the due process request. Information prior to that date is included only to describe the student's academic/behavioral history and not for substantive purposes related to this Decision

2 Parent's documents are designated by PD and a page number; district's documents are designated by SD and a page number.

an IQ assessment, and a behavioral rating scale. The student scored as follows:

Woodcock-McGrew-Werder Mini-Battery of Achievement (“MBA”)

	GE	PR	SS
Basis Skills	1.4	5	75
Reading	1.4	6	77
Writing	1.3	2	70
Mathematics	2.0	27	91
Factual Knowledge	1.6	27	91

Wechsler Intelligence Scales for Children – Fourth Edition (“WISC-IV”)

<i>Verbal Comprehension</i>	SS	<i>Perceptual Reasoning</i>	SS
Similarities	4	Block Design	6
Vocabulary	9	Picture Concepts	11
Comprehension	9	Matrix Reasoning	5
Information	7	Picture Completion	2
<i>Working Memory</i>		<i>Processing Speed</i>	
Digit Span	6	Coding	8
Letter-Number Sequence	6	Symbol Search	8
<i>Composite Score Conversions</i>		<i>Composite Score</i>	<i>PR</i>
Verbal Comprehension		85	16
Perceptual Reasoning		84	14
Working Memory		77	6
Processing Speed		88	21
Full Scale		72	8

Based on these scores, the school psychologist determined that the student performed in the low range in reading and writing, the average range in mathematics and factual knowledge, and had basic skills within the low range. He assessed the student’s overall intellectual abilities as in the borderline/low average range. The Burks Behavior Rating Scales, used to assess the student’s behavioral issues, was completed by the student’s second grade teacher. (SD 77-80). Based on these ratings, the school psychologist found that the student demonstrated poor impulse control, an excessive sense of persecution, and excessive resistance. (PD 69, 70). The school psychologist reported that the student did not need special education for academic reasons. However, he recommended placement in a small, highly structured classroom that implemented behavior modification techniques because the student’s behavior was impacting his learning. (PD 67-70, SD 62-65).

The district held an initial IEP meeting on February 11, 2005. The IEP team determined that the student’s primary disability was EBD2 (emotional/behavior disorder, level 2 out of 4). (PD 40, SD 38). The IEP noted that the student’s behavior impeded his

learning or that of others and called for a Functional Behavioral Analysis and Behavior Intervention Plan (FBA/BIP) to be developed. (PD 43, SD 41). No FBA/BIP is included with the IEP. The IEP provided for 1240 minutes per week (“mpw”) of specialized instruction and/or related services, divided into 800 mpw in Language Arts, 240 mpw in math, and 200 mpw in social/emotional.³ (PD 48, SD 46). Modifications and accommodations included time outs to redirect behavior, a peer tutor, daily praise for good behavior, seating close to the teacher, a rating scale to address behavior issues, and, extra time for independent reading assignments. (PD 44, SD 42).

The student’s present level of performance (“PLOP”) in Language Arts reported that he had “problems with reading comprehension.” The Language Arts annual goal was to “apply reading strategies to improve understanding and fluency.” (PD 45, SD 43). In math, the student’s PLOP indicated that he had difficulty memorizing basic math facts and “struggles with solving problems with missing numbers and reverse operations.” (SD 44). The social/emotional PLOP stated that the student enjoyed school but had “great difficulties” with authority figures and with controlling his temper. It also noted that he required constant re-direction. The social/emotional goal was to “learn to control his temper and accept responsibility for this actions.” The benchmarks leading to the development of this goal were to “control his temper when being re-directed by authority figure,” “accept responsibility for his actions,” and “when being re-directed by adult, (student) will respond in an appropriate manner.” (PD 47, SD 45).

The IEP required that student receive extended time on tests and be tested with the special education teacher. (PD 50, SD 48). Additionally, the report card grading criteria was modified to: 90-100 A, 80-89 B, 70-79 C, 60-69 D, below 60 F. (PD 51, SD 49). Extended school year (“ESY”) was to be provided for six weeks over the summer to help the student maintain his current level of information. (PD 43, SD 41).

The student’s final grades in second grade were: reading, C; listening, C; speaking, C; written composition, C; spelling, C; and, math, B. No final grade is recorded in science or social studies. (SD 184).

Third Grade: School Year 2005-06

The IEP team conducted its first review of the student’s IEP on December 5, 2005. (PD 23, SD 24). His eligibility category remained the same. (PD 25, SD 26). For the first time, the IEP indicated that the student required assistive technology (“AT”) and listed computer, leap pad and calculators as AT devices. No AT evaluation was conducted in connection with this determination. (PD 27, SD 28). Curricular modifications and accommodations were expanded from the initial IEP to include additional time on independent reading assignments, explaining instructions and giving concrete examples, and allowing the use of a calculator, tape recorder or computer. (PD 28, SD 29).

³ A full elementary week is 1500 instructional minutes.

The student's PLOP in Language Arts indicates that he was working below grade level and had difficulty in word knowledge, fluency and comprehension. (PD 29). Despite this, the student's total special education and related services time was reduced from 1240 mpw to 843 mpw. His Language Arts special education instruction was reduced to 720 mpw, and the math special education instruction was totally discontinued. The language arts goal was to "comprehend unfamiliar words using context clues and prior knowledge, verify meanings with resource materials." The benchmarks the student was to achieve to help his accomplish this goal were "recognize 100 high frequency sight words," "use appropriate strategies of decoding, e.g. illustrations, phonics, word patterns, context clues, to recognize unknown words," and "use a variety of resources to determine and clarify meaning of unfamiliar word." (PD 29).

The social/emotional services were changed to 100 mpw in social/emotional (teacher) and 90 mpm social/emotional (social worker), a reduction of ten minutes. (PD 32, SD 33). The IEP noted that the student continued to exhibit problems with anger and inappropriate behavior. (PD 31). To address these behavioral problems, quarterly benchmarks were developed, which included recognizing and identifying emotions and how they are linked to behavior, describing socially acceptable ways to express anger, and demonstrating socially acceptable ways to express anger. (PD 31). The student was to receive ESY services for six weeks over the summer to help him maintain his current level of behavior. (PD 26, SD 27).

While he was in third grade, the student was again psychiatrically hospitalized. He participated in the hospital's school program during his hospitalization. That program consisted of diagnosis and remediation of basic math and reading skills. The program's discharge recommendation, which was sent to the district, noted that the student was unable to read at grade level. (SD 140 -142). In the summer between third and fourth grades, the student had a third psychiatric hospitalization. The discharge summary reported that he was extremely impulsive within the milieu, angered easily, and had poor boundaries. (PD 120-123).

The December 5th IEP required standard classroom grading criteria in math and modified grading criteria in language arts. The modified criteria were not specified. (SD 36). In third grade, the student received a final grade of B in reading, listening, speaking, and math. His final grade in written composition was a D; and, math, B. No final grades were recorded for spelling, science or social studies. (SD 184).

