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## Pennsylvania Special Education Hearing Officer

### DECISION

Child's Name: DK

Date of Birth: xx/xx/xx

Dates of Hearing:

March 18, 2008, April 15, 2008, April 16, 2008, May 14, 2008

CLOSED HEARING

ODR #8419/07-08 KE

Parties to the Hearing:

Abington School District  
970 Highland Avenue  
Abington, PA 19001-4535

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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May 30, 2008

June 14, 2008

William F. Culleton, Jr., Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a xx year old eligible resident of the Abington School District (District), who is currently in the third grade at the District's [redacted] Elementary School. (NT 10-11; S-52.) The Student is identified with Other Health Impairment. (NT 11.) He has been diagnosed with Attention Deficit Hyperactivity Disorder and is believed to have problems with central auditory processing. (NT 11-12.)

Mr. and Ms. (Parents) requested due process alleging that the District had failed to evaluate and provide services to the Student in the school years from the Fall of 2004 until the date of the hearing, and requesting appropriate program and placement, reimbursement for an independent educational evaluation, and compensatory education. The District asserts that it evaluated the Student appropriately and provided a proper program and placement.

The Parents filed their Complaint by letter of counsel received on January 8, 2008. The hearing was held in four sessions from March 18, 2008 to May 14, 2008. The record closed on May 30, upon receipt of the parties' closing statements, as requested by the parties.<sup>1</sup>

## **ISSUES**

1. From September 2004-until January 8, 2006, did the District prevent the Parents from requesting due process by making specific misrepresentations that it had resolved the problem forming the basis of the complaint filed in this matter?
2. From September 2004-until January 8, 2006, did the District prevent the Parents from requesting due process by

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<sup>1</sup> These statements are marked as Hearing Officer exhibits and included in the record. Marked as HO-1 is the Parents' Closing Argument, and marked as HO-2 is the Closing Statement of the Abington School District.

withholding information that was required by law to be disclosed?

3. During the relevant time period ending January 8, 2008, did the District fail to comply with its Child find obligation to evaluate the Student because of a suspected disability?
4. Was the District's initial evaluation as reflected in the Initial Evaluation Report dated April 24, 2006 appropriate?
5. Was the District's initial evaluation as reflected in the Initial Evaluation Report dated November 9, 2007 appropriate?
6. During the relevant time period ending January 8, 2008<sup>2</sup>, did the District fail to provide a FAPE to the Student?
7. Should the hearing officer award compensatory education for any part or all of the relevant time period?
8. Should the hearing officer award reimbursement for any independent assessments and evaluations obtained by the Parents privately?

### **FINDINGS OF FACT**

1. The Student was involved in one disciplinary incident in his first year of kindergarten, in which he hit another child. (P-3.)
2. The Student repeated kindergarten due to reports of academic difficulties and immature behavior. The second year of kindergarten provided full school days of instruction and was considered to have some remedial purpose. In kindergarten, the Student received pull-out support from reading specialists. (NT 182, 194, 467-468, 495-496, 651; P-2, P-4, S-7.)

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<sup>2</sup> At the hearing, the hearing officer limited the relevant time period to conclude on the date of receipt of the due process Complaint Notice on January 8, 2008.

3. The Student improved academically in the second year of kindergarten, but his behavior remained poor in the area of following rules and self control. (NT 294-296, 302-309, 314, 363-364, 422-429; P-5, P-6.)
4. The Student's teacher noted that he had difficulty following oral directions in the second year of kindergarten. (P—6.)
5. The Student's teacher attempted to implement a behavior plan for the Student in February 2005, in his second kindergarten year. (NT 302-305; S-6 p. 2, 3.)
6. In March 2005, the teacher changed to a new behavior plan after concluding that the original plan did not work. There were additional incidents of improper behavior, including fighting, defiance and anger outbursts. (NT 305-306; P-6 p. 5-10.)
7. The teacher consulted the school psychologist about modifying the Student's behavior. (P-6.)
8. There was some discussion regarding testing the Student, but no one suggested an educational evaluation for possible special education services. (NT 299-302, 545-547, 588-589.)
9. In first grade, the Student received remedial instruction from the District's reading specialist in class. (NT 467-468; S-7.)
10. During first grade, the Student participated in a class for developing social skills, once per week for thirty minutes. The District's school psychologist conducted the class. The Student made progress in social skills. The Student's behavior and level of maturity did not impress the psychologist as significantly outside the norm for children of his age. (NT 201-203, 504-505.)
11. During first grade, the Student continued to demonstrate poor behavior outside of the classroom, and in October 2005, the teacher discerned that the Student was struggling academically. The teacher observed problems with listening to directions, rushing through work, remembering directions, and maintaining organization of work and materials. (NT 315, 431-434; P-8, P-12, S-40 p. 8.)

12. The Student's behavior was not problematic in the classroom in first grade. (NT 315, 317; P-8 p. 3.)
13. The Student's marks for social skills improved in first grade, in self control, accepting responsibility and cooperation with others, but his grades remained poor for respecting others and following rules. The Student's academic grades did not improve. (NT 513; P-7.)
14. In December 2005, the Student's first grade year, the teacher indirectly suggested that the Parents request an evaluation, while indicating that it would be premature because the Student was not failing. (NT 318-321.)

