

DECISION

The matter coming before the due process hearing officer (DPHO) at a hearing held on April 18-20, 2011; Petitioner (Parent) represented by Gail Stewart and Tara Ford, Attorneys at Law; Respondent (District) represented by Jacquelyn Archuleta-Staehlin and Elizabeth Church, Attorneys at Law, and the hearing officer, having heard the testimony of witnesses, having reviewed the exhibits, and being otherwise advised in the premises, enters the following findings of fact, conclusions of law and Order.

STATEMENT OF PROCEDURE

Parents filed a request for due process with the New Mexico Public Education Department (NMPED) on February 15, 2011, alleging District failed to evaluate and qualify student as eligible for special education under the category Other Health Impaired (OHI), disregarded its Child Find responsibility, applied improper discipline measures, and denied student FAPE. [DPHO Exhibit 1] District in its response to the complaint denies all allegations, challenges the jurisdiction of the DPHO to hear SAT and § 504 issues, and affirmatively states that student is not eligible for services under IDEA. [DPHO Exhibit 5] This hearing officer was appointed on February 16, 2011. [DPHO Exhibit 2].

At the pre-hearing telephone conference held on February 28, 2011, the hearing officer scheduled the due process hearing for April 18-21, 2011. District requested an extension of

time limits for good cause shown, which was granted over the objection of Petitioner. Statements of issues were submitted on April 4, 2011. [DPHO Exhibits 7, 8] Exhibits and witness lists were exchanged on April 11, 2011. [DPHO Exhibits 9, 10, 11, 12] The DPHO dismissed the NMPED in a Second Pre-Hearing Order entered April 14, 2011. [DPHO Exhibit 13] The parties did not agree to submit joint exhibits. District's oral motion to dismiss following presentment of Petitioner's case-in-chief was denied. Briefs and requested findings of fact and conclusions of law were timely filed. [DPHO Exhibits 14, 15, 16, 17]. This decision was entered on May 29, 2011.[DPHO Exhibit 18]

ISSUES PRESENTED

Petitioner has identified the following issues for determination by the hearing officer:

1. Whether Student was eligible for receipt of special education services during the statutory period (February 11, 2009-the present)?
2. Whether Student has been disciplined for behaviors related to disability?
3. Whether Parent was denied procedural rights under IDEA to the extent that such denial constitutes a denial of FAPE?
4. Whether District failed in its Child Find obligation during the period in question?
5. Whether District violated IDEA provisions by improperly delaying or refusing parental request for evaluation?
6. Whether District violated IDEA provisions by improperly delaying or denying parent's request to consider special education eligibility?
7. Whether District violated IDEA provisions by improperly relying on the SAT process in identifying Student?

8. Whether District violated IDEA provisions by failing to develop and implement an IEP for Student?

9. Whether it is District's policy to systematically deny requests for evaluation to artificially decrease the numbers of students qualifying for special education?

10. Whether Student is entitled to equitable remedy, including but not limited to, compensatory education and services?

11. Whether Student was denied FAPE?

Respondent submits the following Statement of Issues:

1. Whether the DPHO has jurisdiction to address SAT and/or 504 Committee claims as are alleged by Parent?

2. Assuming that Student has been diagnosed with ADHD, is he entitled to receipt of special education and related services as a result of that disability?

3. Whether Student has any other disability recognized by IDEA and whether as a result of such disability he needs/qualifies for receipt of special education and related services?

4. Whether by conducting a staffing within a few weeks of District's receipt of an independent evaluation from Parent in the fall of 2008, District fulfilled its obligations under 34 *CFR* §300.502(c)(1)(2006).

FINDINGS OF FACT¹

1. All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent these contentions are consistent with the findings and conclusions herein, they have been accepted. To the extent that they are inconsistent, deemed irrelevant, or not necessary to a proper determination of the issues presented, they have been rejected.²

2. All applicable time limits have been met, waived by the parties, or extended for good cause shown.

3. *By way of historical background:* Student was previously eligible for special education services in pre-kindergarten as DD (developmentally delayed); he was exited from special education in January, 2008 as a result of a re-evaluation performed by the school's educational diagnostician. Student was deemed not to be eligible for special education services under the categories DD or Specific Learning Disabled (SLD) because he was performing at grade level in all areas. The MDT did not consider other categories of eligibility. *Exh. 3* Parent disagreed with this assessment.