Fourth Grade: School Year 2006-07

The student's behavioral problems increased in fourth grade, both in number and severity of behaviors. He received Misconduct Reports for: not following directions, defying the teacher and walking out of class without permission (PD 157, SD 120); outbursts, walking around without permission and talking back to the teacher (PD 158, SD 121); hitting a student in the head with his fist, throwing books and yelling in the

teacher's face (PD 159, SD 122); slapping a student in the face and going in the teacher's cabinet without permission (PD 160, SD 123); calling the teacher a bitch and "taking the teacher's stapler off the table & began to staple staplers in student's face," (PD 161, SD 124); cursing, running around the room and throwing crayons at another student (PD 162, SD 125); and, constantly swearing. (PD 163, SD 126). On October 3, 2006, the student received a one day suspension for taking bleach from the classroom and encouraging three children in his classroom to drink it. (PD 323). A document detailing this last incident was produced by the parent at the hearing and copies given to the district and the hearing officer. On February 8, 2007, the student was written up for saying that "he was going to bring a pistol to school and blow (his teacher's) head off." (PD 156, SD 119).

During the hearing, the student's fourth grade teacher produced anecdotal reports, which detailed the following behaviors during January 2007: kicking a table until it collapsed (PD 309); walking or running out of class (PD 309, 311, 318, 319, 321); hitting another student with a pen (PD 309); stating he would "kick (his teacher's) ass" (PD 311); turning off classroom lights while students were working (PD 314, 317); telling the teacher to shut up (PD 318); kicking another student in the shoulder (PD 318); and, threatening to harm another student. (PD 318).

On November 21, 2006, the district held an annual review to update the student's IEP. (PD 3, SD2). His eligibility category remained the same. (PD 5, SD 4). The IEP reports that the student had received an "A" in reading and a "B" in math; however, his fall Learning First scores were below level. (PD 4, SD 3). The IEP required four weeks of ESY as the student "will need constant supervision and direction to maintain his acquired skills." (PD 6, SD 5). Computers and calculators are listed as required AT devices. (PD 7, SD 6). Required modifications and accommodations are removal from class for a small amount of time as needed, breaks after completing schoolwork, clear expectations and directions with concrete examples, and calculators, tables, charts and graphic organizers to assist the student with his school work. (PD 8, SD 7).

The Language Arts PLOP again states that the student was reading below grade level and had difficulty with fluency and word knowledge. (PD 10, SD 9). The language arts goal was to "apply reading strategies to improve understanding and fluency." The benchmarks were to "read age-appropriate material aloud with fluency and accuracy," "make and support inferences and form interpretations about main themes and topics," and "make predictions and connections to establish purposes for reading." (PD 10). His PLOP for both biological/ physical sciences and social sciences also reports that the student is reading below grade level. (PD 11, 12; SD 10, 11).

Poor self control and inappropriate behaviors are again reported in the social/emotional area. (PD 13, SD 12). For the first time, the school social worker notes a connection between the student's behavior and academic difficulty, stating that he is "capable but easily angered, i.e. if (student) is unable to finish an assignment he will

become upset and uses profanity, tears up paper, knocks over, chairs, etc.” (PD 9). The student’s social/emotional goal is to “learn to control his temper and accept responsibility for his actions.” The benchmarks to achieve this goal are to “control his temper when being re-directed by an authority figure,” “begin to understand consequences of his behavior,” and “communicate with the teacher immediately when the need arises.” (PD 13). A FBA/BIP was developed. It identifies the student’s target inappropriate behaviors as profanity (daily, severe), throwing objects (three times/week, severe), and physical aggression (four times/week, severe). The antecedent to these behaviors is identified as academic and social frustration. Positive reinforcements are to include one on one time with the teacher, conferencing, classroom helper and a peer tutor. (PD 19, SD 18).

Total special education/related services minutes were increased to 1030 mpw, divided into 600 mpw in language arts, 150 mpw in biological and physical sciences, 150 mpw in social sciences, 100 mpw in social/emotional (classroom) and 30 mpw in social/emotional (social worker). (PD 14 SD 13). The student was to be mainstreamed for math. (PD 15, SD 14).

The IEP requires a modified grading system for the student, using the following criteria: 80-100 A, 79-70 B, 69-60 C, 59-50 D, and below 50 Fail. (PD 17, SD 16). As final grades in fourth grade, the student received an A in reading, math, science, and social studies. His report card noted “partially developed” in listening, speaking, written composition, and spelling. (SD 184).

As part of the district’s standard assessment program, the student took the Learning First assessment in fourth grade. On the winter reading assessment, he scored 1 correct out of 4 in vocabulary development, 0 correct out of 5 in reading strategies, 6 correct out of 14 in reading comprehension, and 3 correct out of 9 in literature. (PD 297).

Independent Educational Evaluation

Michelle Rosen, Ph.D., conducted an Independent Educational Evaluation (“IEE”) of the student on June 4, 15, and 19, and August 8, 2007. Dr. Rosen gave the student an extensive battery of assessments, which included assessments of his intellectual functioning, a non-language based measure of his intellectual functioning, visual and auditory processing assessments, achievement tests, several reading and writing assessments, and an ADHD rating scale. She also observed the student in his classroom and reviewed the student’s records. (PD 308A).

According to Dr. Rosen, the student was attentive during the testing and did not show signs of distractibility or overactivity. He was cooperative but resisted guessing when he was uncertain of an answer. She interpreted this to mean that he did not want to reveal his areas of weakness. To ensure that he would respond even when uncertain of the correctness of his answer, Dr. Rosen told the student that he would get a penny each time he tried his hardest in answering a question. The reinforcer was given

whether the student answered correctly or not. The use of the reinforcer increased the student's efforts during the examination. (PD 300A)

Dr. Rosen's report is lengthy and, as it is part of the record, will only be summarized here. She administered the WISC IV, on which the student received a Full Scale IQ score of 76, which falls within the borderline ability range. However, when attention and speed demands are removed from his performance, the student's overall ability is significantly higher and within the low average range. A comparison of the student's WISC-IV scores received in the IEE with those from the district's 2005 evaluation reveal that the student has significantly declined in vocabulary, from the 37th percentile to the 9th percentile. (PD 301A). The examiner also gave the student a non-language biased intelligence test, the CTONI. On that test, the student performed within the average range overall, achieving a Nonverbal Intelligence Composite of 92. Dr. Rosen reported that this nonverbal IQ score is a more clinically meaningful index of the student's overall ability because of his decoding deficits. (PD 301A).

The student has a weak auditory and visual working memory and relatively weak visual-perceptual skills. He also has a "significant deficit in perceptual directionality and processing speed which has serious educational implications and impacts his ability to accurately and consistently identify symbolic information in reading, spelling and writing tasks." (PD 301A).

Academic assessments revealed that the student has poor word recognition skills, scoring at only the 2nd percentile. He had a very difficult time sounding out words and showed weak sound-symbol association, poor decoding, and perceptual problems in accurately identifying letters within words. On a test of reading comprehension, the student's "rate and accuracy were so low that a basal level for Fluency could not be achieved even at a first grade level story." At one point in the evaluation, the student burst out crying after 90 seconds of trying to read a fifth-grade level story. The student was initially more successful with a second grade story but became overwhelmed when presented with a longer passage. Dr. Rosen then moved to a first grade level story. (PD 304-306).