#### INITIAL EVALUATION APRIL 2006

15. In January 2006, the Parents requested in writing an educational evaluation. (NT 323.)
16. The District obtained the Parents' permission to evaluate the Student on February 21, 2006. (NT 460-462; S-5.)
17. The Parents asked the District to evaluate the Student's poor academic achievement. (S-7.)
18. The District reported its initial evaluation on April 24, 2006. (S-7.)
19. The District obtained the Parents' input through a Parent Information Form as well as the Mother's responses to the BASC Parent – Report questionnaire. The Student's Mother also completed a developmental history form reflecting no developmental delays. (NT 463; S-7.)
20. The Parents reported that the Student had educational needs in reading and listening, and displayed aggressive and immature behavior. (S-7.)
21. The psychologist also reviewed and was aware of the Student's documented record of behavioral difficulties, problems with

organization, listening, following directions and completing work, teasing others and self control. (NT 167-179.)

22. The District's School Psychologist administered the Wechsler cognitive and achievement tests, which are norm referenced and valid for the purposes for which they were used in this evaluation. (S-7.)
23. The Wechsler tests disclosed a full scale IQ in the low average range, with even development within the subtests. There was no significant discrepancy between ability and achievement in reading, mathematics, written language or oral language. (S-7.)
24. The District's Curriculum Specialist conducted an instructional assessment of the Student in mathematics, disclosing no areas of weakness in the first grade curriculum. (S-7.)
25. The District's evaluation considered an informal reading inventory administered in February 2006 by the District's reading consultant. The inventory indicated that the Student reached frustration at Pre-primer level and that his listening capacity could not be determined. On a second reading of a pre-primer passage, the Student's performance improved. (S-7.)
26. The reading consultant reported that the Student demonstrated problems with sitting still, attention, visually tracking words and lines and listening to instructions. (S-7.)
27. The Student was screened using the Houghton Mifflin assessments and scored on grade level in reading sight words. (S-7.)
28. The evaluation identified educational needs in sight vocabulary, decoding and comprehension. (S-7.)
29. The evaluation considered a District- administered group cognitive abilities test which was administered to the Student in March on two successive years while the Student was repeating kindergarten. This is a norm referenced test with validity in the average range of scores. The Student's scores ranged from the second to the eighth percentiles in the first year of kindergarten, and from the

fourteenth to the twenty-first percentiles in his second year of kindergarten. The psychologist found that these scores corroborated the WISC IV scores. (NT 216-218; S-7.)

30. A visual-motor integration test disclosed below average skills. (S-7.)
31. The evaluation considered the Student's performance reports for the two years in which he was in kindergarten, which showed low achievement with improvement in the second year. It considered the Student's performance reports for the first two marking periods of first grade, in which the Student performed at a below basic level in listening, a basic level in reading, science, and social studies, and basic to proficient in mathematics, health, and special subjects. (S-7.)
32. Social and behavioral needs were assessed through a commonly used behavior inventory that is norm referenced and valid for identifying symptoms of ADHD. The Student's Mother and one teacher reported responses on the inventory. The teacher reported at-risk behaviors regarding learning problems, depression, and leadership. The Mother reported at risk behaviors in aggression and leadership and clinically significant behaviors in conduct problems and adaptability. The psychologist was experienced in using this instrument to screen for attention deficit and hyperactivity. (NT 203-215, 283; S-7.)
33. The psychologist was experienced in the differential diagnosis of ADHD, and familiar with relevant literature; she and adopted a parsimonious approach to diagnosis of that disorder. (NT 203-215, 516.)
34. The District's School Psychologist observed the Student in his regular education first grade classroom. However, the psychologist reported only her observations of the Student during testing. His concentration and attention level appeared to be age-appropriate. The Psychologist interviewed the Student and administered an informal sentence completion task, detecting no emotional disturbance, although the Student did express frustration about getting into fights. (NT 181-S-7.)

35. The Psychologist concluded that the Student's behaviors were typical of children his age in the classroom, and that his social skills are age appropriate. At home, the report concluded that behaviors are more problematic. (S-7.)
36. The school psychologist concluded that the Student's problems of behavior and inattention were better explained as a product of the Student's low average cognitive functioning. (NT 218-219.)
37. The District's evaluation found that the Student did not demonstrate a discrepancy between ability and achievement, that his instructional reading assessments are inconsistent but indicate ability to meet expectations in the first grade curriculum, and that his behavioral difficulties do not interfere with his academic functioning. It concluded that the Student was not a child with a disability. (S-7.)
38. The Parents signed a NOREP approving the April 2006 evaluation. No meeting was held to discuss the results. (NT 325-326, 464; S-8.)
39. The April 2006 evaluation did not include a functional behavior assessment. (NT 695; S-7.)

#### 2006-2007 SCHOOL YEAR, SECOND GRADE

40. During the 2006-2007 school year, the Student's negative behaviors increased in frequency. The Student was placed near the teacher's desk, separated from the other students. Later he was placed at the back of the room. (NT 326-330, 438-443; P-6, P-10, S-40 p. 9.)
41. In the first half of second grade, the Student struggled with academics and performed at a below basic level in language arts, with weak comprehension skills and inappropriate behavior. (P-6, S-18.)
42. In the first half of second grade, the Student received reading support services two hours per week in a resource room and three



twenty minute sessions per week in the regular classroom. He also received math support. (P-10, S-7, S-12, S-18.)

