

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

|                                     |   |                    |
|-------------------------------------|---|--------------------|
| MICHAEL S.                          | ) |                    |
|                                     | ) |                    |
| Student                             | ) |                    |
| vs.                                 | ) | Case No. 2007-0007 |
|                                     | ) |                    |
| CITY OF CHICAGO SCHOOL DISTRICT 299 | ) |                    |
|                                     | ) |                    |
| Local School District               | ) |                    |

KRISTINE L. ANDERSON, Hearing Officer

**Decision and Order**

This matter is before me to decide issues presented by a Due Process Hearing concerning the District’s evaluation and identification of the Michael S.’s disabilities, the appropriateness of CPS’ IEPs, and the Student’s placement. Also at issue is whether the District failed to evaluate the Student’s need for, and then provide appropriate assistive technology. I have jurisdiction to hear and decide this matter pursuant to 14-8.02 (g) of the Illinois School Code, 34 C.F.R. § 300.506-509, issued under the Individuals with Disabilities Act (“IDEA”), and 23 Illinois Administrative Code, Subtitle A, Subchapter F. The Parents have been informed of all of their rights pursuant to those statutes and regulations.

**Procedural History**

The Parents requested this Due Process Hearing on August 24, 2006. I was appointed Hearing Officer on September 5, 2006, after the Hearing Officer previously appointed was unavailable to accept the appointment. In a status conference held on September 11, 2006, the parties jointly requested a continuance of the pre-hearing conference to allow them time to prepare for and hold an IEP conference, in which they would try to resolve the matter. I granted their request for continuance. A resolution session was held on September 15, 2006. It did not lead to settlement. The pre-hearing conference was held on October 26, 2006. At that time, the parties requested, and were granted a continuance of the hearing until November 20, 2006.

The hearing began on November 20, 2006 at CPS’ Steinmetz Academy and concluded on November 22, 2006. The parties agreed to grant the Hearing Officer a continuance in issuing her decision to allow her to receive and consult the transcript of the proceedings. A transcript of the final day of the hearing was provided to the Hearing Officer on January 5, 2007. This Decision was issued on January 10, 2007.

## Issues

The issues that were presented during the due process hearing include the following:

1. Whether the District failed to provide an appropriate evaluation in a timely manner in order to adequately identify the nature and extent of Michael's disabilities;
2. Whether the District failed to provide an appropriate educational program/placement based on scientific, researched based evidence, and related services with sufficient intensity to meet Michael's educational needs 8/18/04 to present;
3. Whether the District failed to identify in a timely manner and then provide appropriate assistive technology in the classroom setting and for all school work;
4. Whether the District failed to develop individualized goals/objectives based on accurate present levels of performance in Michael's IEPs;
5. Whether the District failed to accurately and objectively report to the parents the lack of Michael's progress in the CPS offered services and programs;
6. Whether the District failed to consider Michael's educational need for ESY 2005 and ESY 2006; and
7. Whether the District failed to offer appropriate compensatory services for the lack of IEP implementation as well as failure to complete a full evaluation and develop appropriate IEPs.

## Findings of Fact

Michael S. is 16 years old and attends Steinmetz Academy. Though Michael is bilingual and speaks English as his first language, his parents speak Spanish and have a limited understanding of English.<sup>1</sup> By all accounts, Michael is a respectful and cooperative student who applies himself in class. *See, e.g.*, Testimony of M. Reilly, 11/21 Tr. p.33, ( Michael was a quiet student who did "very well" in algebra problem-solving class); Testimony of E. Mitropoulos, 11/21 Tr. p 74 (describing Michael as polite, prepared and attentive). Michael, however, has severe deficits in all academic areas, particularly reading, writing and math. (*See Lopez Psychological Evaluation, JX 2*). Though there is disagreement as to whether his deficits are attributable to a severe learning disability or cognitive delay, there is no dispute that he requires special education services. Michael currently attends special education classes for his academic courses. (*See 5/18/06 IEP; JX 6*)

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<sup>1</sup> An interpreter was provided for the S.'s at the hearing.

According to Mrs. S., Michael first began receiving special services in the first grade when he was diagnosed with a learning disability. (11/20 Tr. p. 176) Mrs. S. also testified that Michael experienced lead poisoning when he was two or three years old. (*Id.*) The District stressed this fact many times to support its contention that Michael is cognitively delayed. This theory is speculative, though, since there is no evidence in the record indicating the severity of the lead poisoning, or its impact -- if any-- on Michael's cognitive abilities.

Prior to his enrollment at Steinmetz, Michael attended middle school and high school in Woodstock, Illinois. (*See* 2/24/04 Woodstock Notification of Conference Recommendations; JX 1, and 1/7/05 Woodstock Withdrawal Form; JX 1a). Woodstock records indicate that Michael performed significantly below grade level in reading, writing and math. (JX 1 at PD 111-13) Indeed, Michael's IEP from November 2003 indicates that Michael was reading and writing on a first grade level. (*Id.*) In math, Michael performed at a third grade level. (*Id.*) The Woodstock team determined that Michael had a learning disability and placed him in a self-contained special education class. (*Id.*) In that class, Michael received remediation in reading decoding and comprehension, writing skills and math. (*Id.*) He also received special education support in history and science. (*Id.*)

