

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER**

**In the Matter of :  
Parents,**

**v.**

**Case No. DPH 1112-08**

**MORA INDEPENDENT SCHOOLS,**

**Respondent.**

**FINAL DECISION OF THE DUE PROCESS HEARING OFFICER**

**Jane B. Yohalem, Due Process Hearing Officer  
December 1, 2011**

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## STATEMENT OF THE CASE

This due process proceeding was brought by Parents. Parents claim that the District failed to meet its child-find obligation to identify Child as a student who may be eligible for services under the Individuals with Disabilities Education (IDEA) and to promptly evaluate Child. 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.111(c). Parents claimed that there were many warning signs during Child's kindergarten year that should have led the District to suspect that Child is a child with a disability and in need of special education.

The District claimed in response that at no time during Child's kindergarten year did anything trigger a responsibility on the part of the District to consider Child's eligibility for receipt of special education services or to evaluate Child. The District claimed that it properly addressed the needs of Child through its three-tier Student Assistance Team (SAT) process. According to the District, Child was performing fine academically and his behaviors were being addressed by the interventions adopted by the District's Student Assistance Team (SAT).

### **The District's Motion to Dismiss**

Prior to the commencement of the due process hearing, the District moved to dismiss the Parents' complaint claiming that: (1) the hearing officer lacks jurisdiction to address Parents' claims that denial of recess is an improper form of discipline or was inconsistent with Child's needs arising from his alleged disability, that the district improperly disciplined a teacher, and that the District's SAT services are inadequate; (2) that the complaint is insufficient because it fails to identify Child's alleged eligibility and the special education and related services Parents claim were denied as well as those currently needed by Child; (3) Parents' seven-month delay in filing a due process complaint and Parents' removal of Child from the District's schools at the beginning of the current school year deprived the District of notice and an opportunity to remedy the problem; and (4) Parents' failure

to file their request for due process prior to enrolling Child in a school outside the District deprives the hearing officer of jurisdiction.

The hearing officer addressed each of the District's arguments in a September 28, 2011, decision denying the District's motion to dismiss the due process complaint. The hearing officer held that Parents' adequately pleaded a claim that the District failed to satisfy its child find obligations as to Child. To establish a violation of child find requirements, Parents need only show that the District had reason to suspect that Child was eligible for services under the Act, and failed to provide a timely evaluation. Parents need not prove conclusively that, had Child been evaluated, he would have been found to be a child with a disability which adversely affects his educational performance, requiring special education. The hearing officer noted, however, that without evidence establishing that Child is a child with a disability eligible for special education services under the IDEA and evidence describing the services allegedly denied, the hearing officer lacks authority to determine whether the educational services provided to Child by the District were appropriate and to award compensatory education. Any remedy in this proceeding, therefore, is limited to requiring an evaluation of Child.

The hearing officer agreed with the District's claim that the hearing officer lacks jurisdiction to address Parents' claims that denial of recess is an improper form of discipline or was inconsistent with Child's needs arising from his disability; that the District improperly disciplined a teacher; or that the District's SAT services are inadequate. These claims will not be addressed in this decision.

Finally, the hearing officer rejected the District's claim that Parents' seven-month delay in filing their due process complaint and Parents' removal of Child from the District's schools deprived Parents of their right to file a due process complaint against the District. Relying on *Forest Grove School District v. T. A.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2484 (2009), the hearing officer concluded that

Parents are not required to leave a child in a school which is failing to meet its child-find obligations in order to preserve their right to a remedy under the IDEA.

Finally, the hearing officer rejected the District's claim, founded entirely on cases construing a Minnesota statute of limitations, that the hearing officer lacked jurisdiction because the complaint filed after Child was placed in another district's schools by Parents. The hearing officer found that New Mexico's two-year statute of limitations for filing IDEA claims governs and that the complaint was filed well within that time period.

Having heard the testimony of the witnesses,<sup>1</sup> having reviewed the exhibits,<sup>2</sup> and having considered the arguments of the parties and the proposed findings of fact and conclusions of law filed by both sides, the hearing officer enters the following Findings of Fact, Conclusions of Law, Discussion, and Order.

### **FINDINGS OF FACT**

1. This case concerns Child's kindergarten year, the 2010-2011 school year. TR. Vol. I at 23-23, 95, 114, 128. At the time of the hearing in this case in October, 2011, Student was six years old and was attending first grade in a nearby school district. TR. Vol. II at 80, 101-02. Child and Child's family continue to reside in the District and Parents indicated that they may in the future return Child to the District's schools if offered an appropriate program. *Id.* at 101-02.