The student shows relative strengths in verbal ability and comprehension. But, these strengths are limited by the student's processing weaknesses, particularly when the information is more demanding and visually complex. Dr. Rosen reported that the student's reading is "extraordinarily slow". This slow reading puts more demands on his working memory capacity, which is an area of significant weakness. Despite these difficulties, Dr. Rosen stated that the student is motivated to learn to read. The student's writing skills show poor sound-symbol correspondence. The student was easily overwhelmed by the demand of writing and constructing sentences. The student's math skills range from borderline to average. (PD 304A-308A).

The student's overall abilities are within the average range, although his performance varies depending on the task. He has weaknesses in auditory and visual

processing, particularly in retrieving information through either modality. He also has significant visual-perceptual weaknesses that impact his ability to accurately recognize and identify language-based information, such as letters, words and numbers. His reading is extraordinarily slow, and he makes more mistakes as the reading becomes more difficult. The student has a specific learning disability of dyslexia. Dr. Rosen reported that the student's combined processing deficits have a significant negative impact on all aspects of a language-based curriculum in all content areas. The student also has social-emotional needs. (PD 309A-310A).

Dr. Rosen made the following recommendations regarding placement:

1. Placement in an "environment with a substantial academic focus where all instruction is delivered in an integrated format, and where the goals and expectations are based upon his ability rather than on his reading or writing level."
2. The student should not be placed in regular education *at this time*. Whatever benefit he might receive from a regular education classroom is currently outweighed by the cost of his falling farther behind because of his deficits.
3. A small classroom with low teacher-student ratio is recommended. The teacher must have an understanding of the complexities of the student's dyslexia and the way that impacts all academic content areas.
4. A "pull-out" program is not recommended because it would result in compartmentalized remediation, rather than the integrated approach indicated by the evaluation. Likewise, a program that utilized isolated multisensory strategies in areas of need is not recommended because the student is not able independently integrate, coordinate and generalize the skills he learns.

(PD 311A)

Dr. Rosen also made extensive recommendations for remediation in: reading/decoding and spelling; reading fluency, comprehension and vocabulary; language/written expression; and, mathematics. These recommendations are fully spelled out in her report and thus not repeated here. She reported that the student's social, emotional and behavioral problems are related to his frustration and embarrassment about his reading deficits, coupled with the difficulty that then ensues in meeting academic expectations. Thus, it is important that he experience success in school, which will foster a sense of pride in his progress. Further, Dr. Rosen stressed the importance of a positive behavior plan that implements positive interventions before a problem occurs. (PD 312A-317A).

The evaluator also made specific recommendations for developing an appropriate IEP for the student. She recommended that goals should be based on the student's ability rather than on his current reading and spelling skills and should focus on remediation. She recommended that grading should not be modified when evaluating the student's progress toward his annual goals. Present levels of performance and goals must be measurable, objective, and specific. Dr. Rosen recommended against using

grade equivalent/grade-level scores in the IEP goals and in measuring progress because such scores are neither standardized nor objective evaluation measures. The student requires assistive technology to participate in all core curriculum subjects. Finally, the student requires intensive remediation in decoding and spelling so that he can develop an effective strategy for attacking new words. Without such assistance, the student's reading "will continue to fall severely below a functional level." (PD 318A).

Janet Marsden-Johnson, Ph.D. conducted an assistive technology evaluation as part of the IEE. Dr. Marsden-Johnson gave the student the Test of Written Language 3 (TOWL-3). The student did not use technology on the test so that a baseline of his writing skills could be gathered. Based on this evaluation, Dr. Marsden-Johnson found that the student's writing skills are very impaired. He scored significantly below average in almost all assessed areas of written language. He scored significantly below age level expectations in spelling, style, use of conventions, and overall quality of written language. It took him three minutes to write the sentence "They are fixing on the erath (*sic*)." He has very poor grammatical awareness and is unable to accurately write words or sentences after an auditory prompt.

The evaluator showed the student how to use assistive technology for spelling and repeated a test that he had taken without technology. He was able to spell each word correctly on a spelling test, whereas he had only spelled two correctly without technology. (PD 326A, 327A). Dr. Marsden-Johnson also showed the student how to use a talking dictionary and how the computer could "read" to him. The use of technology improved the student's reading fluency, reduced his errors, and improved his comprehension. (PD 327A).

Dr. Marsden-Johnson recommended that assistive technology be an integral part of the student's academic program. She recommended 30-45 minutes per day of AT services within the classroom to facilitate integration of AT into the curriculum. She also recommended that the student, his parents, and classroom staff receive intensive training in using AT and incorporating it into academics. The student also needs direct keyboarding instruction. (PD 328A).

Fifth Grade: School Year 2007-08⁴

On September 10, 2007, the district convened an IEP meeting to consider the IEE report. The student's primary disability is listed as learning disability, with emotional disturbance as a secondary disability. (SD 169, 175). The eligibility determination indicates that the student has had two psychiatric hospitalizations. (SD 171). The IEP provides for direct/consultative services in a separate class for language arts for 600

⁴ Two different September 10th IEPs have been submitted into evidence. Though they have substantial overlap, they do differ in the goals. Where the IEPs differ, both versions are indicated herein and referred to as parent's IEP or district's IEP. If the portion referred to is the same in both IEPs, it is referenced as "the IPE."

mpw, science for 160 mpw, and social studies for 100 mpw. It also provides for direct/consultative services in a regular education class for math for 200 mpw, science for 40 mpw, and social studies for 100 mpw. Social work services are provided for 120 minutes per month. (SD 186). The prior year's functional behavior plan is attached to the IEP with a hand-written note stating "Interim plan pending FBA by district's behavior specialist." (PD 360, 361). A standard grading criteria is to be used in all academic areas. (SD 189). The IEP lists audio books and Earobics as necessary assistive technology. (SD 177).

The IEP goal sheets in the parent's document binder differ from those in the district's binder in several ways. First, the parent's IEP does not have any language arts or social science goals. The math and biological/physical science goals are handwritten. (PD 342 – 362). The district's IEP has typed language arts goals for reading comprehension, decoding, written expression, and phonics. It also has typed goals for math, biological/physical sciences, and social sciences. (SD 179-184). In a letter from district's counsel to parent's counsel that was included with a copy of the September 10th IEP, district's counsel states that several goals are not included with the IEP because the special education had not drafted goals for social science, written expression, reading comprehension, reading decoding, and reading sight words. (PD 341). The math PLOP in the parent's IEP states that the student is below grade level. The district's typed math PLOP does not contain that statement. The handwritten goal sheet does not identify a procedure by which the student's progress will be measured.