43. In the first half of second grade, the Parents attended several conferences concerning the Student's academic and behavioral problems. (P-10, S-18.)
44. In January 2007, the Parents provided private therapy to the Student. The therapist and teacher discussed the Student and made plans to coordinate their efforts. (NT 330-332; P-10 p. 8, 9, S-17, S-18.)
45. In January 2007, the Parents requested a meeting regarding the Student's poor academic performance during the first half of his second grade year, indicating frustration with the Student's assigned second grade teacher. (NT 334-335; S-19.)
46. In February 2007, the District referred the Student to its Core Team Review process, a regular education intervention process. (NT 229-231; P-10 p. 12, S-18.)
47. In March 2007, the Father met with the Principal at the Elementary School and indicated his frustration with the Student's assigned second grade teacher. A meeting was scheduled for April. (S-20.)
48. In May 2007, the Student was evaluated privately by a licensed audiologist who reported that the Student demonstrated difficulty with attention, need for extra time and repeated instructions. No physical hearing problem was discovered and a battery of tests was administered to detect any "central auditory processing disorder." The report concluded that the Student has auditory processing deficits. The District was notified of this evaluation during the summer of 2007. (NT 344-347, 232-233; S-22.)
49. In June 2007, the Parents obtained a private scoring of an attention deficit disorder scale which indicated that the Student was moderately atypical for attention problems, with subscales indicating markedly atypical behaviors in behavioral control. This was provided to the District in the summer of 2007. The District's

school psychologist was familiar with the instrument. (NT 240-243; S-24, S-40.)

50. All private test results and reports were provided to the District. (NT 467-468; S-40.)

51. On July 23, 2007 and July 25, 2007, the Parents requested in writing that the District perform another educational evaluation, and on July 27, 2007, they returned the Permission form. On the form, they requested a functional behavior assessment. (S-23, S-25, S-26, S-27, S-28, S-29, S-31.)

### 2007-2008 SCHOOL YEAR, THIRD GRADE

52. In September 2007, the Student scored as instructional at the pre-primer level in the Qualitative Reading Inventory; his listening skill on the inventory was listed as at the pre-primer level. (S-32.)

53. In September 2007, the Parents obtained a private pediatric neurological report supporting a diagnosis of ADHD, and the District was notified of this. (NT 243-245; P-16, P-26, S-33, S-40.)

54. In September 2007, the Student was assessed at a basic level in mathematics. (S-40.)

55. The Student improved in behavior during the first half of third grade. (NT 473, 253-256, 616-617, 620-622; S-51.)

56. The Student improved significantly from the beginning of the school year in 2007 until January 8, 2008. (NT 472-473, 630-631.)

### NOVEMBER 2007 EVALUATION

57. In November 2007, the District provided an initial evaluation report that identified the Student with Other Health Impairment and found no specific learning disability. The report identified needs in reading comprehension, written expression, visual-motor integration, and attending and understanding instructions in class. (NT 246-247, 250-251; S-40.)

58. The school psychologist found that the Diagnosis by the private pediatric neurologist was corroborated by more elevated findings from the BASC screening instrument. (NT 250-253.)
59. The evaluation considered the private audiology report, the private ADHD instrument scoring, the private pediatric neurology report, and the Student's District-administered QRI and mathematics assessments. (NT 243-244, 694; S-40.)
60. The District's school psychologist considered the Student's behavior problems in second grade. (NT 231, 247-248.)
61. The evaluation also considered a third group administered cognitive abilities test, administered while the Student was in second grade, which indicated no improvement over the previous score taken when the Student was in his second year of kindergarten. (S-40.)
62. The evaluation included an Occupational Therapy report that indicated below average eye-hand coordination, position in space, copying, spatial relations, and visual closures. (S-40.)
63. The evaluation included a speech and language evaluation which indicated no need for speech and language services. (S-40.)
64. The evaluation concluded that the Student functions in the low average range of cognitive functioning, based upon a variety of assessments and tests, more than one of which was norm referenced and valid for the purposes for which it was used in this evaluation. (S-40.)
65. The evaluation included the results of the Woodcock-Johnson Tests of Achievement, Third Edition, which is norm referenced and valid for the purposes for which it was used in this evaluation. The Student's achievement was average in mathematics and overall academic skills; low average in oral language and reading; and low in writing. (NT 246; S-40.)
66. The evaluation considered District assessments in the classroom, which indicated that the Student achieved at a basic level in

mathematics in second grade, three years below expectations in reading, and had demonstrated difficulty in writing. (NT 246; S-40.)

67. The evaluation included a functional behavior assessment. (S-40.)

68. The evaluation included a behavior rating inventory, filled out by the Student's Mother and one teacher. The teacher rated the Student as at-risk in attention problems hyperactivity and learning problems. He was clinically significant for atypical behavior. The Student's Mother rated the Student as at risk or clinically significant in attention problems, aggression, and functional communication. (S-40.)

69. The school psychologist concluded that the Student's behaviors are not abnormal to a clinically significant extent. (NT 247-250.)

70. The report recommended learning support in language arts, occupational therapy services, and accommodations in the regular and learning support classrooms. (S-40.)

71. On November 16, 2007, the Parents wrote an email message disagreeing with the evaluation report's conclusion that the Student did not have a learning disability. (S-23.)

72. On November 30, 2007, the District convened an IEP team meeting to discuss the evaluation report and plan a program for the Student. (S-41, S-42.)

#### NOVEMBER 2007 IEP

73. The November 30, 2007 Initial IEP addresses needs in reading comprehension, writing, organization, listening and attention, with measurable goals for which a baseline can be derived from the Present Levels, at least where a baseline exists. (S-42.)

74. The IEP provides occupational therapy consultation and small group therapy, reading support, and itinerant learning support in a general education placement. (S-42.)

75. The IEP is responsive to the Parents' desire to have the Student remain with his present teacher in regular education. (S-42.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>3</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipose” – that is, where neither party has introduced a preponderance of evidence<sup>4</sup> to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail.