2. From the start of the 2010-2011 school year, Child had behavioral and social difficulties in school. Child's kindergarten teacher from August 18, 2010, until October 18, 2010, ("first kindergarten teacher"), a highly experienced kindergarten and elementary school teacher, testified that Child "had a hard time keeping his hands to himself." She described him as striking out

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<sup>1</sup>A due process hearing was held over a one and one-half day period on October 19, 2011, and October 20, 2011. Six witnesses testified.

<sup>2</sup>Exhibits 1-15, 17 and 19 were admitted into evidence.

impulsively, without thinking or talking first. TR. Vol. I at 24. Child would “shut down” whenever he was asked to do something he did not want to do or when he did not like what was happening, refusing to talk and sometimes refusing to follow the teacher’s direction. *Id.* at 30, 32.

3. Child’s first kindergarten teacher made a sustained effort to help Child correct his behavior. She talked with Child repeatedly, trying to teach him to come to her or another adult for help when he had difficulty with a peer, rather than lashing out. Teacher imposed time-outs during recess as a consequence for Child’s misbehavior and taught Child about good and bad choices, both as part of the kindergarten “stop and think” curriculum and individually during periods he was in time-out for misbehaving. TR. Vol I at 62-64, 66. Teacher talked to Parents repeatedly and enlisted their support. *Id.* at 72. Teacher talked to the school guidance counselor and tried many of the extensive list of suggestions offered by the guidance counselor. Teacher talked to Child with his parents present. *Id.* at 69-71; 51-52. Teacher brought the principal in to talk to Child. *Id.* at 90. Teacher described Child’s response to these discussions as hanging his head, saying that he understood, and claiming that he wanted to do better. *Id.* at 65. Teacher was not able to determine the cause of the behavior or why it continued. *Id.* at 65, 132-33.

4. On September 29, 2010, just six weeks into the school year, teacher completed a school behavioral referral form following an incident of fighting/physical aggression by Child. Teacher noted that “[Child] continues to lash out – Ask questions later. He hit another Student.” Ex. 2, p. 1. Teacher testified that she made the referral because Child’s hitting had continued after “many, many times” of talking with Child and trying other interventions. TR. Vol. I at 69. Generally the teacher would not write a referral for a kindergarten student “unless it starts getting really serious.” *Id.* at 60-61. TR. Vol. II at 22 (Child’s second kindergarten teacher testified that Child was the only kindergartener referred for a behavior problem during the year). By the

September 29, 2010, referral, incidents involving Child hitting were occurring daily. Vol. I at 71, 136.

5. On October 15, 2010, teacher wrote to the guidance counselor explaining that she had tried many of her suggestions, and that none of them had worked. TR. Vol. I at 79-80; Ex. 3, pp. 1, 3. She stated that Child's "situation is escalating and not decreasing." Teacher described Child as hitting other students indiscriminately without any real reason. Ex. 3, p. 3. That day, the teacher had learned that Child had hit five students in a three-hour period. *Id.* at pp. 2-3. In her testimony, teacher noted that she had used consequences consistently with Child and that he did not respond to consequences. TR. Vol. I at 81. Teacher also noted that Child never once asked for help from an adult prior to hitting another child, despite the many, many times he had been instructed on this skill. *Id.* at 121. Although teacher had 14 years of elementary education experience, teacher stated: "I feel lost because none of the strategies I have tried have shown any results." Ex. 3, p.1.

6. The kinds of consequences teacher was using with Child and the "stop and think" curriculum worked well with other kindergarten students. TR. Vol. I at 62.

7. Teacher observed that Child was getting angrier and more frustrated in October, 2010. TR. Vol. I at 88. Throughout the two month period, the teacher testified that, as a result of his behavior difficulties, Child did not want to come to school. In this teacher's opinion, a high level of absences was adversely affecting his education. Vol. I at 68, 135; Ex. 14 (15 absences in the Fall and 6 during the first month and a half of the spring semester). Although Child had some deficits in writing and other academic skills, teacher testified that this was not unusual in kindergarten and that it was too early to tell whether these would be easily overcome. TR. Vol. I at 124, 125.