The district's IEP contains several language arts goals. The reading comprehension PLOP states that the student can comprehend reading passages when they are read to him. He is able to respond correctly with high accuracy on multiple choice tests but is often incorrect on open-ended questions. The goal states that the student will be able to answer comprehension questions on short reading passages using various reading strategies with 80% accuracy. (SD 179). The benchmarks are to "establish purposes for reading; survey the reading passage, make predictions, connect, clarify and extend ideas with 80% accuracy," "prior to reading a short story, (student) will scan the story and make accurate predictions in four of five trials," and "(a)fter reading a short story, (student) will compare his predictions with the actual outcome of the story and be able to answer five out of eight comprehension questions with 80% accuracy." (SD 179).

For decoding, the district's IEP identifies the student's PLOP as "within the average range in providing the correct sounds for consonants, long and short vowels, consonant digraphs, and r-controlled vowels when presented in isolation. However, he has difficulties in decoding words which contained the same letter sound combinations and or blends." The decoding goal is to use various strategies and resources to decode unfamiliar words in his reading text with 80% accuracy. (SD 180). As benchmarks toward achieving this goal, the student is to "highlight all unfamiliar words in the passage and orally state the words with moderate cues 5 out of 5 trials," "using a computer software, (student) will work on decoding skills at his speed with 80% accuracy," and

“when reading, (student) will be able to identify new words by using learned word analysis skills with 80% accuracy.” (SD 180).

The student’s PLOP in written expression on the district’s IEP states that he “is able to develop sentences about one topic and provide one or two descriptive words when given a visual and oral prompt. (Student) continues to struggle with organizing information and providing elaboration about one central theme outside of descriptive words.” The written expression goal states that the student will be able to compose a well-organized written composition surrounding a central theme and for a specific purpose. (SD 181). Quarterly benchmarks are to “pre-write and re-write all of his ideas before writing short stories (*sic*) use various resources 80% accuracy,” “given a specific topic, (student) will organize his ideas into a written composition that includes a beginning, middle and end in three out of five trials with minimal grammatical errors,” and “using learned techniques, (student) will produce (*sic*) a well organized written essay surrounding a central theme with 80% accuracy.” (SD 181).

The district’s IEP states that in phonics, the student’s PLOP is “within the average range in providing the correct sounds for consonants, long and short vowels, consonant digraphs and r-controlled vowels. However, (student) has difficulty with consonant blend sounds.” The phonics goal is to “be able to apply word analysis skills through phonics and consonant blends.” The benchmarks are to “orally produce and identify double consonant blends with 80% accuracy,” to “orally produce and identify three consonant blend words with auditory and visual supports with 80% accuracy,” and “using previously learned strategies, (student) will correctly identify and produce all word sounds using multi-sensory strategies with 80% accuracy.” (SD 182(a)).

In math, the parent’s IEP states that the student’s PLOP is below grade level. (PD 352A). That statement is not included on the district’s IEP. (SD 182(b)). Both IEPs have the same annual goal: by the end of the year the student is to have the ability to solve word problems using grade level computation in addition, subtraction, multiplication and division. (PD 352A, SD 182(b)). The benchmarks on the parent’s IEP are that the student will be able to identify “the problem to discern which operation to use in addition and subtraction problems,” “the problem to discern which operation to use in multiplication with 80% accuracy,” and “to identify in the problem to discern which operation to use in division with 80% accuracy.” (PD 352). The district’s IEP math quarterly benchmarks are to be able to “identify the problem and discern with (*sic*) operation to use in 4 our (*sic*)5 trials with 80% accuracy,” “to identify which operation to use in a given set of math word problems and correctly use addition, subtraction and multiplication with 80% accuracy,” and “to identify the correct operation in a given set of word problems and correctly use addition, subtraction, multiplication and division with 80% accuracy.” (SD 182(b)).

For biological/physical sciences, the parent’s IEP states that the student’s PLOP is “reading below grade level.” (PD 353). The district’s document does not contain this statement. Rather, it identifies the student’s PLOP as “(student) knows and is able to

apply concepts that describe properties of matter, energy and interactions between them.” (SD 183). The annual goal on the parent’s IEP is that the student “will know and apply the accepted practices of science by using safety procedures, explaining results and through observation of science experiments in a given project 4 of 5 times with 80% accuracy.” The benchmarks for this goal are to use basic safety practices with 80% accuracy, to explain why similar results are expected when procedures are done the same way with 80% accuracy, and to explain how knowledge can be gained by careful observation with 80% accuracy. (PD 353).

The biological/physical sciences goal on the district’s IEP is “using basic safety practices, (student) will complete simple classroom lab activities with 80% accuracy.” The benchmarks toward development of this goal are “(g)iven moderate teacher support, (student) will be able to explain the results of the lab activities with 80% accuracy,” “(w)hen given a lab activity, (student) will follow the given procedures to complete the lab activity and orally explain the activity with 80% accuracy,” and “(student) will be able to explain the process of observing a lab activity and the results in a written format with 80% accuracy.” (SD 183).

The student’s social sciences PLOP on the district’s IEP indicates that he is able to provide and participate in social studies activities when he is given verbal directions and has visual support. His annual goal is “(g)ive (*sic*) the 5th grade curriculum, (student) will be able to identify and understand the structure and functions of Illinois and the United States with 80% accuracy.” Quarterly benchmarks include “(u)sing various assistive technologies, (student) will understand and identify the Illinois government and economics with 80% accuracy,” “(u)sing various available resources, (student) will understand and compare the physical geography of Illinois and United States with 80% accuracy,” and “(u)sing various assistive technologies, (student) will identify difference levels of government at the Nation (*sic*) level and explain their functions with 80% accuracy.” (SD 184).

The IEP lists numerous modifications and accommodations that are to be provided, including: "audio books; use of color to highlight directional words in math problems and reading; science and social studies books on tape; oral reports, use computer or present ideas physically; to the greatest extent possible (student) will participate with general education classroom for all academic areas with support; whenever possible, provide previewing and preteaching of new concepts, topics and vocabulary; information should be presented in an (*sic*) verbal-visual combination as much as possible (e.g. graphic organizers, outlines, etc.); provide semantic and phonemic cueing when necessary to retrieve information; extra time to answer questions; nurse to check on medication changes and asthma status; behavior specialist to be contacted to review interim behavior plan and complete functional analysis, a new behavior intervention plan will be developed; modify or simplify grade level materials content at level he can understand; provide high interest low reading ability level material.” (SD 178).

The IEP team selected placement in a separate setting and in the general education classroom to allow the student to “receive instruction to remediate specific areas of deficits and participate in the learning environment with typically developing peers which will enhance his academic growth in the content areas. Oral comprehension is a noted area of strength per outside evaluation and (student) would benefit from learning in the general education classroom.” (SD 187). On the parent’s IEP, the section entitled “Justification of Placement in the Least Restrictive Environment” has a box checked, which states “The potentially harmful effects of this placement decision, and recommendations to counter these effects, are:” Nothing is written after this statement. (PD 355). The district’s IEP, in the same section, has written after this statement “To the greatest extent possible, (student) will receive services with his general education peers.” (SD 187).

Counsel for the parent wrote a dissent to the IEP following the meeting and indicated an addendum to the dissent would follow, after the parent had received a complete copy of the IEP goals. (PD 367, 368).