### **FREE APPROPRIATE PUBLIC EDUCATION**

The District was and is obligated to provide the Student with a free and appropriate public education (“FAPE”), in accordance with an

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<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>4</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

Individualized Education Plan (IEP) reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). “The education provided must be sufficient to confer some educational benefit upon the handicapped child.” L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Under the IDEA, an IEP must include goals, “including academic and functional goals designed to ... meet each of the child’s other educational needs that result from the child’s disability ... .” 34 C.F.R. § 200.320(a). See, M.C. v. Central Regional School District, 81 F. 3d 389, 393-394 (3<sup>rd</sup> Cir. 1996). These needs include behavioral, social and emotional skills. Ibid.

In determining the appropriateness of an IEP, the legal standard is whether or not the IEP was “reasonably calculated” to provide meaningful educational benefit. Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982); Ridgewood Board of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. (1999)). In making this determination, the IEP is to be judged as of the time it was written, not in hindsight. Roland M. v. Concord School Committee, 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990); cert. den., 499 U.S. 912, 111 S.Ct. 1122, 133 L.Ed.2d 230 (1991); Fuhrman v. East Hanover Board of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993).

The IDEA requires the states to educate children with disabilities “with children who are not disabled” and this must be done “to the maximum extent appropriate ... .” 20 U.S.C. §1412(a)(5)(A). The intent of Congress was to “ensure, to the maximum extent possible, that children with disabilities are educated with children who are not disabled.” Jonathan G. v. Lower Merion School District, 955 Fed. Supp. 413 (E.D. Pa. 1997). Each disabled child must be placed in the least restrictive environment that will provide him or her with meaningful educational benefit. T.R. v. Kingwood Twp. Board of Education, 205 F.3d 572 (3d Cir. 2000).

Compensatory education is an appropriate remedy where a district has failed to provide a student with FAPE under the IDEA. M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990), cert. denied, 488 U.S. 923 (1991). Where an IEP confers only trivial or de minimis educational benefit, the student has been denied FAPE and is entitled to compensatory education. M.C., supra. The period of compensatory education is equal to the period of deprivation, and accrues when the District knows, or has reason to know, that the student

is not receiving an appropriate education. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

### IDEA LIMITATION PERIOD

The IDEA provides timeframes for actions brought under its auspices in two sections. First, the act provides that states must maintain procedures that afford “any party” an opportunity to present a complaint “which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint... .” 20 U.S.C. 1415(b)(6)(B). Second, in a separate section, the Act provides:

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint ... .

20 U.S.C. 1415(f)(3)(C). These sections provide a two year “look forward” limitations period for filing a due process complaint notice, which accrues from the time the filing party “knew or should have known” of the events giving rise to the claim asserted in the complaint notice. As this hearing officer reads the statute, the initial provision, ensuring a right to file a complaint notice, describes not the limitation period, but the nature of the rights ensured in that section. Thus, the pertinent provision is the latter one, quoted above, section 1415(f)(3)(C).

This section is subject to two explicit exceptions:

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

- (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

#### A. Applicability of IDEIA

Initially, the Parent argues that the IDEIA limitations period is inapplicable to the present matter because the claims go to events that preceded the Act's effective date. The hearing officer is unpersuaded. The IDEIA explicitly provides that it applies to requests for due process made after its effective date, Pub. L. 108-446, Title III, §302(a)(1) (2004). More than one federal court has noted in dicta that the IDEIA's two year limitations period applies to due process requests filed after the effective date of the Act. Robert R. v. Marple Newtown School Dist., 2005 U.S. Dist. LEXIS 27093 at \*3 (E.D. Pa. Nov. 8, 2005); cf. A.A. v. Exeter Township School Dist., 485 F.Supp.2d 587 n. 5 (limitations period inapplicable because claim filed before effective date of IDEIA). See also, In re Educational Assignment of B.D., Spec. Educ. Op. 1861 at 5 (January 30, 2008); In re Educational Assignment of S.I., Spec. Educ. Op. 1850 at 8-10 (November 7, 2007); In re Educational Assignment of Z.S., Spec. Educ. Op. 1748 at 10 n. 70 (July 10, 2006).

#### B. Misrepresentation

The Parent argues that the first exception to the IDEIA limitation period applies because the District specifically misrepresented to the Parent that it had resolved the problem forming the basis of the complaint. 20 U.S.C. 1415(f)(3)(C)(i). The hearing officer finds that the Parent has failed to prove any misrepresentation.

#### C. Withholding of Information

The exception for withholding information applies when the parent is prevented from filing a due process request due to the district's withholding of information required by law. Few cases have been discovered that construe this exception to the IDEIA limitations period. In Mostow v. Hinsdale Township High School, 2006 U.S. Dist. LEXIS 63462 (N.D.Ill. 2006), the district court considered a claim that information was withheld



and misrepresentations made so as to avoid the limitations period, in the context of a request for Temporary Restraining Order. The district court held that a parent had established likelihood of success on the merits by alleging that a district had misinformed a parent about the services available to the student from the district. *Id.* at 6-12. In Marple Newtown School District v. Raphael N., 2007 WL 2458076 (E.D. Pa. Aug. 23, 2007), the court held, without extensive analysis, that the exception was satisfied where a district had failed to provide information to a parent in the parent's native language.

In the present matter, the Parent's attorney asked the witnesses at every stage of the Student's school career whether or not the District had informed the Parents that they had a right to an evaluation. While procedural safeguards and prior written notice are required by law under defined circumstances, the hearing officer finds that the District was not obligated to provide such notice of safeguards when it recommended the Student's retention in kindergarten at the end of the Student's first kindergarten year, (FF 2), or whenever it reported inappropriate behavior or failing grades to the Parents. (FF 3-6, 11, 14.)