In late 2004, a few months before his enrollment at Steinmetz, Michael was given a full psychological three year reevaluation. ( JX 2) The examiner's report makes clear, however, that Michael also was referred for testing due to "concerns regarding his current overall level of cognitive ability...." (*Id.* at PD 138) Rosa Lopez, a school psychologist for Woodstock schools, conducted the evaluation bilingually. (*Id.*) Based on her evaluation, Ms. Lopez concluded that Michael's cognitive skills fell within the mild mental retardation range. (*Id.* at PD-140) Michael's reading skills were found to be at or below first grade level, with Ms. Lopez noting that Michael's reading ability was "extremely limited," and that he only was able to read single syllable words and could not read a simple paragraph. (*Id.*) Ms. Lopez determined Michael's writing skills were at the "mid second grade level." (*Id.* at PD 141) He was able to spell single syllable words, but could not combine two simple sentences into one sentence because of his limited reading skills. (*Id.*) Though still significantly delayed, the evaluation demonstrated math to be a relative strength for Michael. (*Id.*)

In evaluating Michael's language proficiency, Lopez concluded that Michael's Spanish proficiency fell somewhere in the mid kindergarten to first grade level. (*Id.* at PD 141.) English skills were slightly better. Significantly, Ms. Lopez stressed that, "[t]his extremely limited language development is unusual and points to a possible severe communication disorder that will need to be further explored." She stressed that Michael's language delays "undoubtedly" impacted Michael's performance on the cognitive and achievement tests as well. (*Id.*) At the conclusion of her report, Ms. Lopez made only one recommendation -- that Michael's limited language development be further explored. (*Id.*) She declined to make any other specific recommendations but deferred to the IEP conference team. (*Id.* at PD 142)

The family left Woodstock and returned to Chicago in January 2005. (11/20 Tr. p.179-80) Michael was enrolled at Steinmetz in March of that year.<sup>2</sup> Rhoda Stacy, Steinmetz's special education case manager, promptly scheduled a domain meeting on March 16, 2005 to plan an assessment for Michael. (3/16/05 Consent for Evaluation; JX 3, PD 64-65) She also scheduled an IEP conference that convened on March 28, 2005.

Though she did not recall precisely when she received Michael's records from Woodstock, Ms. Stacy confirmed that she had seen Ms. Lopez's report of her psychological evaluation, and a copy of Michael's IEP prior to the domain meeting. (11/20 Tr. p.149) Ms. Stacey recalled that she was confused by what seemed to be a conflict between Michael's Woodstock IEP, which stated he had a learning disability, and the psychologist's report, which indicated that Michael's most likely level of cognitive ability was within the mild mental retardation range. (*Id.* at p.32) She shared this information with Dr. Pamela Davis, Steinmetz's school psychologist, and the two agreed that there seemed to be a conflict. (*Id.*)

At the domain meeting, the team, which included Ms. Stacy and Dr. Davis, (11/20 Tr. p. 32), decided that Michael should be assessed in the areas of social emotional status, general intelligence, and academic performance.<sup>3</sup> (JX 3) Despite their awareness that Ms. Lopez had unequivocally recommendation that Michael be assessed for a severe communication disorder, the team chose not to recommend a language assessment of Michael. (*Id.* ) Ms. Stacy testified that the team wanted to confer with Mrs. S. before recommending a language evaluation for Michael. (11/20 Tr. p. 148) She later conceded that she could not recall ever discussing this issue with Mrs. S.. (*Id.* at p. 150)

At the conclusion of the domain meeting, Ms. Stacy promptly followed up by sending the S.'s an "URGENT" consent for evaluation form. (JX 3) The form, was in English, however, not Spanish With respect to other legally required procedural safeguards, Ms. Stacy could not specifically recall whether she sent Ms. S. a copy of the conference notification and a copy of the parents' rights, but she stated that it is her standard practice to do so. (11/20 Tr. p.38-39) She also stated that it was standard procedure to provide parents with copies of their rights in Spanish when necessary. (*Id.* at pp. 151-52 ) She admitted, however, that the conference notifications and conference recommendation forms were provided in English because she did not have copies of these documents written in Spanish. (*Id.* at pp. 154-55 )

Mrs. S. confirms that she received documents and forms from CPS, such as notifications of IEP conferences and a Consent for Evaluation. But because they were in English, she didn't

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<sup>2</sup> Mrs. S. testified that she originally tried to enroll Michael at Clemente H. S. in January, 2005, but was turned away because the family didn't have a permanent address. She subsequently enrolled Michael in Steinmetz in March. This issue was raised for the first time at the hearing, and the evidence concerning these alleged events was inconclusive. I did not rely on these assertions in determining the relief to which Michael and his family are entitled.

<sup>3</sup> Ms. Stacy stated that Mrs. S. did not attend the March 16<sup>th</sup> domain meeting, because it is not standard practice to invite the parent to domain meetings. (11/20 Tr. p. 148)

understand what the forms said, and no one explained them to her. (11/20 Tr. p.185) Instead, Mrs. S. testified that CPS simply sent the forms home with Michael, and he would ask her to sign them. (*Id.*) As Mrs. S. put it, “every time they are going to do something to him [Michael], they tell him, and he tells me, and I sign it. (*Id.*) Mrs. S.’s testimony concerning her receipt of correspondence contradicts CPS’ position in one critical way: Mrs. S. maintains that she never received notification of her parental rights written in Spanish until September 15, 2006 -- the date of the resolution conference. (*Id.* at p.188)

The IEP conference for Michael proceeded as planned on March 28, 2005. The attendees at the conference included Mrs. S., Michael, Ms. Stacy, who chaired the meeting, Deborah Kern, Michael’s service provider, who wrote the IEP, and Minerva Vega, a Steinmetz aid who acted as an interpreter for Mrs. S.. (3/28/05 IEP; JX 4) Prior to the meeting, Ms. Kern, sought feedback from Michael’s teachers through Teacher Progress Reports. (*See, e.g.* 3/15/05 Progress Report; JX 22) The teachers made it clear, however, that they were unable to give any meaningful feedback because Michael had only been attending their classes for a few days. (*Id.*) During the conference, the team agreed that Michael was eligible to receive special education services as a learning disabled student, and that Michael should attend special education classes for all of his academic subjects: math, English, social studies and science. (*Id.*) Prior to this conference, Michael apparently had only been receiving special services in math.