Wilson Reading System

The Wilson Reading System (“WRS”) is a research-based interactive, multi-sensory reading and writing program for those with dyslexia. It uses phonetically controlled texts that incorporate only the elements of word structure taught in or up to the incorporating lesson. It has criterion-based assessments built into program, which measure a student’s progress and success, and also has extensive and systematic teaching materials. The WRS uses a 12 step system for teaching decoding and encoding. Steps 1 to 6 teach the basics of decoding and encoding. Steps 7 to 12 teach more advanced word analysis, vocabulary development, comprehension, and metacognition. In the WRS, a student does not advance to the next step until s/he has met the criteria for the current step. The system has two models of implementation: intervention and intensive. The intensive model is for those students who have been diagnosed with a language based learning disability. (PD 410-414).

The WRS provides for two levels of certification for individuals who want to use the WRS for teaching reading. Level I certification requires the participant to have 90 hours of online instruction and a 60 lesson practicum that includes a demonstration, observation and feedback from a Wilson trainer. Level II certification requires completion of two courses and a practicum. The WRS also has an Introductory Workshop, which is a ten hour workshop conducted by a Wilson trainer. Those who complete the workshop are able to begin using the WRS but are not considered trained in the WRS. (PD 369-402).

Statutory Framework

Under the IDEA, a district must assess a student in all areas of suspected disability using a variety of assessment tools and strategies to gather “functional, developmental, and academic information” to determine if the student has a disability. 20 U.S.C. § 1414(b)(2)(A). The student must be assessed in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B). A specific learning disability is “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. §1401(30)(A). The term includes dyslexia and perceptual disabilities. 20 U.S.C. §1401(30)(B).

An IEP must contain the student’s present level of academic achievement and functional performance, including a statement of how the student’s disability affects his involvement and progress in the general curriculum; a statement of measurable annual goals; and, a description of how the student’s progress on annual goals will be measured. 20 U.S.C. §1414(d)(A)(i)(I)-(III); 34 C.F.R. §300.347(a)(1), (2),(3),(7)(I) (1999); 23 Il. Adm. Code § 226.230(a) (1)-(3). The IEP also must contain “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research” that the district will provide to, or on behalf of, the student and program modifications or supports. 20 U.S.C. § 1414(d)(1)(A)(IV). If a student’s behavior impedes his learning or that of others, the IEP team must “consider the use of positive behavioral interventions and supports, and other strategies” to address the student’s behavior. 20 U.S.C. § 1414(d)(3)(B)(i).

In developing the IEP, the IEP team must consider whether the student requires AT devices and services. 20 U.S.C. § 1414(d)(3)(B)(v); 23 Il. Adm. Code §226.220(a). An assistive technology device is “any item, piece of equipment, or product system. . . that is used to increase, maintain, or improve functional capabilities of a child with a disability.” 20 U.S.C. §1401(1)(A). Assistive technology service is “any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device.” 20 U.S.C. § 1401(2). Assistive technology service includes evaluating a child to determine if AT is needed and training or technical assistance for the child and, where appropriate, the child’s family and professionals who provide services to the child. 20 U.S.C. §1401 (2)(A), (E),(F). The school district must furnish AT devices prescribed in a student’s IEP. 23 Il. Adm. Code § 226.750 (a)(1).

A student’s IEP must be reviewed at least annually and revised as appropriate to address any lack of expected progress toward annual goals and in the general curriculum. 20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.343(c)(2)(I); 23 Il. Adm. Code § 226.200(d), (f)(1)-(4).

A hearing officer’s decision must be based on substantive grounds, based on a determination of whether the student received a free appropriate public education. 20 U.S.C. § 1415(f)(3)(E)(i). If the complaint alleges procedural violations, the hearing officer may find that the student did not receive a free appropriate public education only if

the procedural inadequacies –

“(I) impeded the child’s right to a free appropriate public education;
(II) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or
(III) caused a deprivation of educational benefits.”

20 U.S.C. § 1415(f)(3)(E)(ii).

Conclusions of Law

A two part test is used to analyze whether a district has provided a student with a free appropriate public education: first, the district must comply with the IDEA’s statutory procedures; and then, it must develop an IEP that is reasonably calculated to enable the student to benefit from the special education and related services. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). The student must receive more than a nominal benefit from specialized instruction and related services. T.H. v. Bd. of Educ. of Palatine Comm. Consol. Sch. Dist., 55 F. Supp. 830 (N.D. Ill. 1999). The parent in this matter alleges that the district denied the student a FAPE in several ways.

The parent first contends that the district did not evaluate the student in all areas of suspected disability, which resulted in an educational program that did not address all areas of the student’s disabilities. The parent’s initial request for a case study evaluation stated that the student had academic problems. The social worker’s report indicated that the student was referred for academic and behavioral problems and was reading below grade level. Despite this, the only achievement test administered by the school psychologist was a screening test. The initial IEP noted that the student had problems in reading comprehension, difficulty memorizing basic math facts, and struggled to solve math problems with missing numbers and reverse operations. Although reading and memorization were identified as problems from the start, the district did not conduct an assessment to determine the nature or severity of the student’s difficulties in these areas.

Again in December 2005, at the first annual review of the IEP, the IEP team reported the student was working below grade level and had difficulty with word knowledge, fluency and comprehension. Rather than evaluating the student to determine the nature and extent of his documented reading problem, the district reduced the student’s special education services in language arts from 800 mpw to 720 mpw and totally discontinued special education instruction in math.

The record contains further evidence of the district’s lack of investigation into the causes of the student’s reading difficulties in 2006. The district received a report from the psychiatric hospital at which the student had been hospitalized indicating that the student could not read at grade level. The student’s November 2006 IEP states that his Learning First scores were below level and that he was reading below grade level in

language arts, science and social science. It also reports that he was having difficulty with fluency and word knowledge. The evidence clearly shows that while the student's reading problems were impacting his ability to learn across the curriculum, the district did not evaluate him for learning disabilities. Additionally, no one questioned whether the student's behavioral problems were related to his academic struggles.

The district argues that the student made academic progress during these years and points to his report cards as proof of such progress. The student's final grades in reading and math did rise from a B in third grade to an A in fourth grade. However, because modified grade criteria were used each year, the hearing officer finds the district's argument unpersuasive. While the modified criteria used in third grade are not provided, the fourth grade modified criteria were 80-100 A, 79-70 B, 69-60 C, 59-50 D, and below 50 Fail. This modified scale is significantly lower than the second grade modified criteria, which was 90-100 A, 80-89 B, 70-79 C, 60-69 D, below 60 F. In second grade, the student's final grades were C in reading, listening, speaking, and written composition and B in math. In fourth grade, he received an A as a final grade in reading, math, science and social studies and "partially developed" in listening, speaking, written composition, and spelling. Lowering the grade criteria in this fashion makes it impossible to know whether the student actually made progress or his grades reflect only the lower standard. The fourth grade report card also uses a designation of "partially developed" for listening, speaking, and written composition rather than providing a grade; thus, the student's progress or lack thereof in these subjects cannot be ascertained through his report card data.