In October, 2008, Parent and her advocate met with the IEP facilitator, special ed director, and the educational diagnostician for the LEA. The purpose of this meeting was to review and compare the reports Parent obtained with the educational diagnostician's report performed approximately nine months earlier. *Exh 3* The meeting held on October 3, 2008 was neither a MDT nor an EDT meeting. *Exhs 7, 8; TR 381* Testimony indicated that District considered the reports of

¹ To the extent that the foregoing findings of fact contain conclusions of law, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Bd.*, 835 F. Supp. 340 (1993).

²Parents' Exhibits are numerical, Respondent's Exhibits are by letter, DPHO Exhibits are identified as such.

Dr. King and Dr. Handmacher. District, however, did not concur with the conclusion that Student requires formal special education services in the form of a § 504 Plan or an IEP. Neither Dr. King nor Dr. Handmacher were available for testimony and cross-examination. Parent cannot afford to pay the costs of expert witnesses. *TR 364-365* [Reports of Dr. Stan Handmacher and Dr. John King were admitted over District's objections (as time-barred and unavailable for cross-examination) for purposes of background information and to show District had knowledge of same. *Exhs 15 17; TR 559, 617* Both independent evaluators diagnosed ADHD and recommended medication to help Student focus in school. All reporting came from Parent with the exception of a teacher questionnaire. *Exh. 15, TR 231.*]

The summary of the meeting was to “begin SAT (Student Assistance Team) chair interventions.” *Exh 8* The chair of the SAT and the IEP facilitator consulted on October 8, 2008, concluding that Student did not require a § 504 Plan since he was receiving classroom accommodations and modifications at that time that were designed to assist him in the regular ed 2nd grade classroom. *Exhs 4, 5, 8, 9, 14;TR 315-317, 320-324, 338, 429* Modifications and accommodations consisted of preferential seating, independent study and original investigations, frequent immediate feedback, checking for understanding, problem solving and inquiry experiences, clearly defined limits to behavior, frequent reminder of rules, low to mid level technology, among other things. *Exhs 9, 14; 320-324*

4. At the time of the hearing Student attended 4th grade in District's elementary school.

5. During the statutory period in question (February 2009-February 2011), Parent consistently reported Student's difficulties in completing homework assignments. Student had

considerable difficulty at home with paying attention, hyperactivity, aggression and overall executive functioning. *Exh 15; TR 30, 614*

6. Medication apparently helped Student to focus. Parent discontinued medication, as is her right, contrary to her medical experts' advice because school "didn't meet her half ways," as she believed they had agreed. "I told them now he's your problem." *TR 61-62, 187-188, 376-377, 618, 632*

7. Student's 3rd grade teacher acknowledged that Student had ADHD. *TR 63-66*

8. Student's 3rd grade teacher knew of the independent evaluations but never inquired further. *TR 65-66*

9. A student in one of District's schools has to first go through the SAT process in order to be evaluated for special education eligibility. *TR 491-492, 573, 575*

10. The LEA does not refer to SAT unless a child is at risk in more than one area. *TR 299, 302*

11. A student who tested above average at the end of the school year would not be referred to SAT even if he tested below average at the beginning of the school year and would not be referred to SAT if he or she was making progress during the school year. *TR 134-135*

12. District started and stopped a SAT process initiated in March, 2010; the team requested that Student's 3rd grade teacher and Parent complete forms for a § 504 Plan. *Exh. 19; TR 30, 69, 335-343, 610-612*

13. Parent never received PWN (Prior Written Notice) that District was not going to proceed with evaluation for a § 504 Plan. *TR 440*

14. Teachers describe Student as well-behaved. He is smart, "very bright." He is a

hard worker and has a big heart. *TR 60-61, 68, 79, 108-109, 173, 194, 565, 577*

15. Student's primary difficulty in school is in written language (including spelling) and staying on task to complete assignments. Student takes an inordinately long time to finish homework and class assignments, especially writing assignments. It is well documented that Student has problems focusing and staying on task but can be redirected. *TR 30, 38, 53, 63, 67-68, 76, 141, 167, 173-175, 186-187, 192, 440*