The 3/28/05 IEP includes goals and benchmarks for each of the academic areas listed above. Unfortunately, however, the IEP omits any specific or objective present levels of performance. This omission precluded the team from measuring whether the IEP goals and benchmarks enabled Michael to make academic progress. (JX 4, PD 51-54) What’s more, the team simply failed to record whether Michael achieved any of his twelve benchmarks. (*Id.*) Nor are the goals and benchmarks tied to Michael’s specific deficits. Indeed, while the IEP team expressly noted that Michael has poor reading skills and has an “inability to decode,” (*Id.* at PD 52-53) there are no goals that addressed Michael’s poor reading decoding, encoding or comprehension skills. (*Id.*) Neither were there any that focused on improving Michael’s writing skills. (*Id.*) This is despite Mrs. S.’s explicit request that Michael receive services that would help him to read and write.<sup>4</sup> (*Id.* at PD-47)

Rather than individualizing goals and benchmarks to address Michael’s areas of deficit, Ms. Kern selected goals and benchmarks from a state web site of standard curriculum goals and benchmarks for all Illinois students.<sup>5</sup> (11/22 Tr. pp 20-21) The team apparently did not expect Michael to succeed on these state goals and benchmarks, however, because they significantly modified Michael’s grading criteria. Michael only had to achieve forty percent accuracy on the individual benchmarks, and an overall grade of forty percent to pass a course. (*Id.* at PD 59) The IEP includes several other modifications and accommodations for Michael as well,

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<sup>4</sup> It is also despite the fact that the team had Michael’s IEP from Woodstock, which clearly showed that he was receiving reading and writing instruction prior to his transfer to Steinmetz. (*See* JX 1, PD 111-13)

<sup>5</sup> Ms. Kern testified about how she selected goals and benchmarks while discussing Michael’s 3/28/05 IEP. She made clear, however, that the process was the same for each of Michael’s IEPs. (11/22 Tr. pp. 20-21)

including, extended time on tests, tests to be read aloud, shortened or modified assignments and a scribe as needed. The team, however, rejected any use of assistive technology for Michael. (*Id.* at PD-050 )

Mrs. S. gave her consent to have Michael evaluated in the March 28 IEP meeting. (*See*, JX 3) Several weeks later, in late May of 2005, Dr. Pamela Davis conducted a psychological evaluation of Michael. (Davis Report of Evaluation; JX 13) Recognizing that Ms. Lopez had only recently conducted a bilingual psychological evaluation of Michael, Dr. Davis concluded that Ms. Lopez's results were likely to offer the most valid assessment of Michael's cognitive abilities. (11/22 Tr. 171) Dr. Davis, therefore, relied on Lopez's findings on the WISC-IV and, to a lesser extent, the WIAT. She "interpreted" Lopez's results in her report. (JX 13, PD 120) Dr. Davis testified that she also found Lopez's reference to Michael's lead poisoning to be significant in preparing for her assessment of Michael. (*Id.*)

In addition to relying on Lopez's findings on cognitive measures, Dr. Davis administered the Kaufman Test of Educational Achievement in reading and math. The test indicated Michael was functioning on a first grade level in reading decoding and comprehension. His math skills were measured to be late second grade to early third grade. (JX 13) Dr. Davis also administered a portion of the Vineland Adaptive Behavior Scales to help her assess whether Michael was cognitively delayed or learning disabled. (11/22 Tr. pp. 156-57) Dr. Davis conceded that she did not administer the full test -- she only administered two of the Vineland's four subtests. (*Id.*) She also admitted that she did not follow the established protocol for administering the test -- she interviewed Michael directly rather than asking a parent or teacher to complete the scales. (*Id.*) Nevertheless, Dr. Davis maintained her belief that the results on the Vineland were an accurate measure of Michael's adaptive skills because she is a skilled interviewer, and because she believes the two subtests that she administered can stand on their own.<sup>6</sup> (*Id.* at 223-26)

In her report, Dr. Davis concluded that Michael functions within the mild to moderate range of cognitive delay. (JX 13) She recommended that Michael receive "self-contained instruction in basic skills as available." (*Id.*) She also suggested teaching Michael to read words from the Dolch word list, and that Michael be allowed to use a tape recorder and calculator as appropriate. (*Id.*) She further recommended presenting Michael with a visual and "hands-on" approach to learning through the use of computer software, such as Math- Blaster. (*Id.*) Dr. Davis concluded that Michael would likely be most successful in a vocational program for students with cognitive delays, but referred Michael to the IEP team for eligibility determination and appropriate placement. (*Id.*)

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<sup>6</sup> Dr. Michelle Rosen, an expert in pediatric neuropsychology, whom the parents retained to evaluate Michael, testified that Dr. Davis's method of administering the Vineland rendered the test invalid, because she did not follow the proper protocol for test administration. (11/22 Tr. 315-160) Dr. Davis herself testified that in order for a clinician to do an accurate differential diagnosis between learning disabilities and cognitive delay, she must include at least two areas of adaptive behavior "measured in a *standardized way*." (11/22 Tr. p. 157) (emphasis added)

Though she placed a great deal of confidence in Lopez's bilingual assessment, Dr. Davis' report is completely silent on Lopez's finding that Michael's limited language skills could be attributable to a severe communication disorder and should be explored further. Nor does Davis' report recommend that Michael receive a speech and language evaluation. (*Id.*) Though Dr. Davis failed to include such a recommendation in her report, she testified that she actually believed a speech and language evaluation was an appropriate next step. Dr. Davis asserted that when she met with Mrs. S. in the IEP meeting on June 2, 2005, she offered her the opportunity to have a speech and language evaluation performed. (11/22 Tr. 161-62) According to Davis, however, Mrs. S. declined the offer. (*Id.*) Dr. Davis asserted that she repeated the offer in the September 15, 2006 resolution meeting, but that Mrs. S. once again declined. (*Id.* at 169-70) Dr. Davis' recollection about her offers to Mrs. S. is contrary to the weight of objective evidence.