In addition, on the IEE, the student scored significantly lower in vocabulary than he had on the same subtest in 2005 when evaluated by the district. He scored at the 37th percentile on the WISC-IV vocabulary subtest in 2005 and at only the 9th percentile in 2007. The student's expressive vocabulary skills also declined within the same time period. The district's assertion that the student made progress within the relevant time period is not supported by the evidence.

The student's fourth grade special education teacher testified that the student has very good comprehension skills and was reading at a high third grade level. The teacher also reported that he completes all his work, does neat work and gets good grades. She did report that he needs improvement in writing as it is hard for him to put his thoughts down on paper. This testimony is contradicted by documentary evidence submitted at the hearing. The Learning First assessment on which the teacher relied shows that the student achieved only 1 correct out of 4 in vocabulary development, 0 correct out of 5 in reading strategies, 6 correct out of 14 in reading comprehension, and 3 out of 9 in literature. Each of these scores is below the average items correct for all students in the district. As to the teacher's testimony regarding the student's grades, as discussed above, the modified grading criteria in conjunction with the changes to the criteria over the years makes it difficult to accurately assess whether he has made progress. For these reasons, the hearing officer finds this testimony not credible.

The student's fourth grade math teacher testified that the student was doing "ok" in math but could be doing better. He reported that the student had trouble analyzing word problems and interpreting story problems but was good at calculating basic operations. He testified that in his class, the student was able to stay focused for most of the 35-40 minute session. Based on the teacher's forthright answers, the hearing officer finds his testimony credible regarding the student's performance in his class.

A district must ensure that it recognizes a student's needs and completes a full and individualized evaluation. Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205, 36 IDELR 153 (N.D. Ill. 2002). There is clear evidence in the record that the district did neither. The evidence shows that the student was reading below grade level and had problems with fluency, word knowledge and comprehension. These problems impacted his learning in all the core curricular areas. Even in math, noted as an area of strength for the student, his reading problems interfered with his ability to learn. Whatever progress the student made was minimal at best and, according to standardized tests, he actually showed a significant decline in vocabulary, which had been one of his strengths. The parent has shown by a preponderance of evidence that the district did not fully evaluate the student in all areas of suspected disability. The failure to fully evaluate a student leads to inadequate programming. Bd. of Educ. of Oak Park and River Forest H.S. Dist. No. 200 v. Kelly E., 21 F. Supp. 2d 862, 875 (N.D. Ill. 1998) ("Kelly E."). The district could not provide for what it had not assessed. Because the district did not fully evaluate the student, the program it provided was inadequate as it did not address all areas of his disability.

The parent next alleges that the district failed to develop an effective functional behavioral analysis and behavior intervention plan for the student. A student's IEP must address all areas of his disability, both academic and behavioral, to meet the substantive standard of "conferring benefit." Alex R. v. Forrestville Valley Comm. Unit Sch. Dist. #221, 375 F. 3d 603 (7th Cir. 2004). ("Alex R"). Although the IEP team must consider a behavioral intervention plan for a student whose behavior impedes his learning, a BIP is not required by either the IDEA or its implementing regulations. *Id.*; 20 U.S.C. §1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). While the district's assertion that it was not *required* to develop a BIP is correct, it was required to adequately address the student's behavioral problems in his IEP and update the goals to address new or increased problems.

The district argues that the student's behavior improved between first grade and the end of fourth grade. The record clearly shows otherwise. Written disciplinary reports show that kicking, spitting and not following teacher's instructions escalated to hitting a peer in the head, threatening to harm another student, threatening to bring a gun to school and blow the teacher's head off, pushing staples into a student's face, and "the bleach incident," in which three students were sent to the emergency room after the student and a couple others persuaded them to ingest a mixture of bleach and water. The student's IEPs do not mention any of these aggressive and threatening behaviors, and testimony from the case manager revealed that disciplinary reports and teacher

anecdotal were not discussed at IEP meetings.

Several district staff testified regarding the student's behavior. The instructional aide, who was with him for third and fourth grades, stated that there are "two (student's)," meaning that if he did not get his way, he would become upset. She testified that she had seen him hit his teacher, have fights with other students, and described the "bleach incident." She stated that as recently as four weeks before the hearing, the student had choked another student. She testified that the student had "calmed down" in the few months prior to the hearing, which she attributed to a reduction of the number of students in the classroom from 15 to seven. On cross-examination, the aide testified that she had seen a change in the student's behavior: he does not "fly off the handle" like before and asks permission to leave the room or to have a time out. The aide was direct in her answers, and the hearing officer finds her testimony credible.

The student's fourth grade math teacher testified that the student exhibited normal fourth grade behavior in his class. According to the math teacher, the student responds to other students' inappropriate behaviors but does not initiate such behavior.

The student's fourth grade special education teacher stated that the student is very aggressive and physically violent in her room. She testified that he taunts other students, uses profanity and is disrespectful to adults. She reported that if she touches the student when he was upset, he becomes more violent; therefore, she calls security at such times. She stated that the student has the most severe behavior in the class. She reported that she has written about 15 disciplinary reports on the student, including one the week before the hearing. She only completes a report when there is a very severe incident. Regarding the October 3rd "bleach incident," the teacher testified that the student and a couple other students took some cleaning solution from behind her desk, put it in test tubes along with water, and then encouraged other students to drink it. Security was called and an ambulance took the students who had ingested the solution to the emergency room.

She testified that the student showed behavioral improvement during the year, in terms of keeping his temper and apologizing to his peers and teacher when he did something wrong. She stated that the positive behavioral interventions she uses are to rub the student's back, give him a hug, and point out positive things he does. This testimony about the student's new ability to control his temper is contradicted by evidence in the record showing that the student's threatening and aggressive behaviors increased in severity and intensity during fourth grade. Given the teacher's testimony that she did not record all the student's behavioral problems, it is likely that the student had more problems in fourth grade than are reported in the record. For these reasons, the hearing officer finds the teacher's testimony not credible.

The school social worker, who began working the student in 2005, testified that she initially provided consultative services because the student was functioning well in class but changed to direct services after reviewing his social assessment and considering of the mother's concerns. She testified that she did not receive reports that

the student was violent but did know that he was destructive. She testified that the student has a hard time controlling himself when he is frustrated and that his frustration has to do with academic frustration.

The student's case manager testified that although she was aware of the student's problems with profanity, she was unaware of his violent behaviors and of any suspensions prior to January 2007. She reported that she has provided instructional time-outs for the student, during which he sits quietly with her, calms himself down, and honestly reports his behavior problems. She was with the student the Friday before the hearing for a time out, and he told her that he had hit another student after she had hit him. The case manager stated that the student responds very well to re-direction. While the case manager's testimony regarding her personal contacts with the student are credible, the hearing officer was struck by her lack of knowledge regarding the student's threatening and aggressive behaviors, both toward other students and school staff. Further, the parent's allegation that the student's behavioral issues were not been addressed by district is supported by the case manager's testimony that the student's threatening and aggressive behaviors were not discussed at IEP meetings.