In effect, the Parents argue that the alleged omissions that are the subject matter of their claims suffice to toll the IDEA limitations period. To accept this argument would simply negate the limitations period in every case, a result that is contrary to the plain language of the statute. Consequently, this was not a failure to provide information required to be provided within the meaning of the second exception to the IDEA limitations period. 20 U.S.C. 1415(f)(3)(D)(i), (ii).

The same is true of the District's alleged failure to inform the Parents that the new full day kindergarten class (to which the Student was assigned in his second kindergarten year) was for children considered "at risk." (FF 2.) The IDEA does not require disclosure of such information. This was a general education program and was not part of a formal screening or special education service.

#### D. Continuing Violation

The hearing officer does not accept the Parent's "continuing violation" argument. There is no basis in the IDEIA for imputing such an exception in addition to the two exceptions explicitly set forth. Nowhere in

the statute or in the applicable regulations is there an indication that Congress intended a third exception for “continuing violation.” In re Educational Assignment of B.D., Spec. Educ. Op. 1861 at 6 (January 30, 2008). Pennsylvania’s Special Education Appeals Panels have declined repeatedly to apply the “continuing violation” doctrine. In re Educational Assignment of B.D., Spec. Educ. Op. 1861 at 6 (January 30, 2008); In the Matter of the Educational Assignment of C.M., A Student in the Pocono Mountain School District, Spec. Ed. Opinion No. 1765 (August 2006); In the Matter of the Educational Assignment of P.P., A Student in the West Chester Area School District, Spec. Ed. Opinion 1757 (August 2006); In re Educational Assignment of Z.S., Spec. Educ. Op. 1748 at 10 n. 70 (July 10, 2006).

#### E. Section 504 Limitations And Exceptions

Next, the Parent argues that her claims arise under Section 504, which does not have a statutory limitations period. However, all of the Parent’s claims are framed under the IDEIA, and the Parent points to no distinct additional issues under Section 504. The §504 “child find” does not differ materially from that set forth in the IDEA. 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §104.32(a). W.B. v. Matula, 67 F.2d 484, 501 (3<sup>rd</sup> Cir. 1995). Nor do the respective provisions for eligibility on account of emotional disturbance differ materially, at least as applied to the matter at hand. 34 C.F.R. §104.3(2)(i)(B); 34 C.F.R. §300.8(c)(4)(i). All claims arise out of the same facts alleged in pursuit of the IDEA claims.

Thus, there is no basis to apply procedural standards that differ from those governing the application of the IDEIA to these facts. In the Matter of the Educational Assignment of P.P., A Student in the West Chester Area School District, Spec. Ed. Opinion 1757 (August 2006). Moreover, federal cases instruct that the Pennsylvania two year statute of limitations for personal injury is to be imputed to section 504 claims. Sutton v. West Chester Area School District, 2004 U.S. Dist. LEXIS 7967 at 25 (E.D. Pa. 2004). Therefore, this hearing officer will not extend the applicable limitations period based upon the characterization of the claims as arising under §504. The hearing officer reaches the same conclusion regarding the argument that minority tolling should be applied here under §504. M.D. v. Southington Bd. Of Educ., 334 F.3d 217, 222 (2d Cir. 2003).

## FAILURE TO IDENTIFY

The Parents argue that the District should have referred the Student for evaluation while he was in his second year of kindergarten. (FF 3-8.) The hearing officer finds that the facts known by the District did not require such a referral at that time. Ibid. In making this finding, the hearing officer is mindful that the District's actions must be judged based upon what the District knew at the time, not on "hindsight." See, Roland M. v. Concord School Committee, 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990); cert. den., 499 U.S. 912, 111 S.Ct. 1122, 133 L.Ed.2d 230 (1991); Fuhrman v. East Hanover Board of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993). These cases apply the "hindsight" principle to the IEP process, but the hearing officer finds no principled reason not to apply it to his review of the District's judgments in not referring the Student for evaluation during his first two years with the District, which he spent in kindergarten.

The Student did exhibit both serious difficulties in reading and behavioral concerns in his first year of kindergarten. (FF 1-2.) However, these concerns were not at the level experienced later. (3, 4, 6, 11, 40-41, 43.) There was one known behavioral incident; the Student had difficulty with reading comprehension. (FF 1-2.) We must take into account that children develop cognitively and socially at different rates, and problems that later would be red flags for evaluation are not so in early years, because of the variability of developmental paths in children. (NT 504-505.)

The Parents agreed with the decision to retain the Student. (FF 2.) They accepted that his difficulties might be explained by a lag in development that might be within normal limits at his age. The decision was to place the Student in a new full-day kindergarten with learning supports for reading. (FF 2.) The record shows by a preponderance that this was a reasonable decision.

The Student improved academically in the second year of kindergarten. (FF 3.) The parties agreed on this, and the written documents of record corroborate this view. However, the Student's behavior in school did not improve; in fact it seemed to get worse. (FF 3-7.) The teacher attempted two successive behavioral interventions to no avail. (FF 5-6.) She consulted the school psychologist. (FF 7.) There was vague discussion of testing the Student, though no-one directly suggested a full evaluation. (FF 8.) Again, the hearing officer finds that during this period, there was

reason to attempt interventions in regular education before moving to an evaluation. There was not yet a red light.