16. In 3rd grade, Student was not performing at grade level for spelling although teachers testified that vocabulary building was the focus of assignments, not spelling. Teachers are not teaching spelling, *per se*, as part of the 4th grade curriculum. *TR 51, 247, 281-282, 298*

17. Student expresses himself very well orally. Student has told teachers he wants to be a better writer. Student does well on computer assignments, but a computer is not readily available for drafts of writing assignments, only for final copy. *TR 180-182, 201, 216, 227-228, 262-263*

18. Student performed at the proficient level in the NM Standards Based Assessment administered during his 3rd grade. He barely fell into the proficient range on the written language assessment while he performed above norm in reading and language usage, which encompasses grammar, spelling, and the writing process. *Exh P; TR 121-122, 129, 196-197*

19. Based on the Lexile, a statistical peer group rating, Student's ranking in reading went from the 63% to the 39% in 4th grade. In language usage, his ranking went from the 62% at the end of 3rd grade to the 44% and 55% in the 4th grade. *Exh P; TR 154*

20. The results of the NM Standards Based Assessment administered in April, 2011 were not available at the time of hearing. The page showing where Student had to write out an

answer for the April, 2010 standardized assessment was not provided as part of Exhibit P. *Exh. P, p.33; TR 156, 241*

21. In 3rd and 4th grades the consequence for a student not completing homework or classwork was a “discipline slip.” Student would pull from a series of colored cards and finally a “hot slip” which went home to parents. Cards pulled resulted in different escalating forms of disciplinary action such as shortened lunch period, no recess, missing parties. A student’s discipline slips were placed on the blackboard. *Exhs 12, 26; TR 38-47, 54, 85, 203-209, 405, 619*

22. Student was disciplined on a frequent basis using the card system for not being able to complete homework and in-class assignments. The special ed director viewed this system as an “intervention” rather than a form of discipline, despite the appellation. *TR 39-57, 405*

23. Parent testified cards were pulled by Student sometimes three times a week, once a week, and even twice in one day. *Exh 12; TR 44, 208-209*

24. Student did not report all party losses to Parent: “My son, he tries not to tell me too much because he doesn’t like hurting people’s feelings or getting people into trouble.” *TR 620*

25. On occasion Student has slumped down in his chair when given writing assignments. Classmates alerted the 4th grade teacher that Student was crying when taking the NM Standards Based Assessment practice tests requiring writing. *TR 234, 697-698*

26. Student’s 4th grade teacher believes Student’s slowness is the result of lack of motivation. *TR 194-195*

27. District provides Student with accommodations and modifications outside of a § 504 Plan or IEP but as part of Tier I interventions (RTIs) in the form of redirection, seating, shorter spelling lists, more time, moving him from the setting, small group instruction, differentiated

instruction. *TR 37, 55, 77, 80-81, 109-110, 143*

28. Student's 4th grade teacher's 1:1 instruction interventions have had positive results. *Exhs 27, 40*

29. Student may benefit from oral planning of the assigned written project, breaking work into "chunks," and redirection. *TR 204-205, 216-217, 518-519, 702-703*

30. The undisputed fact is that Student takes much longer than his peers to complete written assignments, which affects both his classroom performance and that of other students who on occasion end up waiting for him to complete tasks. *Exh 20, p. 6; TR 75-77, 234*

31. Student was frustrated performing school work, especially written assignments. *TR 77-78*

32. Parent frequently received calls from Student's 4th grade teacher because Student was not doing homework or had unfinished class work. *TR 618*

33. According to Student's 3rd grade teacher, that although she had frequent contact with Parent during which times Parent expressed her concerns about Student's ability to complete assignments and perform written work, Parent never made a request to have him tested for special ed. *TR 146, 294*

34. The 4th grade teacher testified she never received a request from Parent for evaluation. *TR 294*

35. District's special ed director was evasive as to whether a Parent's request for evaluation must be in writing. *TR 356-360, 626-627*