As the *Alex R.* court stated, "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.'" *Alex R.*, 375 F. 3d 603 (7th Cir. 2004). The overwhelming weight of the evidence – both testamentary and documentary – shows that the student's aggressive and violent behaviors increased in severity and intensity between 2005 and 2007. Sadly for the student, the staff responsible for providing his special education services did not communicate about these problems or investigate their causes. The IEP goals for the two years at issue state that student will learn to control his temper and accept responsibility for his actions. The evidence shows that he made minimal, if any, progress on these goals. Staff testimony regarding his beginning capacity for remorse and asking for time outs does not outweigh the severe behaviors recorded in his numerous disciplinary reports. The record is replete with evidence showing that the student's IEP goals failed to appropriately address his violent and disruptive classroom behaviors.

Moreover, after the IEP team developed a behavior plan for the student on December 5, 2006, there is no evidence that it was implemented. The classroom teacher testified that she rubbed his back and gave him hugs as rewards for good behavior. Neither of these "interventions" appears in the IEP or BIP. While a BIP is not required under *Alex R.*, the district was required to develop an IEP that adequately addressed the student's emotional and behavioral difficulties. The parent has shown by a preponderance of the evidence that the district did not do so, either through an appropriate BIP or appropriate IEP goals.

Finally, the parent argues that the district failed to provide essential related services of social work and assistive technology to the student. As to social work services, the hearing officer finds that there is insufficient evidence to show that the

district failed in this regard. The situation as to assistive technology, however, is different. The district never evaluated the student's assistive technology needs even though his IEPs noted problems with reading and writing. The district did not evaluate the student to determine if assistive technology devices would help him with his reading and writing problems. The IEE assistive technology evaluation clearly demonstrates that AT devices are helpful to the student and positively impact his ability to read and write. As the *Kelly E.* court held, the failure to fully evaluate a student leads to inadequate programming. Kelly E., 21 F. Supp. 2d 862, 875 (N.D. Ill. 1998). The parent has shown by a preponderance of the evidence that the district failed to evaluate the student for assistive technology needs and because of that failure, did not provide him with necessary AT devices and services.

The parent's final allegations pertain to the September 10th IEP, which the district developed to address the IEE. The parent argues that the IEP is inconsistent with the independent evaluator's recommendations regarding placement and therefore denies the student a FAPE. Dr. Rosen recommended that an appropriate placement for the student would provide: intensive remediation in reading, decoding and spelling, using a systematic phonics with explicit instruction in letter-sound relationships; integrated instruction in all classes, with goals and expectations based on the student's ability rather than his reading or writing level; and, a small classroom with a teacher who understands the complexities of dyslexia and how that disorder impacts all content areas. She also made specific recommendations regarding the student's needs in comprehension and assistive technology. She recommended against placement in a regular education setting *at this time* because of the risk that the student would fall farther behind academically "because he is unable to complete the work expected of him or demonstrate functional basic skills." She also recommended against providing multisensory strategies in isolation because doing so would not help him develop the ability to generalize these skills into his regular education assignments because he does not have the ability "to independently integrate, coordinate, and generalize these skills."

While the district accepts Dr. Rosen's learning disabilities diagnosis, it refutes her placement recommendations for the student, arguing that it is the district's prerogative to determine methodology. Lachman v. East Maine Sch. Dist. 63, 852 F.2d 290 (7th Cir. 1988). ("Lachman") The September 10th IEP provides for placement in a regular education classroom with 340 mpw of special education services and placement for 860 mpw in a separate special education classroom. The IEP provides goals for decoding, phonics, reading comprehension, written expression, math, biological/physical sciences, social sciences and social work. The program set out in these goals must provide the student more than a minimal benefit and must be tailored to his unique needs. Rowley, 458 U.S. 176 (1982). An IEP must contain specific goals, and the goals and objectives must provide measurable criteria against which the student's achievement can be measured. Independent Sch. Dist. No. 701, Hibbing Pub. Sch. v. J.T., 45 IDELR 92 (Minn. 2006) ("Hibbing"). This student's unique needs stem from his combination of dyslexia, weak auditory and visual processing skills, weak working memory capacity, and emotional problems.

The IEP decoding PLOP reflects the student's decoding problems as identified in Dr. Rosen's report. However, neither the decoding goal nor the benchmarks address the specific problem identified in the PLOP. The goal and benchmarks focus on words, not same letter sound combinations and/or blends. Dr. Rosen testified that the student would not benefit from this goal because he needs to learn decoding beginning with syllables, not words. The WRS certified trainer also testified that the student must begin at the most basic level for reading instruction.

The phonics goal is written in terms of word analysis skills. Dr. Rosen testified that the phonics goal does not differ from the prior approach used to teach reading to the student, which was unsuccessful. She recommended that the reading material contain very few nonphonetic cues, e.g. picture cues. One of the benchmarks requires visual supports, completely opposite to this recommendation. Neither the goal nor the benchmarks contain objective criteria against which the student's achievement can be measured, so there is no reliable way to measure whether the student is making progress.

The comprehension is essentially the same as the student's language arts goal in the November 2006 IEP. The goal does not address the IEE finding that while comprehension is an area of relative strength for the student, his reading/decoding problems significantly impact comprehension. The goal requires that the student read material and comprehend it, rather than separating comprehension from the reading demand. The AT evaluation recommended technology to improve the student's comprehension by decreasing decoding and reading.

The written expression PLOP does not accurately reflect the findings of the IEE. In assessing the student's written language, the evaluator had to administer a second grade level of items because the student had become quickly overwhelmed by the writing demand when given a grade-appropriate item. His writing reveals poor sound-symbol correspondence and poor spelling. The AT independent evaluator stated that his writing skills are very impaired. He had difficulty writing a story to describe a picture and took three minutes to write a one sentence description. Because the PLOP is inaccurate, the goal and objectives that follow cannot be accurate.

The math, biological/physical sciences, and social sciences levels of performance do not state how the student's disabilities impact his ability to participate in these general education subjects. This is necessary so that appropriate instruction can be provided. Dr. Rosen's report stresses the need for integrated instruction and the importance of teachers fully understanding dyslexia and how that is manifested across all content areas and how the student's specific processing deficits impact his participation and performance in the general curriculum.

None of the goals or benchmarks contain objective criteria for measuring the student's progress and therefore do not meet the *Hibbing* standard or the requirements

of the IDEA. For this student, this is a particularly important omission. His report cards have not provided a reliable means of measuring his progress for the last few years because of problems in the modified grading criteria noted above. Objective data indicate that his skills have declined in at least some areas pertaining to reading. It is essential that his IEP sets out a reliable means of measuring his progress in all areas of service provision.

The IEP's behavior intervention plan is a copy of the prior year's plan. There is a notation on it indicating that it is an interim plan, pending a FBA by the district's behavior specialist. Given the severity of the student's behaviors in fourth grade, it is hard to understand why preparing an appropriate BIP would not be at the top of the IEP agenda. To adopt the same plan that was ineffective last year violates the requirements of the IDEA and, under *Alex R.*, does not provide the student with a FAPE.