The first grade teacher was able to get the Student's behaviors under control in the classroom. (FF 12.) Meanwhile, the teacher's experienced eye noticed serious problems with the Student's cognitive functioning. (FF 11, 14.) He had serious problems with following directions and attention. (FF 11.) The teacher brought these observations to the Parents' attention, but did not recommend an evaluation in the first half of the year because the Student was making some progress academically.<sup>5</sup> (FF 9, 10, 113.) In January, the Parents decided to request an evaluation in writing. (FF 15.) There ensued an unaccountable delay: the District delivered a Request to Evaluate form immediately, but the Parents did not return it to the District until February 21, 2006. (FF 15-16.) The evaluation commenced, but the report was not delivered until April 24, 2006. (FF 18.) There is no allegation that the report was not completed within the sixty school days allowed by law.

The hearing officer concludes that, in light of the teacher's reports, there was not an unusual delay. There was some progress in the first part of first grade, and behavior was not problematic in the classroom.

#### EVALUATION OF APRIL 2006

The hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311.

It first must be noted that the evaluation (or re-evaluation) required by the IDEA is an educational evaluation, not a medical one. The IDEA repeatedly characterizes the evaluation as educational. At

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<sup>5</sup> The teacher's form indicates that she recommended against evaluation because the Student was not failing in first grade. (P-8 p. 3.) The hearing officer agrees with the Parents' observation that a student should not have to fail to receive an evaluation; however, under the circumstances, the record shows preponderantly that, at this point in time, the District was not on notice of information clear enough that an evaluation was compelled. Again, the facts- especially the teacher's report - were still ambiguous enough that there was not yet a red light for the District. (FF 11-14.) Even the Parents mulled over the situation before concluding that an evaluation was needed - in January. (FF 15-16.) They did not feel compelled to make sure the evaluation was started until the end of February. As a whole, the record corroborates that there was serious concern, but not clarity that an evaluation was appropriate among all the interested parties at this point in time.

§1414(a)(1)(C)(i)(I), the Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to “determine the educational needs of such child ... .” In 20 U.S.C. §1414(b)(2)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii). See also, 20 U.S.C. §1414(b)(3)(C) (“educational needs”); 20 U.S.C. §1414(b)(4)(A) (same); 20 U.S.C. §1414(c)(1)(B)(i)(same). Thus, the District’s obligation is limited to determining the Student’s functioning in school, and how to address deficits in school functioning.

The regulations define “evaluation” to be:

Procedures ... to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs [.]

34 C.F.R. §300.15. Further, the regulations require that the evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs ... .” 34 C.F.R. §300.304(c)(6). At least one federal court has interpreted the IDEA to require that the evaluation be “sufficient to develop an appropriate IEP ... .” Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25. It is clear that the evaluation is required to address how the child functions for educational purposes, rather than to provide a complete depiction of the child’s medical conditions. 20 U.S.C. §1414(d)(1)(A)(i). The Ninth Circuit Court of Appeals reached a similar conclusion in Park v. Anaheim Union High School District, 464 F.3d 1025 (9 Cir. 2006).

The law requires that evaluations be based upon specified procedures, and courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002). The procedures for re-

evaluations are the same as those for initial evaluations. 34 C.F.R. §300.303.

In conducting an evaluation, a public educational agency must “assure that “ the child “is assessed in all areas of suspected disability... .” 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4). The agency must utilize a variety of tools and strategies to gather relevant information, 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b)(1). These strategies must gather relevant “functional, developmental, and academic” information. 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b)(1). The agency must also review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1).

The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2). The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The agency must utilize information provided by the parent that may assist in the evaluation. Ibid. This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ... .” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2).

## ADEQUACY OF THE EVALUATION OF APRIL 2006

The District’s evaluation of April 2006 met all of the criteria set forth in the law for an appropriate evaluation. The District followed all of the procedures that the law specifies. The evaluation utilized a variety of instruments of different kinds, several of which are norm-referenced and valid for the purposes for which they were used. (FF 19, 22, 24-25, 27 29—

30, 32, 34, .)<sup>6</sup> The District inquired into the Student's cognitive, academic and behavioral functioning, and also screened him for depression. (FF 18, 19, 22, 25-26, 29-31.) Its approach included a comprehensive review of records, and utilization of observation reports from teachers and the Parents, as well as personal observations by the school psychologist during her testing. (FF 19, 21, 31-32, 34.) Under these circumstances, the District has met its burden to show that its evaluation was appropriate. At the very least, this re-evaluation report was adequate to provide a basis for a comprehensive IEP that would address all of the Student's educational needs. That is all that the law requires.

The psychologist who conducted the evaluation was familiar with the Student from her consultations with his kindergarten teacher on behavioral issues in the second year of kindergarten, (FF 7), and from his participation in a special class for social skills development during his first grade year, (FF 10). The psychologist did not find the Student's behavior to be significantly outside the norm for children of his age. (FF 10.)

The Parents rely largely upon the documentation of behavior and academic difficulties throughout the two kindergarten and first grade years. (FF 1-13.) They point out that there was no analysis of these documents in the Evaluation Report. While the hearing officer agrees that it would have been beneficial to have more detailed treatment of these documents in the Report, he relies upon the credible<sup>7</sup> testimony of the District's school psychologist that she considered these reports, (FF 21, 31), and upon her persuasive testimony indicating that she weighed this information in light of all the evidence before her in a manner consistent with appropriate professional practice. (FF 35-37.) Thus, the Parents' argument boils down

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<sup>6</sup> The Parents argue that the District's psychologist gave improper weight to an instrument called the Cognitive Abilities Test (CogAT). The psychologist relied on scores from this instrument to corroborate her findings on the WISC-IV. (FF 29.) However, under cross examination, she evidenced a lack of familiarity with the exact nature of the entity measured by the instrument. The hearing officer weighs this with other evidence of record, and concludes that the psychologist's use of the instrument was not proven to be inappropriate, and was at most used to corroborate her findings.