36. Student's teachers did not register any concerns about Student's struggles with writing assignments with the special ed director. According to the special ed director, Parent never

communicated to him that she wanted Student evaluated. It is disputed whether she met with him at any other time apart from the meeting in the spring of 2009. *TR 432*

37. Neither Student's 3rd nor 4th grade teacher requested that the IEP facilitator look into evaluation or any other process to obtain additional services for Student. Student's 4th grade teacher is firm in her belief that because Student functions at grade level, Student does not need special education services and does not need a SAT referral. *TR 210-211, 283-284, 579*

38. Before determining whether an evaluation is necessary, the special ed director would consider whether a child is struggling to produce work in and out of the classroom but only as one of many factors; several data points have to be considered (triangulation of data model). *TR 404*

39. Parent obtained a follow-up consultation report from Dr. King dated December 23, 2009. Parent claimed she showed this report to the special ed director, the principal, and to the 3rd grade teacher. The 3rd grade teacher and the special ed director denied ever seeing it. *Exh 15; TR 68, 603-606*

40. Parent claimed she wrote a letter dated January 28, 2010, with the assistance of Joan Curtis an advocate from Disability Rights New Mexico, outlining Student's problems and requesting evaluation, faxing same to school staff and NMPED personnel. This is credible testimony. The special ed director claimed he never received the faxed letter, nor was District contacted by NMPED regarding the letter. This is also credible testimony. There was no response to this letter. *Exh. 18; TR 388, 390-391, 393, 437, 607, 609, 651-654,668*

41. District staff prohibited Parent from coming to the classroom because she created scenes in front of the children. Parent filed a police report against the 3rd grade teacher alleging she

verbally harassed Student. *Exh. 20, p. 7; TR 79, 111, 138, 334, 371*

42. Parent has been in an adversary relationship with the LEA administration and with specific teachers since Student first attended District's schools. *TR 638*

43. Student presently attends therapy once a week. The school principal has been made aware of Student's counseling. *TR 634-635*

44. Student's inability to complete written assignments in a timely fashion may have a negative impact on his academic success in middle school. *TR 224-226, 304-305*

45. Several of District's exhibits were prepared from memory for litigation purposes (*Exh 40*, for example). Several documents from Student's educational record were not produced until the date of the hearing or worse, "lost" (Parent's § 504 Questionnaire, for example). *Exhs P, 40; TR 156, 340-341, 546-547, 697-704*

46. Much of the testimony elicited from Parent and school personnel was conflicting. There are credibility issues on both sides.

CONCLUSIONS OF LAW

1. The DPHO has jurisdiction over this matter pursuant to the *Individuals with Disabilities Improvement Act (IDEA 2004)*, *20 U.S.C. §§ 1400, et seq.*, *34 CFR §§ 300.511-300.514 (2006)*, and the *New Mexico Special Education Regulations, NMAC 6.31.2.13(I)*.

2. All procedural safeguards required by IDEA and implementing regulations, and the New Mexico Special Education Regulations have been complied with.

3. Extensions of time limits have been granted at the request of one or both of the parties.

4. Parent bears the burden of proof that Student was denied FAPE under IDEA. *Schaffer v. Weast*, 126 S. Ct. 528 (2005), 44 IDELR 150; *Johnson v. Independent School Dist. No. 4 of Bixby*, 921 F. 2d 1022 (10th Cir. 1990).

5. The applicable time limit under the Statute of Limitations for IDEA actions is two years from date of filing the request for due process, in this case from February 11, 2009.

6. The DPHO has no jurisdiction over §504 claims under the *Americans with Disabilities Act* or SAT procedures. *NMAC 6.31.2.7(A)(15)*; *NMAC 6.31.2.10(B)(1-2)*; *The Student Assistance Team (SAT) and the Three-Tier Model of Student Intervention, NMPED revised Fall, 2009*

7. A parent does not have to medicate a child to receive special education services. *NMPED Memorandum: Prohibition on Mandatory Medication, May 18, 2006*

8. The relationship between District and Parent borders on toxic. Parent has interacted inappropriately with Student's teachers in her zealous efforts to obtain services for her son.