The special education teacher testified that she is putting together a learning center for the student to address phonics and decoding instruction. She plans to teach phonemic awareness by showing the student the difference between phonemes, teaching him how to identify them, and helping him put them in word families. One method she will use to teach reading is to cut out letters from the newspaper and have the student use them to make new words. She will teach fluency by using age appropriate materials and having the student read them for inferences and main topics. She had difficulty providing a specific answer to a question by parent's counsel regarding how she would measure the student's progress in decoding, stating that she would ask the student some questions and have him do some trials on which he would be scored. She testified that she is not familiar with the Earobics program, which is the software to be use for the student. She testified that the student is with her alone for two hours during the day for language arts instruction. In the general education classroom, she is responsible for the student as well as eight other special education students.

The district's school psychologist (not the same person who conducted the initial evaluation) testified about the IEE and the IEP goals and placement. She stated that she had spent about 30 minutes over the summer reviewing the report. She testified that she was unfamiliar with the test of non-verbal intelligence and the phonological assessment and that she rarely gives the WISC IV. She disagreed with the IEE conclusion that the structured remediation cannot occur in a placement with the student's typically developing peers. She stated that while reading and writing are tools for learning, they are not the only tools. She has never met or observed the student. Given the length of the IEE report and the short time the psychologist spent reviewing it, coupled with her unfamiliarity with several assessments administered in the IEE, the hearing officer gives little weight to her testimony regarding the IEE and its recommendations.

The independent evaluators and the certified WRS trainer testified that the student needs systematic phonics instruction in order to learn to read. Dr. Rosen testified that the IEP goals for phonics, reading and decoding basically recycle the ways

the student had been taught to read in earlier grades rather than providing the specific remediation he needs. Dr. Rosen testified that the reading goals (comprehension, phonics and decoding) provide instruction that is no different from what the student has received in the past and will not benefit the student. She stated that he needs a remedial, systematic approach to reading that includes explicit instruction in the basics, letter-sound relationships. The WRS trainer testified that the student would do well with the WRS because it would address his decoding deficits. While district personnel stated that the student would benefit from the IEP, their testimony is not persuasive. The witnesses provided a cursory answer to a direct question by district's counsel, with no explanation as to how the student would benefit.

Based on the above, the hearing officer finds that the goals set out in the September 12th IEP are not tailored to meet the unique needs of this student, as identified in the independent evaluations. Additionally, given the student's severe behavior problems, particularly last year, the lack of an updated behavior plan is a glaring omission in the IEP. The student is not likely to benefit more than minimally from the program the district has proposed.

As to the district's argument that methodology is left to the district's discretion, *Lachman* holds that when a proposed IEP is "based upon an accepted, proven methodology," a parent does not have the right to compel a district to provide a different methodology that the parent considers more appropriate. *Lachman*, 852 F. 2d 290 (7th Cir. 1988). The September 12th IEP does not identify any methodology – let alone an accepted and proven methodology - for teaching this student to read, which is precisely the parent's objection: the IEP does not meet the student's needs because it provides no methodology to remediate his dyslexia and therefore puts him at substantial risk for further academic failure.

During the final hearing day, the district presented testimony regarding a plan to provide to train the student's special education teacher in the WRS through supervision by an academic coach from the district's multisensory program. The district's citywide multisensory trainer testified that an academic coach will supervise the special education teacher in the WRS through weekly on-site supervision. The academic coach, who was not called to testify, has experience teaching learning disabled students, providing assistive technology, and has had the Wilson Overview/Intervention workshop. She is not, however, certified by the WRS. The academic coach will provide the teacher with an overview of the WRS and 10 hours of tapes. The coach will initially evaluate the student and work directly with him while the teacher observes the process. By the third week, the teacher will take over the lessons, and the coach will observe her. Beginning the fourth week, the coach comes twice a week to observe. The coach will provide curricular materials. The special education teacher has had no training in the WRS. She testified that she has not spoken with the academic coach but will call her once she has her schedule. She stated that the coach will come for three days/week for approximately eight weeks

The parent argues that the evaluation of a proposed IEP must be limited to the terms of the document itself. Knable v. Bexley City Sch. Dist., 238 F. 3d 755 (6th Cir. 2001). The written offer in the September 12th IEP clearly does not mention the WRS or any similar programs listed in the independent evaluation. Under *Knable*, the proposal described in the above testimony does not constitute a proposed placement for the student because it was not set forth in his IEP.

Assuming *arguendo* that the district has offered the program described in the above testimony to the student, the question remains whether that program meets the student's needs and would provide him with educational benefit. The program as described essentially provides on the job training for the special education teacher in the WRS. The teacher has no experience with the program and, as of the date of the hearing, had no contact with the academic coach. Credible testimony has been presented that the student should not be taught by someone who is just beginning training on the WRS because of the severity of the student's problems. The program presented in this testimony does not address the independent evaluator's recommendation that *all* instruction be provided in "an integrated and cohesive manner and with consideration of the impact of (the student's) specific processing deficits." For these reasons, the program described in testimony presented at the hearing does not offer the student a free appropriate public education from which he could benefit.

IT IS ORDERED THAT:

1. Within ten days, the district is to convene an IEP meeting to place the student at a therapeutic school that can provide the placement identified in the independent educational evaluation. The program must include a systematic, research based phonics program in which there is explicit instruction in letter-sound relationships that are taught in a clearly defined and logical sequence to a level of automaticity. The program must also be able to address the student's processing problems, comprehension issues, weak memory skills, and behavioral problems.
2. The district, in conjunction with the therapeutic school, is to conduct a functional behavioral analysis and prepare a positive behavioral intervention plan to address the student's behavioral/emotional problems.
3. The IEE recommends that the student receive an assessment to determine if the student has a central auditory processing disorder. The district has indicated that it has personnel qualified to conduct such an evaluation. The district is to work with the parent and Dr. Rosen to determine which specific tests are recommended. The district is to complete the evaluation with 30 days.
4. The district is to provide necessary assistive technology for the student as well as any training needed by the parent or school staff.

Order

Within forty-five (45) days of receipt of this Order, City of Chicago School District 299 shall submit proof of compliance to:

Illinois State Board of Education
Program Compliance Division
100 North First Street
Springfield, Illinois 62777-0001

Right to Request Clarification

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

Right to File Civil Action

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

ISSUED: September 27, 2007

Mary Schwartz
Due Process Hearing Officer

CERTIFICATE OF DELIVERY BY MAIL

The undersigned hereby certifies that a copy of the Decision and Order was sent by certified mail with return receipt from Chicago, Illinois, and directed to:

Mr. Michael O'Connor, Esq.
Mauk & O'Connor, LLP
1427 West Howard Street
Chicago, Illinois 60626

Ms. Tracy Hamm, Esq.
Due Process & Mediation
Chicago Public Schools
125 South Clark Street, 8th Floor
Chicago, Illinois 60603

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

Before 5:00 p.m. on September 27, 2007.

Mary Schwartz
Due Process Hearing Officer
6116 S. University Avenue, 2N
Chicago, Illinois 60637
773.684.3035(voice & facsimile)
708.912.0755 (cellular)
maryschwartz@gmail.com