8. On October 18, 2010, a few days after teacher's October 15, 2010, letter to the school counselor describing herself as "feeling lost", teacher prepared a formal referral of Child to the counselor, asking for a meeting with the parents present. Ex. 4. A parent conference was held on

October 19, 2010. Ex. 5. After eight weeks of imposing consequences every time Child acted aggressively, and seeing no positive result, teacher recommended a change in environment. TR. Vol. I at 95. A decision was made to move Child to a different kindergarten classroom in the same school. *Id.* There was testimony that the move was made primarily to separate Child from his cousin, a student with whom he often fought. TR. Vol. I at 135, 154. Although this was likely a secondary reason for the move, the hearing officer gives greater weight to the highly credible testimony of Child's kindergarten teacher and the contemporaneous documents prepared by that teacher describing Child's problematic behavior as extending far beyond any conflict with his cousin.

9. Child's second kindergarten teacher testified that within days of moving to her class, Child was excluded from class by the band teacher for not following directions and not listening in band class. Vol. I at 233. Teacher described Child's behavior in her class. He would fidget when spoken to, play with his shoes, and fail to make eye contact. *Id.* at 235. When Child was placed in the corner for a time out as a consequence for aggressive behavior, he would fidget, do hand stands, twirl around and make noises. *Id.* at 244. In circle and at other times, he would make odd noises. *Id.* at 245. During an incident in music on November 16, 2010, Student refused the teacher's direction to go to the restroom and rolled around on the floor in the middle of class. He failed to stop when directed by the teacher. *Id.* at 239, 244; Ex. 2, p. 2. On November 30, 2010, another staff member reported that Child refused to cooperate, punched another student, leaving him crying, and later punched other students as well. Ex. 2, pp. 4-5.

10. The second kindergarten teacher taught daily, as part of the kindergarten curriculum, social and behavioral skills using the "stop and think" program. Kindergarten students were taught social skills and proper behavior in class such as listening carefully to adults and asking for help from an adult when having difficulty with a peer. TR. Vol. I at 233-34. Although Child learned to

listen and intellectually was able to list the social and behavioral skills taught, he was not able to use these skills. *Id.* at 236-37. The teacher testified that this instructional program worked well with the other children in her class, who were able to use these skills. *Id.* at 238.

11. In addition to the “stop and think” daily social and behavioral skills lessons she gave the class, the teacher imposed consistent consequences for Child’s aggressive behavior. These included time out, loss of part or all of recess, removal from his peers, use of a “good choice” ladder which gave points and rewards for good behavior and imposed deductions for bad behavior, individual talks with Child about his behavior and what might be done to help him correct it, speaking with the whole class (together with Child) about avoiding aggressive behavior, and talking to parents and working with them on their response to Child at home. Exs. 7 and 8; TR. Vol. I at 247-249. None of these interventions, however, worked with Child. TR. Vol. I at 253, 256. While other children consistently earned rewards on the “good choice” ladder, Child did not. *Id.* at 247-49. His aggressive behavior continued to escalate both in frequency and intensity. Ex. 7, TR. Vol. II at 45 (teacher gives as an example Child stomping on a girl’s foot when he had to move down the “good choice” ladder).

12. On November 17, 2010, the teacher requested assistance from the school’s SAT. Ex. 7. The reason for the request is described as “Behavior: need for management skills.” *Id.* Where the form requests the reason for the behavior, the teacher noted “attention” and “does not understand/realize/ relevance of abiding by school rules.” Ex. 7, p. 3.

13. The SAT convened on December 8, 2010. Ex. 8, p. 1. The notes of that meeting indicate that Child “tends to hit other students constantly” and that the use of consequences has had no impact on his behavior. *Id.* At that meeting, the SAT developed a “behavior contract” for Child. Ex. 8, p. 2. That “contract” listed consequences for Child’s behavior using time-out and removal of other children, leaving Child alone; discussing Child’s behavior with him, including discussing



what could be done to help him change his behavior and the school's expectations; calling Child's parents and having them take Child home for the day; and calling the principal, school counselor or resource officer. Ex. 8, p. 2. The only interventions on the list which had not already been used by both of Child's teachers since the beginning of school was calling parents and having them remove Child from the school setting for the day and having the principal, resource officer or school counselor come in. TR. Vol. I at 263-64. The guidance counselor testified that she had never before used a written behavior contract with a kindergartener. TR. Vol. I at 198.