9. Student has ADHD; students with ADHD may be eligible for special education services, determined on a case-by-case basis, under the categories of OHI (Other Health Impaired), ED (Emotional Disturbance) or SLD (Specific Learning Disability). *34 CFR § 300.8*; *20 U.S.C. § 1401(3)(A)*

10. Not all students with ADD or ADHD are eligible for special education under IDEA if they are performing at grade level and generally progressing, i.e. if educational performance is not affected by the disability. *34 CFR § 300.8(c)(9)*; *Letter to Harkness, 35 IDELR 94 (OSEP 2001)*

11. Student, while performing at grade level on standardized tests and passing from grade to grade, is losing ground academically.

12. Student's frustrated behaviors in the classroom affect his peers.

13. Evidence is conflicting as to communications, written and oral, between LEA staff and Parent concerning Student's academic performance and Parent's actual contacts with school personnel.

14. IDEA does not require that a parent's request for evaluation be in writing or that a parent use that express term. *34 CFR § 301(b); 20 U.S.C § 1445(d)(1)(A)(I)*

15. District was on notice during the statutory period in question that Parent sought further evaluation, whether she used that actual term of art or not.

16. District was on notice during the statutory period that written language was a suspected area of disability, as was demonstrated in the numerous interventions provided Student in that specific subject area during this period.

17. Student has not responded positively to District's interventions to date as evidenced by the need for discipline slips; his actual performance in the area of written language when compared to his peers is questionable because of the numerous Tier 1 supports given him in that subject area.

18. The severe discrepancy ("wait to fail") model is not the only way to determine whether evaluation is indicated. *34 CFR § 300.307(a); The Student Assistance Team (SAT) and the Three-Tier Model of Student Intervention, op cit, p. 136*

19. The NM Standards Based Assessments are not the only criteria for determining whether a student is eligible for IDEA special education services.

20. IDEA mandates that the LEA use a variety of assessment tools and strategies to gather relevant functional and developmental information about a child. *34 CFR § 300.532*

21. Student's difficulties in written expression are well documented and are likely the result of his ADHD.

22. The IEP team makes the ultimate decision with respect to a child's eligibility under IDEA, not a neuropsychologist or physician.

23. A parent's desire to have a child designated as IDEA eligible and the opinions of parent's experts are to be considered, but do not control the IDEA process. *34 CFR § 300.533(a)*

24. Student has deficits in ability to write which is part of the SLD written language category of impairment under IDEA. ADHD is a condition enumerated in IDEA regulations for OHI purposes. *34 CFR § 300.8*

25. By reason of Student's disability, expressed as extreme difficulty in the area of written language (including, but not limited to, spelling), Student requires an up-to-date educational evaluation in the area of written language to determine whether he is IDEA eligible or not because of that disability (namely ADHD).

26. It is not appropriate to discipline Student for his inability to perform work on time if this is related to his disability.

27. District has a Child Find obligation under IDEA which it has failed to properly execute. Under the facts of this case, this does not constitute a substantive denial of FAPE *34 CFR § 300.111(c); El Paso Indep. Sch. Dist.v. Richard R., 567 F. Supp.2d 918 (W.D. Texas 2008), vacated in part on other grounds, 591 F. 3d 417 (5th Cir. 2009)..*

28. District failed to provide Parent with PWN (Prior Written Notice) during the

2009-2010 and 2010-2011 school years when District was aware of Parent's requests for further "evaluation" (however expressed) but effectively denied same. This procedural violation does not constitute a substantive denial of FAPE under the facts of this case. *20 U.S.C. § 1414(c)*

29. Parent has met her burden of proof pursuant to the evidentiary standard of mere preponderance of the evidence **only** insofar as proving that District has failed to properly evaluate, thereby denying Student FAPE.

DISCUSSION

Request for Evaluation

It is District's position that Parent never asked for an evaluation after October, 2008 either formally or informally, as both the 3rd and 4th grade teachers and the special ed director testified. This position is inconsistent with the uncontroverted testimony that Parent was a frequent visitor to teachers' classrooms (to the extent that she was banned), and by testimony to the effect that a SAT process was triggered (and aborted) in the spring of 2010 following Parent's submission of a consultation followup report from Dr. King dated December 23, 2009.