First, as stated above, Dr. Davis includes several explicit recommendations in her written report. Yet there is no mention that Michael should be given a speech and language evaluation. (*See* Jx 13) Neither is there any mention in the June 2 IEP, or the report of the Resolution Session that CPS offered Mrs. S. a speech and language evaluation. Indeed, while the Resolution Session Agreement makes no mention of a speech and language evaluation, it expressly memorializes CPS' offer of an AT evaluation. (9/15/06 Resolution Session Agreement; JX 15) Finally, none of the other witnesses who attended these meetings --Ms. Stacey, Ms. Kern and Mrs S. corroborate Dr. Davis' account.

On May 4, 2005, the S.'s received notification -- in English -- that the team would convene to review Dr. Davis' report and determine Michael's eligibility to receive services. (5/4/05 Conference Notification; JX 13a) The team met about a month later, on June 2, 2005. Among the attendees were Mrs. S. and Michael, Dr. Davis, Ms. Kern, and Dina Radke, an employee in the juvenile court system who attended on Michael's behalf, and Minerva Vega who acted as interpreter for Mrs. S.. (6/2/05 IEP, JX 5; 11/20 Tr. pp.193-94)

In this meeting, the IEP team changed Michael's eligibility determination from learning disabilities to a finding that he had a mild cognitive impairment. (*Id.* at PD 29) There is nothing in the IEP to indicate that anyone objected to this change. Mrs. S. did, however, assert her concern that Michael was not receiving services that best fit his needs, and requested a language arts (reading and writing) tutor to address his deficits. (*Id.* at PD 28) The team rejected Mrs. S.'s request, on the grounds that Michael would not benefit from tutoring. (11/22 Tr. pp. 37-38) Mrs. Kern, Michael's service provider, also explained that Steinmetz does not provide special education tutoring -- tutoring is available only for regular education courses. (*Id.*)

The team again decided that Michael would attend special education classes in language arts, math, biology and social studies. (*Id.* at PD 30). Unlike his March 28 IEP, the June 2, 2005 IEP specifies Michael's present levels of performance by listing the results of the Kaufman -- a standardized assessment. (JX 5) In particular, that IEP lists Michael's reading decoding and reading comprehension scores to be below first grade level, listening comprehension at a grade level of 2.5, and math skills at a grade level of late second to early third grade. (*Id.*)

With respect to the IEP's goals and benchmarks, Mrs. Kern again selected Michael's goals and benchmarks from the state web site of standard curriculum goals and benchmarks. (11/22 Tr. 20-

21 ) There is little connection between those goals and benchmarks and Michael’s individual needs -- reading and writing. Indeed, though the team explicitly acknowledged that Michael is virtually a “non-reader” with poor decoding and spelling skills, (*Id.* at PD 32, 42) none of the benchmarks focused on improving Michael’s decoding or encoding skills. In fact, Ms. Kern admitted that she never discussed that possibility with Michael’s teachers. (11/22 Tr. p. 78 ) Nor did the team heed Dr. Davis’ modest recommendation that Michael be taught sight words from the Dolch word list of high frequency words.

Instead, Ms. Kern selected such English/reading goals and benchmarks as:

- [Michael will] “expand knowledge of word origins and derivations and use idioms, analogies, metaphors and similes to extend vocabulary development with 40% accuracy.” ( JX 5)
- [Michael will] “compare the meaning of words and use analogies to explain relationships among them with 50% accuracy.”(JX 5)

Science and history goals and benchmarks also were selected from the state web site. (*Id.*) Unlike reading, several of the math benchmarks seemed intended to provide Michael with functional skills, such as calculating wages, balancing a checkbook and financial calculations. Even in math, however, it is evident that the team did not always take Michael’s individual performance level and skills into account when selecting benchmarks.<sup>7</sup> Despite functioning at a 2d-3d grade level in math, his IEP includes a benchmark that requires Michael to “identify properties of ...special numbers, such as pi and square roots.” (*Id.* at PD 33)

Though Michael’s goals and benchmarks were the same curriculum requirements that applied to regular education students, the IEP team declined to consider providing Michael with any assistive technology to help him access that curriculum and participate more independently in his classes.<sup>8</sup> Rather than consider technology for Michael, the team prescribed modifications and accommodations that minimized or relieved Michael of the requirement to read and write in his classes. The modifications, for example, included extra time on tests, assignments and tests to be read aloud, and a reading and writing scribe as needed. (*Id.*) The IEP also modified the grading criteria for Michael by reducing the grading scale by 30%. (*Id.*) Finally, the IEP team

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<sup>7</sup> The evidence presented by the Parents at the hearing focused primarily on the District’s failure to address Michael’s inability to read and write. The brief testimony concerning math services that were provided to Michael, suggests that CPS did try to individualize instruction based on Michael’s needs and abilities, and that Michael was making some progress in math. (*See, e.g.*, Testimony of M. Reilly, 11/20 Tr. pp. 30-40). For that reason, this decision does not focus on math services.