14. At the December 8, 2010, SAT meeting, the team decided to refer Child to the school's mental health counselor, a licensed social worker who works with children with mental health problems. TR. Vol. II at 62-64; Ex. 9. The plan was to have the mental health counselor do an assessment of Child as part of the SAT process. TR. Vol. II at 71. The counselor met with Child one time on December 9, 2010, to establish rapport. Counselor, however, was never after that meeting with Child that Child continued to hit other children. Nor was he ever asked to meet with Child again. *Id.* at 74. He testified he would have visited to try to determine the causes of Child's behavior, including possible anger and relationship issues, if he had been told that Child continued to hit other children regularly. *Id.* at 76, 77-78.

15. The interventions listed in the December 8, 2010, "behavior contract" did not change Child's behavior. TR. Vol. I at 272. Teacher reported that Child's physical aggression was increasing, as was Child's failure to respond to direction and his disruption of the class. *Id.* On January 19, 2011, teacher prepared a behavioral referral for Child. The referral notes that Child has punched other children two days in a row, making them cry, and that Child is not responding to the consequences given to him for his behavior. Ex. 2, p.3. The principal notes at the bottom of the referral that a meeting with parents will be scheduled as soon as possible to discuss Child's aggressive behavior and that if the behavior continues, Child will have to be suspended. *Id.*

16. Child's behavior continued to escalate. According to his teacher, his physical aggression was increasing. TR. Vol. I at 272. When the teacher spoke to him, he seemed not to hear. *Id.* On January 21, 2011, Child choked another boy. *Id.* at 279. On February 10, 2011, Child again choked another student and later that same day tried to stab another student with a pencil. Ex. 12, p. 2. Other parents were beginning to complain that their children were frightened and did not want to go to school. Ex. 12, p. 3. Teacher testified that nothing was working. TR. Vol. I at 301-02. Consequences were not effective; Child did not seem to understand the purpose of a time out, loss of recess, or other consequence. Typical motivators which worked with other children did not work with Child. TR. Vol. II at 19-20, 50. Child was not learning to think before striking out, something the other children were able to master. *Id.* at 51.

17. Following an incident on February 18, 2011, (Parent claimed teacher acted improperly in response to Child's continued aggressive behavior), Parent removed Child from the classroom and home-schooled him for the remainder of the school year.

18. It was undisputed that at no time did the SAT team or any teacher or staff member suggest an evaluation to determine whether Child was a child with a disability in need of special education and related services. Parents were not aware of their right to request an evaluation. TR. Vol. II 93, 96. They testified they would have done so if they had known. TR. Vol. II at 93, 96.

19. Staff uniformly testified that Child was making progress in academic subjects like reading and math. There were some areas in which Child's report cards showed he needed improvement. The teachers, however, testified that it was too early to know if areas where Child needed improvement would be long-term problems. TR. Vol. I at 297. Child's second kindergarten teacher testified that Child was socially successful. *Id.* at 298-99. The hearing officer does not find that testimony credible in light of the overwhelming evidence in the record of severe behavior problems which plainly interfered with Child's relationships with peers and disrupted the class.

20. Social and behavioral skills were an important part of the kindergarten and early elementary school curriculum. TR. Vol. I at 236 (stop and think curriculum taught social and behavioral skills every day) ; Ex. 10, p. 2 (the District's report card includes grades for personal/social growth skills such as self-discipline, respecting authority, obeying school rules, and interacting appropriately with peers).

21. Every staff member claimed that they did not suspect a special education need at any time and that they continue to believe that there is no reason to suspect a disability which might qualify Child for special education. TR. Vol. I at 99; Vol. II at 37-38. The school staff testified that they were reluctant to evaluate a kindergartener: that time was needed to allow a kindergartener to get used to the classroom structure and for the school to get to know the student. TR. Vol. I at 176; 223-225; 182-83. Child's second kindergarten teacher testified that, had Child continued at school, the SAT process would have been continued and other interventions would have been attempted through that process. TR. Vol. II at 294-95. The school counselor, as well as several teachers, testified that every student has to go through the SAT process before a referral for special education would be considered. TR. Vol. I at 223-25. Exceptions were made only for obvious disabilities which had previously been identified in head start or elsewhere. *Id.* at 45-50.

22. Parents testified that Child is very speedy at home and that it is hard to slow him down and get him to listen. TR. Vol. II at 82-89. They, like school staff, did not know why Child was hitting other children at school. *Id.* at 87, 119. Mother testified that Child had difficulty focusing and she believes that Child has an attention deficit disorder. *Id.* at 106, 135. Child has not yet had a full evaluation, but parents have sought private assessment, which they represented identified a disability. They stated that with counseling, Child's behavior in a school in a neighboring district has improved. *Id.* at 99, 127, 133.