Parent literally made a nuisance of herself in an effort to get the LEA's attention, whether it proves justified or not. Her efforts to improve her son's school experience were not new to District; District had notice. Magic words in writing or not are not necessary for a Parent's request for evaluation. *34 CFR § 300.301(b)*

Child Find

IDEA creates an affirmative duty to locate children in all areas of suspected disability. *20 U.S.C. §§ 1401(3), 1412(a)(3); 34 CFR § 300.111* The child find obligation triggering a student's evaluation occurs when the LEA has reason to suspect that 1) the student has a disability, and 2) there

is a resulting need for special education services. *34 CFR § 300.8(2); El Paso Indep.Sch. Dist., op cit.; Dep't.of Educ.v. Cari Rae, 158 F. Supp. 2d, 1190 (D. Haw. 2001)* Pre-referral interventions may be attempted before referring a student for an IDEA evaluation. *Montgomery County Bd. Of Educ., 51 IDELR 259 (SEA AL 2008)* The child find duty can be violated, however, if a LEA repeatedly uses interventions rather than evaluating a student's need for special education and related services. *El Paso Indep. Sch. Dist., Id..* The "Memorandum to State Directors of Special Education" states in no uncertain terms: "The regulations at 34 CFR § 300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§ 300.304-300.311, if a child is suspected of having a disability under 34 CFR § 300.8." (*OSEP11-07*)

The thrust of most case law in this area is that there must be **no** reasonable basis for suspecting that a student has a disability for an LEA to refuse to evaluate, which is not this case. In a case directly on point and on an almost identical fact pattern, the Court concluded that written expression for an ADHD child was a suspected area of disability and ripe for evaluation, despite RTI interventions. *W.H. v. Clovis Unified Sch. Dist., (D. Calif.2009)* Further, the LEA must assess "in all areas related to the suspected disability." *34 CFR § 300.304(a)(4)* It cannot simply say a child must have two "at risk areas" before a referral is made, or excuse further evaluation based upon "grade level performance," or "no severe discrepancy." Under IDEA a LEA must acknowledge a suspected area. Certainly that is the area of written language in the instant case if it takes this child two and a half weeks to do what his peers do in one week (and he is considered bright).

Failure to Evaluate

The eligibility of Student to receive special education services under IDEA as Other Health Impaired (OHI) or Specific Learning Disability (SLD) is at issue. *34 CFR § 300.8(a) and (b)(9) and (10)*. Before IDEA eligibility can be determined, however, a student in this LEA must be referred to SAT (the Tier II Student Assistance Team) who then may or may not recommend evaluation. *The Student Assistance Team (SAT) and the Three-Tier Model of Student Intervention, op cit.*

The last evaluation for Student (who had been exited from special education based upon that evaluation's results and recommendation) was in January, 2008. While the reports of Parent's experts were considered by District in the presence of Parent and her advocate at an informal "meeting," and the two members of the SAT team (the IEP facilitator and the SAT chair) consulted soon thereafter, again informally, the reports were not given much weight, apparently trumped by the earlier evaluation performed by District's employee, the educational diagnostician.

During the statutory period, District's position has unswervingly been that Student does not require referral for evaluation based upon the educational evaluation performed by District's diagnostician back in 2008, his performance in standardized tests, and the response to intervention (Tier I/RTI) already in place. District did not evaluate for more than three years, but clung to its original exiting decision that Student did not have a SLD and was not DD. District was not swayed during this period by the fact that numerous Tier I interventions had to be put in place (interventions designed to service a student's needs within the regular classroom in the form of accommodations and modifications, e.g., more time, shortened assignments, seating, specialized instruction, etc.), neither was District impressed with Student's demonstrated stress, his inability to perform as his peers did, and the number of discipline slips he earned, all deemed necessary to get Student to focus and on

task. District appears to have a vested interest in supporting its original evaluation, even though it is outdated by any standard.