<sup>8</sup> Dr. Davis testified that during the meeting, she offered to refer Michael for an AT assessment, but that Mrs. S. refused. ( 11/22 Tr. 164-65) This testimony is not credible, since the IEP clearly indicates the team determined that assistive technology was “not required” for Michael --not that it was offered and rejected by the parent. (JX5, PD 31) Moreover, Davis’ testimony is contradicted by Ms. Kern who stated that she did not recall the team discussing AT in either of the IEP meetings held in June 2005 or May 2006. (11/22 Tr. 111-12)



recommended that Michael receive extended school year services, and Mrs. S. agreed.<sup>9</sup> (*Id.* at PD 28 )

Several of Michael's teachers offered testimony concerning Michael's performance in their classes during the 2005-06 school year. Vincenzo Inga, for example, is a special education/ social studies teacher who team taught a U.S. history class in which Michael was a student. (11/21 Tr. 93) The class combined students with special needs and regular education students. (*Id.* p.92) Mr. Inga testified that he did not participate in drafting Michael's IEP history goals and benchmarks, but confirmed that Ms. Kern selected what she considered to be appropriate U.S. history goals and benchmarks from a state web site.<sup>10</sup> (*Id.* at pp. 111-12)

Mr. Inga stated that teachers of special education students usually did not receive a copy of a student's entire IEP. (11/21 Tr. p. 96) Instead, teachers were provided with the portion of an IEP that detailed the accommodations and modifications the student was to receive. (*Id.* ) As Michael's special education history teacher, it was Mr. Inga's responsibility to ensure that he implemented the modifications and accommodations on Michael's IEP. (*Id.* at 99-100) Thus, since Michael could not read the textbook, Mr. Inga read it to him. To accommodate Michael's poor writing skills, Inga shortened his assignments, and required Michael to do written work only when possible. He also helped Michael spell words. (*Id.* at 100-103) To illustrate how Michael performed in his class, Mr. Inga described a weekly vocabulary list that Michael was expected to do. (*Id.*) Mr. Inga would read the words to Michael (there were five words a week). Michael would then be expected to find the word, either in the main text, or in the glossary of the history book. Once Michael found the word, Inga would read him the definition, since Michael couldn't read it himself. Inga would then use the word in a sentence as an example, and then ask Michael to write a sentence using the word as well. Inga stated that Michael could not independently write sentences, so he would have to spell almost all the words for Michael. (*Id.* at 100-01; *See also* example of Michael's vocabulary work, JX 27).

Michael attended Kenneth Landsdown's special education self-contained biology class from January to June of 2006. Mr. Landsdown testified that he reviewed Michael's IEP and was aware of the relevant benchmark, (which he confirmed was a standard state goal) as well as the

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<sup>9</sup> Michael attended an ESY class in literature in the summer of 2005. (11/21 Tr. pp. 54-55) Mrs. S. testified that the class Michael attended was not a special education course because Michael did not understand what was going on. (11/20 Tr. p. 196-97) Mindy Mack, testified that she was a consult teacher who assisted the summer school special education classes that summer. (11/21 Tr. pp. 54-55) She confirmed that the class that Michael attended was indeed a small, self-contained, special education class. (*Id.*) She also testified that she helped to coordinate art therapy for Michael that summer, as well. (*Id.* at pp. 66-67)

<sup>10</sup> Mr. Inga testified that Ms. Kern did not seek his input concerning which history goals might be appropriate for Michael. He testified, however, that teachers sometimes seek such assistance. (11/21 Tr. p. 112)

modifications and accommodations that Michael was to receive.<sup>11</sup> (11/21 Tr. pp. 200, 216) Mr. Landsdown testified that that Michael was able to participate in the class of six students. (*Id.* at 202-05) He did not require any of the students to read or write extensively in his class. There was little, if any, work that the students were expected to complete independently. Instead, Mr. Landsdown prepared an outline of each chapter. Landsdown said they went through the outline together and the students would fill in blanks with his assistance. (*Id.* at 204) All of the test questions were taken directly from the outline, which the students were allowed to refer to during the test. (*Id.* at 210-213) In addition to the above described teaching method, Landsdown modified Michael's assignments by reducing his workload by half. (*Id.* at 204) He also noted that Michael's benchmark required him to complete his assignments with only fifty percent accuracy. (*Id.* at 215) Mr. Landsdown testified that Michael received a grade of "B" in his class. (*Id.* at 204)

Ernest Mitropoulis, taught Michael in a regular physical education and drivers education class in the 2005-06 school year. (11/21 Tr. p. 72) Mr. Mitropoulis testified that he read Michael's IEP and implemented the modifications. (*Id.* at 77-78) Though there was little need to read and write in these classes, Mitropoulis did read to Michael when necessary. He also modified the grading scale so that a score of 50-60% was passing. (*Id.* at 79) This was not the modification specified on Michael's IEP, but Mitropoulis used that grading scale for all special education students. (*Id.*) Mitropoulis stated that Michael received a grade of "D" in drivers education, and a "B" in phys. ed. (*Id.* at 75) While Michael was able to pass the school administered drivers ed. test with Mitropoulis' assistance, Mitropoulis did not know if Michael was able to pass the state drivers test to receive his license. (*Id.* at 84)

Michael's service provider, Deborah Kern testified that it was her responsibility to act as Michael's liaison to Michael's teachers. (11/22 Tr. pp. 9-10) Thus, in addition to writing Michael's IEPs, Ms. Kern collaborated with his teachers, giving feedback and receiving input concerning the content of his IEP. (*Id.*) In particular, Ms. Kern helped the teachers to understand and apply the appropriate modifications, like reading to him. (*Id.* at 67-68) Indeed, according to Ms. Kern, this modification was of particular importance because Michael's reading was so poor, he needed everything read to him. (*Id.*) Despite his complete dependence on others to read to him in class, Kern conceded that CPS did not provide Michael with any instruction to help him learn to read. (*See* JX 4-6) The only reading instruction that Michael has received occurs in his English class. (11/22 Tr. pp. 68-69) According to Ms. Kern, Michael's English teacher reads questions to him and then asks Michael to draw a picture of what is being read. (*Id.*)