<sup>7</sup> The hearing officer finds the psychologist's testimony to be credible, despite aspects of her demeanor that suggested some defensiveness. Based upon the content of her answers, particularly her willingness to concede a point, and even admit areas in which she lacked knowledge or understanding, as well as her willingness to explain her reasoning fully and cogently, the hearing officer concludes that the psychologist's initially defensive demeanor was not indicative of unreliability.

to a suggestion that the psychologist in fact ignored these documents, contrary to her testimony, an hypothesis that the hearing officer rejects, based upon the record.

The Parents argue that the psychologist failed to address the Student's behavioral difficulties by conducting a functional behavioral assessment. They assert that, in the absence of such an assessment, the psychologist was relying upon nothing more than the BASC, thus violating the IDEA requirement that no single instrument be the basis for denying identification. The hearing finds that the psychologist did not violate this rule. While she relied primarily upon the BASC, this was an instrument with which she was familiar from her experience in clinical and research settings, (NT 106-107, 189-194), and which is valid and reliable for purposes of assessing the symptoms of ADHD. (FF 19, 32.) Moreover, her assessment was based upon more than just this instrument. She also relied upon teacher reports, (FF 31-32), which were not unambiguous, and her own observations of the Student over the course of two years, including teaching him in a classroom setting, (10, 34). The hearing officer finds that this constituted reliance upon multiple and varied kinds of data sources, consistent with the mandate of the IDEA.

The Parents argue that the school psychologist should have referred the Student for a psychiatric evaluation to obtain a diagnosis or ruling out of ADHD.<sup>8</sup> The hearing officer does not accept this argument. As a certified school psychologist, (NT 190), this individual was entitled under law to use judgment in deciding whether or not additional information was necessary for an appropriate educational evaluation. The record clearly supports the conclusion that she exercised such judgment. (FF 35-37.) The record does not support a conclusion that she exercised this judgment inappropriately.

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<sup>8</sup> The Parents also challenge the psychologist on her knowledge of the frequently asserted entity known as Central Auditory Processing Disorder. Parents' counsel jostled with the psychologist on whether or not the entity was cognizable under the IDEA as a legal disability. The hearing officer notes that the psychologist's understanding of the law of identification was imperfect. However, he does not find that this outweighs the other indications of her expertise and credibility upon which are based his finding that her opinions were adequate to support her evaluations. The dispute really boils down to a question of diagnostic classification and nomenclature, as to which psychologists and other medical and educational professionals may legitimately differ.



The Parents argue that the psychologist committed an error of judgment because she allowed herself to be influenced by her knowledge of news reports and professional studies indicating that ADHD is or was widely over-diagnosed, (FF 33; NT 210.) The implication is that this produces a bias against the diagnosis that affected her judgment. The hearing officer finds that the record as a whole does not support this argument, and he rejects it. Moreover, the premise is untenable. An expert is expected to have knowledge of the broad range of professional and scientific studies concerning a given diagnosis; it would be incongruous to suggest that experts who have knowledge of literature on over-diagnosis, and give it reasonable credence, are disqualified from making educational judgments on behalf of school districts. Yet this is the implication in the Parents' argument.

## PROVISION OF FAPE DURING SECOND GRADE

The Student's behavior and grades declined in second grade, both in the first part of the year and in the second part, when the Parents began to seek private help for him. (FF 40-50.) The Parents argue that the Student is entitled to compensatory education for that period of time; however, there is no basis to award it because, as the hearing officer has found, he was not eligible at that time for special education and related services.

Part of the Parents' complaint is that the District responded inappropriately to the Student's behaviors. Initially, they argue that the District failed to conduct a functional behavior analysis. (FF 39.) Regardless of whether or not that should have been done as a matter of good practice, the IDEA requires such an evaluation of behavior only when the child is identified with a disability and such an analysis is necessary to provide FAPE.

Moreover, there is no explicit disability of behavior in the IDEA. Rather, behavior can be part of the legal criteria for finding some of the enumerated disabilities. For example, Serious Emotional Disturbance can be shown in part from behavior that demonstrates an inability to build or maintain satisfactory interpersonal relationships, or inappropriate types of behavior under normal circumstances. 34 C.F.R. §300.8(c)(4). Similarly, deficits in adaptive or social behavior and other kinds of unusual behaviors can support part of the criteria for autism, mental retardation, and traumatic

brain injury. 34 C.F.R. §300.8(c)(1), (6), (12). However, there is no defined disability category for dysfunctional or even oppositional behavior by itself. The presence of any problematic behavior does not automatically require a functional behavior analysis under the law.

The Parents also argue that the Student in second grade was punished for behavior related to his disability, by being placed away from other students either at the front of the class or at the rear. (FF 40.) However, there was no claim of violation of the IDEA's requirements for discipline of disabled or thought to be disabled children. The only claim to which this allegation is relevant is the claim that the District failed to provide FAPE; however, since the Student was not identified at this time, he was not entitled to FAPE under the IDEA.

The Parents argue that the District's omissions to evaluate the Student in his two years of kindergarten were due to a policy of the District to try as many interventions as possible before evaluating for special education. (NT 601-607.) The hearing officer is not persuaded by this argument. He has weighed the evidence in this particular case, and finds that the omissions to evaluate during those years were based upon individualized assessment of need, not upon any policy considerations. While the possible influence of organizational culture cannot be ignored, there is no evidence that the District's responses to the Student's needs were driven by policy or culture as opposed to direct assessment of need.