District does not openly acknowledge that Student has ADHD. His teachers, however, acknowledge that condition. Some of the criteria for IDEA consideration in ADHD children is “limited alertness.” Lethargy and lack of motivation may also be indicators. *M.P. v. Santa Monica-Malibu Unified Sch. Dist.*, 633 F. Supp 2d 1089 (SD California 2008); *Letter to Cohen*, 20 IDELR 73 (OSEP 1993); *Liberty County School System*, 31 IDELR 176 (1999). OSEP in “Letter to Harkness” clarified that school districts have child find responsibilities for children with ADD/ADHD: because this condition can adversely affect educational performance in many ways, a “LEA’s evaluation must be conducted in accordance with applicable IDEA guidelines, even though ADD/ADHD is not a specifically identified disability under IDEA.” *op.cit.* While it is the case that IDEA does not require that LEA’s test all children for whom evaluations are requested, this situation begs the question. *Pasatiempo v. Aizawa*, 25 IDELR 64 (9th Cir., 1996); *Letter to Anonymous*, 19 IDELR 498 (OSEP 1992); *Clark County Sch. Dist.*, 37 IDELR 169 (SEA NV 2002) The need for evaluation and services for an ADHD child is determined on a case-by-case basis. The decision whether Student is IDEA eligible is vested in the MDT/EDT following evaluation and thus remains to be seen. 34 CFR § 300.306, 34 CFR § 300.308; *Marshall Joint School Dist.v. C.D.*, 616 F. 3d 632 (7th Cir. 2010)

There is no doubt that Parent has caused some of the resistance in this case because of her demands and the way she has chosen to express them. In all of this – District’s intransigent position that Student does not need any more help than he is already getting and Parent’s vociferous demands -- it is Student that is caught in the middle of this blame game. This is not a win/lose

situation or at least it shouldn't be. The child is feeling demonstrated stress both at home and at school because of the position these parties have taken. One truly has to feel sorry for him.

Procedural Violations

A procedural violation constitutes a denial of FAPE only if the violation: 1) impeded the child's right to FAPE; 2) significantly impeded parent's opportunity to participate in the decision-making process; or 3) caused a deprivation of educational benefit. *20 U.S.C. § 1415 (f)(3)(E)(ii); NMAC 6.31.2.13(I)(21)(b); O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F 3d,692 (10th Cir. 1998)*

While District did not give PWN for its refusal to evaluate or refer to the Tier II process, neither did Parent make obvious her requests for evaluation except for the January 28, 2010 faxed letter, receipt of which could not be proven. Parent was not denied parental participation in the process (there was no process) and Student was not deprived educational benefit. The violation in District's child find duty may be attributed to the confusion between RTI programs and IDEA Child Find mandates. So long as District believed it was providing interventions to assist Student's deficits, it assumed that was all that was necessary. That is not the law. This procedural violation, however, does not result in a denial of FAPE in this case.³

Other Issues

All other issues raised by the parties for determination in this Decision are covered under the Findings of Fact and Conclusions of Law entered herein.

ORDER

³ There is an excellent review in *Child-Find in the RTI Era: Do We Really Understand it?*, Jose L. Martin, Richards Lindsay & Martin, ©) 2010, 2011

WHEREFORE IT IS HEREBY ORDERED THAT:

1. Student be evaluated as soon as possible and no later than prior to the beginning of the 2011-2012 school year by an independent educational diagnostician who is not an employee of the LEA. Attorneys for the parties shall exchange up to three names each and try to agree on a diagnostician. If they cannot agree, the NMPED will select one. The diagnostician shall perform a comprehensive independent evaluation which centers on the one area in which Student exhibits great difficulty, namely written language, with the goal of making recommendations as to whether Student needs further services beyond those interventions currently offered to him, including need for assistive technology. District will pay the costs of the evaluation.

2. A MDT/EDT (Multi-Disciplinary Team/ Educational Determination Team) shall meet within one week after the commencement of the 2011-2012 school year to review the testing results and recommendations of the independent diagnostician. Parent's attorney and the diagnostician are to be present at this meeting, expenses of both paid for by the District.

3. There is no compensatory education or other equitable relief awarded.

Any party aggrieved by this decision has the right to bring a civil action in a state or federal district court pursuant to 20 U.S.C. § 1415(I) and 34 CFR § 300.516. Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party.

Muriel McClelland
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I emailed on May 29, 2011 and mailed by US mail on May 30, 2011 a copy of the foregoing Decision to the following persons:

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