Ms. Kern monitored Michael's progress through Student Progress Reports. (*Id.*) The Progress Reports were not sent to the Parents, but Ms. Kern used them when preparing to write Michael's IEP. (*Id.*) The Progress Reports measure several categories including attendance, preparedness, whether the student completes homework and classroom assignments, whether the student prepares for tests, and finally, the student's grade at that time. (*See e.g.*, JX 22,26 and 31)

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<sup>11</sup> Because he started midway through the year after the original biology teacher quit, Mr. Landsdown testified that he was responsible only for 4/06 benchmark. (11/21 Tr. pp. 198, 203)

Though some of the progress reports for 2005-06 indicate Michael was receiving low or failing grades, Michael did not fail any courses at least for the spring of 2006. (JX 16)

Unlike the Progress Reports, IEP report cards were given to students' parents each grading period. ( 11/22 Tr. 52-53, 55) Ms. Kern completed Michael's IEP report cards after obtaining written feedback from his special education teachers. (*Id.* at 52-54 ) The IEP report cards do not provide grades but state whether a student is making progress on, or has met the relevant benchmark. There also is a space for teacher comments. (*See e.g.*, JX 25) The record contains three IEP report cards for Michael dated 11/05, 1/06 and 6/06. (*Id.*) All of the eight entries on each of Michael's three IEP report cards indicate that he is making progress on his IEP benchmarks. Yet, Ms. Kern testified that the IEP report cards weren't accurate. Rather than make progress on his IEP benchmarks, Michael actually regressed during the 2005-06 school year. (11/22 Tr. 49-50, 76-77 ) Kern learned that Michael was regressing through her collaborative meetings with his teachers. (*Id.* at 136-37) Unfortunately, neither Kern nor any of Michael's teacher informed the S.'s that Michael was regressing. Instead, they gave the Parents the IEP report cards which incorrectly indicated that he was making progress. (*Id.* at 136-37)

Because he was not progressing, the team decided to make grading requirements less rigorous for Michael when they met in May 2006 to write a new IEP. (*Id.* at 49-50) They altered his grade reduction from 30% in the June 2005 IEP to a 50% reduction in the May 2006 IEP. (*Id.* at 135) This was the first time that the Parents received any information that Michael was not making progress. Indeed, it is not clear that the team explained the reason for the grading change even then.

Attendees at the May 2006 IEP meeting included Mrs. S. and Michael, Ms. Stacy, Ms. Kern, Josephine Martinez, a representative from the district, Mitzi Maras, a school social worker, and Carmen Acevedo, an advocate for Michael and the S. family.<sup>12</sup> (JX 6) The team decided that Michael should continue to receive specialized instruction in his academic courses, including British literature, a math course,<sup>13</sup> conceptual physics and occupational prep. Michael apparently was to attend one academic course, Latin American History, without direct special education services. (*Id.* at PD- 19) Unfortunately, the IEP goals and benchmarks for these courses are incomplete and haphazardly written. First, the team failed to include present levels of performance that are measurable and objective. Instead the team included such vague statements as, "Michael is interested in the field of automobile mechanics. In physics he will discover how his field of interest is related to this subject." (*Id.* at PD 13)

Second, the goals and benchmarks do not match the courses listed for specialized instruction, or are incomplete. For example, there are no goals and benchmarks for the occupational prep.

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<sup>12</sup> Ms. Acevedo is a probation officer in the Educational Advocacy Unit for the Cook County Juvenile Court Probation Department. (Tr. p. 220-21) She began working with the S.'s to help them access educational resources in August 2006. (*Id.* p. 223)

<sup>13</sup> It is difficult to read the name of this course on the IEP. It appears to say Advanced Algebra and Practical Trigonometry.

course taught by Ms. Kern. But there is a page of goals for social studies, even though there is no social studies course listed for specialized instruction. (*Id.* at PD 19 ) Likewise, there is an annual goal for social studies that states Michael will “understand events...shaping the history of Illinois, the United States and other nations.” But the supporting benchmarks completely omit levels of accuracy that Michael will be expected to achieve. (*Id.* at PD 15)

Third, the IEP’s goals and benchmarks failed to address Michael’s areas of greatest need -- reading and writing. Instead, they once again were selected from the state list of curriculum goals. The page devoted to English instruction does appear to address reading by including goals and benchmarks that require Michael to “*read* and understand literature...,” or “*read* and interpret literary works....” (*Id.* at PD 16) (emphasis added). Ms. Kern conceded, however, that despite what the benchmarks suggest, Michael wasn’t actually required to read. Instead, his teacher read the materials to him. ( 11/22 Tr. pp. 80-81)

With respect to accommodations and modifications, the team once again concluded that Michael did not need assistive technology to access any portion of the curriculum. (*Id.* at PD 11) He was to receive a scribe as needed, extra time on assignments, and tests read aloud, among other modifications. (*Id.* at PD 12) As described above, one of the most notable aspects of Michael’s 2006-07 IEP is the fact that the grading criteria was made less rigorous due to Michael’s regression. (11/22 Tr. pp. 135-37) Though Michael still did not make academic progress with that accommodation, Ms. Kern testified that he was able to reach a plateau and stop failing. (*Id.* at 82-83) Ms. Kern also testified that because the team believed Michael had “plateaued,” the team decided ESY would not be helpful for him, and did not recommend it. (*Id.* at 81-83)