#### ADEQUACY OF THE EVALUATION DATED NOVEMBER 9, 2007

The record was not well developed concerning the adequacy of the evaluation of November 2007. The ER was admitted into the record, and it appears that the evaluation was far more extensive than the April 2006 evaluation, including additional and different achievement measures, more detailed inquiry into the Student's learning problems, and a functional behavioral analysis. (FF 51, 57-70.) The record is far more than preponderant that the evaluation was appropriate.

## PROVISION OF FAPE DURING THIRD GRADE

The hearing officer finds no basis in the record to conclude that the November IEP offered by the District failed to offer a reasonable opportunity for meaningful educational benefit. While it is not extensive, and is not as clearly written as would be desirable, the IEP addresses needs in reading comprehension, writing, organization, listening and attention, with measurable goals for which any existing baselines can be derived from the Present Levels. (FF 73-74.) It is responsive to the Parents' desires regarding placement. (FF 75.) The Student has succeeded in the present placement, and his behavior is substantially improved. (FF 52-56.)

## RIEMBURSEMENT FOR INDEPENDENT EDUCATIONAL EVALUATIONS

Parents are entitled to an independent educational evaluation if they disagree with the district's evaluation. 34 C.F.R. §502(b)(1). For a parent-initiated evaluation, parents are entitled to reimbursement if a hearing officer finds the district's evaluation inappropriate. In the Matter of the Educational Assignment of J.B., Spec. Ed. Opinion 1341 (April 2003).

In the present matter, the hearing officer does not find the District's evaluations inappropriate. Under these circumstances, reimbursement will not be awarded.

## CLAIMS UNDER SECTION 504

Section 504 of the Rehabilitation Act of 1973 provides that “[n]o otherwise qualified individual with handicaps in the United States shall, solely by reason of his/her handicap ... be excluded from the participation in, be denied in the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance ... .” 29 U.S.C. § 794. An individual with handicaps is defined as “any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.” 29 U.S.C. 706(8). There are few differences between the IDEA's affirmative obligations and the prohibitions under section 504. *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995),

abrogated on other grounds, A.W. v. Jersey City Public Schools, 486 F.3d 791 (3d Cir. 2007).

Section 504 applies to individuals whose impairment substantially limits one or more major life activities. 34 C.F.R. §104.3. Assuming that education is one of these major life activities, the Parents' claims on behalf of the Student are identical to - and spring from the same factual allegations as - any §504 claim that he may have. Whether under IDEA or section 504, the factual issue is whether or not the Student's educational opportunity is substantially limited by his alleged disability. The District here found that educational opportunity was not impaired in the Student's kindergarten years and in first and second grade. Thus, the Parents do not allege any claim that is distinguishable from those asserted, and decided above, under the IDEA.

The Parents assert that the Student's social relationships and adaptive skills are impaired, by the very nature of his behavioral difficulties. However, the Parents did not show this to be the case in fact. There was no evidence that the Student did not have social relationships; in fact, the record contains references that the Student had developed friendships on his own. There was no evidence that the Student was not developing normally. In sum, the section 504 claims are not distinct from the IDEA claims in this case, and section 504 offers no greater or different relief.

## **CONCLUSION**

In conclusion, the hearing officer finds that the IDEA limitations period should not be extended. Therefore, the hearing officer considers all claims that arose on or after a date which is two years prior to the date on which the Parents filed their due process request. Examining all claims arising within that time frame, and considering circumstances extending back to the beginning of the Student's first kindergarten year, the hearing officer finds that the Parents have failed to prove by a preponderance of the evidence that the District violated the IDEA or Section 504. The District did not have knowledge or notice that the Student should be referred for evaluation until an evaluation was requested in January 2006. From the Student's kindergarten years, the District provided interventions, and attempted new and different interventions, to address the Student's academic and behavioral difficulties. During his second year of kindergarten, the Student appeared to respond to these interventions.

The evaluation in April 2006 was timely and appropriate, and appropriately found that the Student was not a child with a disability, based upon the data and information available to the District at the time. The District continued to provide intervention and support to the Student addressing his needs. When these proved unsuccessful, the District moved to evaluate within a reasonable period for rectification. The second evaluation identified the Student, and FAPE was both offered and implemented.

Under these circumstances, the Parents are not entitled by law to reimbursement for assessments and evaluations that they obtained privately.

### **ORDER**

1. From September 2004-until January 8, 2006, the District did not prevent the Parents from requesting due process by making specific misrepresentations that it had resolved the problem forming the basis of the complaint filed in this matter.
2. From September 2004-until January 8, 2006, the District did not prevent the Parents from requesting due process by withholding information that was required by law to be disclosed.
3. During the relevant time period ending January 8, 2008, the District did not fail to comply with its Child find obligation to evaluate the Student because of a suspected disability.
4. The District's initial evaluation as reflected in the Initial Evaluation Report dated April 24, 2006 was appropriate.

5. The District's initial evaluation as reflected in the Initial Evaluation Report dated November 9, 2007 was appropriate.
6. During the relevant time period ending January 8, 2008, the District did not fail to provide a FAPE to the Student.
7. The hearing officer will not award compensatory education for any part or all of the relevant time period.
8. The hearing officer will not award reimbursement for any independent assessments and evaluations obtained by the Parents privately.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

DATED: JUNE 14, 2008