23. The extreme nature of Child's aggressive behavior, described by school staff as highly unusual for a Child so young; Child's failure to respond (or even to understand) interventions and instruction which worked for the other children; the length of time Child's aggressive behaviors continued and the escalation in those behaviors both in frequency and intensity as the year progressed; the inability of Child's teachers and school staff to understand the cause of Child's behavior; the extent of disruption in the classroom; Child's reluctance to attend school and frequent absences; should have led the District to suspect that Child might be a Child with a disability. The District should also have suspected that any disability was adversely affecting Child's educational performance. Child was plainly not making progress in learning the social and behavioral skills which are an important part of the general curriculum in kindergarten and early elementary school. Child's first kindergarten teacher testified that his absences were interfering with his educational progress. Under these circumstances, the District violated its child-find obligation when it continued to persist with interventions which had been shown not to work rather than evaluating Child under the IDEA.

### **CONCLUSIONS OF LAW**

1. The due process hearing officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. §1415(b)(6) (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2007). These provisions give the hearing officer jurisdiction over complaints with respect to any matter relating to the identification, evaluation, or educational placement of a child or the provisions of FAPE to that child. The hearing officer has jurisdiction to decide Parents' claims that the district failed to evaluate Child for possible identification as a child with a disability eligible for special education.

2. This proceeding has complied with all procedural safeguards required by the IDEA, its implementing regulations, and the New Mexico Special Education Regulations. *Id.*

3. An extension of time for entry of the decision in this matter has been granted until December 1, 2011, at the request of both parties. H.O. Order, 11/10/11. This decision is, therefore, timely filed on December 1, 2011. 34 C.F.R. §300.515(c).

4. The Parents are the complaining parties and therefore bear the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).

5. The statute of limitations for due process hearings under the IDEA is two years. 20 U.S.C. § 1415(f)(3)(C) (2004); 6.31.2.13(I)(19)(b) NMAC. Only claims arising within the statutory period have been considered by the hearing officer.

6. This case focuses exclusively on the child-find obligation of the District. The IDEA provides that districts must ensure that “[a]ll children with disabilities ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated.” 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.111(a)(i).

7. Child-find must include “children suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade.” 34 C.F.R. §300.111(c).

8. The obligation to evaluate arises when there is a reason to suspect a disability and reason to suspect that the disability is adversely affecting a child’s educational performance so that the child needs special education services. The threshold for “suspicion” is relatively low. The key is not whether the child is actually qualified, but whether the child should be referred for an evaluation. *Department of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001); *School Bd. of the City of Norfolk v. Brown*, 769 F.Supp. 2d 928, 942 (E.D. Va. 2010).

9. Identification and evaluation of a child suspected of having a qualified disability must occur within a reasonable time after school officials are on notice of behavior that indicates a disability. *School Bd. of the City of Norfolk v. Brown*, 769 F.Supp. 2d 928, 942 (E.D. Va. 2010).

10. The IDEA does not require or encourage districts to monitor a child's progress under an SAT program prior to referring for evaluation. Letter to Brekken, OSEP, June 2, 21010, 110 LRP 73610. A multi-tiered intervention process like the District's SAT process cannot be used to delay or deny a full initial evaluation for special education and related services. Once the district has reason to suspect that a student may have a disability and needs special education as a result, the child must be identified and evaluated, regardless of whether all tiers of the intervention process have been completed. *Memorandum to: State Directors of Special Education*, OSEP 11-07, January 21, 2011. 111 LRP 4677.

11. The fact that a child is making progress in traditional academic areas is not the sole measure of whether a child might have a disability qualifying him for special education. *L.B. v. Nebo School District*, 379 F.3d 966 (Ct. App. 10<sup>th</sup> Cir. 2004) (child at the top of her class academically, but has severe social and behavioral deficits is qualified for special education); *G. "J." D. v. Wissahickon School District*, 111 LRP 41848 (E.D. Pa. 2011) (kindergartener's severe behavior problems qualified him for special education even though child was doing well academically). In kindergarten and early elementary school, an important part of the curriculum is the learning of social and behavioral skills. Failure to make progress in these areas due to disability constitutes an adverse effect on early elementary school educational performance no different than a lack of progress in math or reading. Special education and related services are often necessary to assist a child with difficulty in regulating his behavior to learn appropriate social skills and behavior. Here extensive regular-education interventions had been tried and were not successful with Student.