During the IEP conference, Mrs. S. once again voiced her concern that Michael’s needs were not being met. (*Id.* at PD 08) Perhaps in response to her concerns, this IEP lists tutoring as one of Michael’s modifications and accommodations. (*Id.* at PD 12) Apparently the details were not finalized at the conference, however, because the IEP notes that information concerning tutoring will be passed on to Mrs. S. through the probations officer. (*Id.*) There was no evidence presented at the hearing that CPS ever followed through on providing Michael with tutoring. (*See, e.g.,* Kern Testimony, 11/22 Tr. p. 114)

The S.’s filed a request for a due process hearing on August 24, 2006. In a resolution session held on September 15, 2006, CPS agreed to conduct an assistive technology evaluation of Michael. (JX 15) The parties, however failed to resolve all issues in dispute at that session. (*Id.*) CPS conducted the AT evaluation on October 11, 2006. (CPS Assistive Technology Evaluation Report; JX 10) The S.’s also obtained an independent speech and language evaluation and an assistive technology assessment, as well as neuropsychological evaluation prior to the hearing.

Dr. Janet Marsden-Johnson conducted the independent speech and language evaluation and an assistive technology assessment of Michael on October 2, 2006. Dr. Marsden-Johnson has an M.A. in Speech and Language Pathology and a PhD in Augmentative Communication and Child Language. (Marsden-Johnson CV; JX 7) Since 1985 she has maintained a practice that specializes in evaluation and treatment of children and adolescents with language disorders, including those requiring assistive technology support. Dr. Marsden-Johnson conducted a three

hour assessment of Michael, the results of which she believes are a reliable indication of his abilities. (Marsden Johnson Report; JX-8) The language evaluation included an assessment of Michael's expressive and receptive vocabulary, and auditory perceptual skills. (*Id.*) She also evaluated Michael's oral and written language, as well as his reading and listening skills. (*Id.*) From her assessment, Dr. Marsden-Johnson concluded that Michael has a significant speech and language disorder, and is functioning significantly below age level in all areas tested. (*Id.*) In particular, Dr. Marsden-Johnson noted that Michael has significant word retrieval difficulties but has not been taught any strategies for retrieving words. (11/20 Tr. pp. 69-70) She also stressed that Michael's auditory processing deficits would be expected to negatively impact Michael's ability to read. (*Id.* at 71-72, 76)

Dr. Marsden- Johnson also conducted an assistive technology evaluation of Michael. (JX 8, PD-233) Specifically, Michael was asked to independently read a short story that was written on a first to second grade level. He was unable to successfully read the book. He was then given a Start-to-Finish book that "read" to Michael on the computer. The computer highlighted the words as it read to Michael and allowed him to select words he did not know so he could hear them again. (*Id.*) Michael was given a quiz on each of the stories. He achieved 50% accuracy on the story he read independently. He answered all the questions correctly on the Start-to-Finish story. (*Id.*)

Next, Michael was asked to write a summary of the story he had just read using Co:Writer and Write:Outloud technology. According to Dr. Marsden-Johnson, Michael enjoyed the task and was willing to work hard. The software programs helped Michael with spelling and vocabulary and allowed him to look up definitions of words. (*Id.* at PD-233) An informal spelling test showed that Michael was unable to correctly spell any of the target words without assistive technology. With AT, he spelled them all correctly. (*Id.* at PD-233)

Dr. Marsden-Johnson concluded that assistive technology is very helpful to Michael. Indeed, she does not believe that Michael's speech and language deficits are attributable to a cognitive delay because Michael showed too much improvement using AT during the three hour assessment. (11/20 Tr. pp. 91-92) Dr. Marsden-Johnson stressed, however, that AT can provide a significant benefit to Michael regardless of his "diagnosis." (*Id.* ) She therefore recommends that Michael be provided with appropriate assistive technology such as SOLO (Read:Outloud, Write:Outloud, Co:Writer), Start-to-Finish books, and Kurzweil 3000<sup>14</sup>. (JX 8, PD 235) For his language disorder, Dr. Marsden-Johnson also recommends that Michael receive intensive individual speech and language intervention in a program geared to children with extensive needs. (*Id.*)

Lauren Kunicki also conducted an assistive technology evaluation on behalf of CPS. ( JX 10) An eleven year employee of CPS, Kunicki has been conducting assistive technology evaluations for the last three years. (11/20 Tr. p. 108 ) She has a bachelors degree in speech pathology and a masters degree in special education. (*Id.* at 109) Ms. Kunicki evaluated Michael on October 11,

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<sup>14</sup> Kurzweil 3000 is software that assists students with reading and writing. (*See*, JX 8, PD-240-41)

2006 as per agreement in the September 15 resolution session. Her conclusions and recommendations are virtually the same as Dr. Marsden-Johnson's.

Specifically, Ms. Kunicki's report states that Michael was pleasant and eager to perform all activities during the evaluation. (JX 10) Ms. Kunicki assessed Michael's reading ability by asking him to independently read a story at first grade level. Michael was able to read approximately 67% of the words independently, and answered comprehension questions with 90% accuracy. Ms. Kunicki then read passages to Michael that were on a tenth grade and seventh grade level. Michael answered comprehension questions with 50% (tenth grade ) and 80% ( seventh grade ) accuracy. (*Id.* at PD-148) Ms. Kunicki's report does not state whether she then assessed Michael's reading performance while using assistive technology. It is clear, however, that Ms. Kunicki assessed Michael's writing ability with AT.