12. Parents met their burden of establishing that the District should reasonably have suspected that Child's severe difficulties with social relationships and regulation of his behavior arose from a disability, either a developmental delay in social or emotional development (a category recognized by New Mexico and by this District), Other Health Impairment (ADD), or an emotional

disturbance. Parents also met their burden of establishing that Child's educational performance was adversely affected and that, therefore, Child was potentially in need of special education and related services.

13. Failure to locate and evaluate a child who is potentially a child with a disability constitutes a denial of FAPE. *N.G. v. District of Columbia*, 556 F. Supp.2d 11, 16 (D.D.C. 2008). In recognition of the "paramount importance of properly identifying each child eligible for services under the Act," Parents are entitled to the remedy of an evaluation or of payment for an independent evaluation without having to first establish conclusively that the evaluation will show their child to be eligible for special education services. *School Bd. of the City of Norfolk v. Brown*, 769 F.Supp. 2d 928, 942 (E.D. Va. 2010); *J.P. v. Anchorage School District*, 260 P.3d 285 (Ala. 2011) (parents are entitled to reimbursement for a private evaluation even though the child was found ineligible).

14. When a child is suspected of being a child with a disability, the district shall ensure that "the child is assessed in all areas of suspected disability." 20 U.S.C. §1412(b)(3)(B).

## **DISCUSSION**

The hearing officer acknowledges that it is often difficult to know whether a kindergarten student's behavioral difficulties arise from a disability. In this case, however, the hearing officer was struck by both teachers' descriptions of the severity and frequency of Child's aggressive behaviors. All of the school staff who testified, even those with lengthy experience in kindergarten and elementary education, admitted to being at a loss as to how to effectively intervene with Child and as to why he was behaving so aggressively. Child's behavior was described as deteriorating throughout the year, despite interventions by school staff which worked well with other children.

Staff did turn to a mental health counselor for assistance at one point, suggesting some degree of suspicion that a disability might be causing Child's behavior problems and his consistent failure to respond to interventions, despite his expressing a desire to do better.

Although an SAT intervention process is good practice, teachers and staff must be aware of the obligations imposed on them by the IDEA to identify and evaluate children whose behavior suggests a disability and the need for special education services. *See Memorandum to: State Directors of Special Education, OSEP 11-07, January 21, 2011. 111 LRP 4677; Forest Grove School District v. T. A., \_\_\_ U.S. \_\_\_, 129 S. Ct. 2484, 2495 (2009).* The hearing officer finds that the District delayed seeking an evaluation of Child past the point where its staff had ample reason to suspect that Child's escalating behavioral difficulties and lack of understanding of and response to consequences and other interventions were attributable to a disability requiring specialized instruction designed to meet Child's needs. By January or February, 2011, the District should have proceeded with an evaluation. Parents' decision to home school Child did not relieve the District of its child find obligation. That obligation continued.

It is hereby **ORDERED**:

1. that Parents will arrange for and obtain an independent evaluation in the areas of suspected disability, here Other Health Impaired (ADD); emotional disturbance and delay in social or emotional social and emotional development for Child;
2. the District will assist Parents, if Parents request assistance, in making these arrangements, and will make arrangements to pay for the evaluation;
3. the evaluation shall address the instructional implications for Child of any disability identified;
4. the evaluators chosen by Parents must meet the qualifications to conduct diagnostic evaluations set either by the District or by the school district where the evaluators are located;
5. the District will cooperate with the evaluators, providing information from school staff, if requested by the evaluators, concerning Child's behavior and performance in school during the time Child was enrolled in the District's kindergarten program (Parents may allow the evaluators



to review this decision or portions of the transcript to assist the evaluators in obtaining a clear picture of Child's behavior); and,

6. the District will ensure that the independent evaluation is provided at public expense, without cost to the Parents. Transportation costs and the costs of an overnight stay, if necessary to conduct the evaluation, will be borne by the District. These will be limited to the State's per diem and mileage rates.

### **RIGHT TO APPEAL**

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I) (2004), 34 C.F.R. 300.516, and 6.31.2.13(I) (25) NMAC (2009). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

**THIS DECISION ENTERED THIS THE 1<sup>st</sup> DAY OF DECEMBER, 2011.**

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Jane B. Yohalem  
Due Process Hearing Officer

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Final Decision of the Due Process Hearing Officer* was mailed to the Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and by e-mail in PDF format, as well as by first class U.S. Mail, on December 1, 2011, to the following counsel of record in this proceeding.

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