To assess Michael's writing ability, Ms. Kunicki asked him to copy sentences from a book, write a sentence that was orally dictated to him, and finally, to write a few sentences about a topic of his choosing. Michael was able to copy two sentences with only one error. (*Id.* at PD-148) When writing a sentence that Ms. Kunicki dictated to him, Ms. Kunicki noted that Michael had difficulty with spelling and punctuation -- he had four spelling errors and one punctuation mistake. When asked to write sentences about a topic of his own choosing, Ms. Kunicki states that Michael needed assistance for supporting detailed sentences. Ms. Kunicki then observed Michael using Write: Outloud and Co-Writer software. She stated that Michael worked very well with these programs -- he improved the content of his writing and liked the programs too. (11/20 Tr. pp. 115-16 )

Like Dr. Marsden-Johnson, Ms. Kunicki stressed that Michael quickly grasped how to use AT, and that the quality of Michael's work notably improved using assistive technology. She recommends, therefore, that Michael be allowed to use AT materials to help him with tasks that require reading and writing. (11/20 Tr. 116-17) The materials Kunicki recommends include Co: Writer, Write:Outloud, Draft:Builder, Kurzweil, a portable electronic speaking dictionary and a tape recorder to tape lectures. (*Id.* ) Ms. Kunicki's testified that, despite her recommendations, CPS has not yet provided Michael with this assistive technology, but is waiting to learn the outcome of the hearing. (*Id.* at 118 )

Dr. Michelle Rosen conducted a neuropsychological evaluation of Michael. (Rosen Neuropsychological Evaluation Report; JX 39) Dr. Rosen holds a PhD in clinical psychology and has had a private practice as a pediatric neuropsychologist since 1998. The focus of her practice includes the evaluation of children and adolescents with learning difficulties and/ or neurological disorders, as well as cognitive remediation. (Rosen CV; JX 38) Dr. Rosen testified that she conducts comprehensive neuropsychological evaluations that are similar to school psychological evaluations. (11/22 Tr. p. 264) She was contacted by Carmen Acevedo on behalf of the family to evaluate Michael. Before meeting with Michael, Dr. Rosen reviewed a lengthy family history form, Michael's school records and medical records -- particularly those pertaining to lead exposure. (*Id.* at 269-72)

Dr. Rosen administered a comprehensive battery of tests to Michael on September 21 and 22, 2006 to assess Michael's cognitive abilities, attention and memory, visual-perceptual skills and

academic performance. (*Id.* at PD 250-53) Rosen stated that she believed the results of the assessment were valid, but that some of the results should be interpreted “within the context of a severe language-based learning disability.” (*Id.* PD 250) She noted that Michael was polite, cooperative and, “persisted on all tasks in an effortful manner.” He also “demonstrated good attention with no distractibility or impulsivity.” (*Id.* at PD 249) Like Dr. Marsden-Johnson, Dr. Rosen noticed Michael exhibited difficulty with word retrieval during the testing. (*Id.*)

In her Clinical Impressions, Dr. Rosen stressed that the results of her evaluation, when compared to previous testing in May 1998, show a significant decline in measures of Michael’s nonverbal intelligence. She attributes this decline to the fact that Michael’s severe processing weaknesses have hindered him from acquiring new information at a rate consistent with his age group. Rosen states that Michael’s early exposure to lead may also be a contributing factor. (*Id.* at PD 254) Rosen concluded, however, that the current testing, along with Michael’s previous test scores indicate that Michael meets the criteria for a severe learning disability of the dyslexic type. Further, according to Dr. Rosen, he does not exhibit a mild cognitive impairment. (*Id.*)

When summarizing the results of her testing, Dr. Rosen stated that Michael exhibited a pattern of significant weaknesses with areas of relative strength. (*Id.*) For example, Michael’s auditory/verbal and visual memory skills are intact on both contextual and rote learning tasks. He also demonstrated an ability to retain information over time. In contrast, Michael exhibited a significant weakness in phonological processing and working memory span. These weaknesses, according to Dr. Rosen would have a direct impact on Michael’s ability to decode words and expand his sight word vocabulary. (*Id.*)

In her recommendations, Dr. Rosen noted her concern that Michael has not demonstrated academic progress over time, and that the IEP team at Steinmetz lowered the evaluation criteria on his current IEP to “50% accuracy which could be achieved by chance alone.” (*Id.* at PD 255) She recommends, therefore, that “Michael requires the most intensive and restrictive environment for Learning Disabled students where all services are provided in an integrated manner with a primary focus on remediation.” (*Id.*) Because Michael has not demonstrated progress with previous instruction, Dr. Rosen recommends that Michael requires a systematic phonics program in which there is explicit instruction in letter-sound relationships taught in logical sequence. (*Id.*) She also concurs with Ms. Kunicki and Dr. Marsden-Johnson in recommending that “all efforts be made to integrate assistive technology into [Michael’s] daily work. (*Id.* at PD 257) Her recommendations concerning the types of technology required are listed with specificity in her report. (*Id.* at PD 258-59)

As part of their relief, the S.’s have requested that Michael be allowed to attend the Acacia School. Karen Fouks, principal and clinical director of Acacia testified that it is a state approved day school for students with special needs such as learning disabilities, behavior disorders, and speech and language disorders. (11/21 Tr. pp. 147-48 ) Among other things, it offers individualized instruction for high school students in required content areas, as well as remediation in areas of deficit such as reading. (*Id.* at 165-66) The school utilizes different approaches to reading instruction, but relies most frequently on multisensory approaches, such as the Wilson method. (*Id.* ) Ms. Fouks testified that the Acacia team had reviewed Michael’s

records and had concluded that Acacia Academy has a program of instruction to fit Michael's individual needs. (11/4/06 Acacia Letter; JX 30)

Michael S. testified briefly at the hearing. He testified that he would like to learn how to read and write. (11/22 Tr. p 141) Since he has been at Steinmetz, though, no one has tried to teach him those skills. (*Id.* at 142) For that reason, he would like to attend Acacia Academy. (*Id.* at 141) He understands that attending Acacia will require that he ride a bus, and he is willing to do that. (*Id.*)

### Conclusions of Law

Congress created the Individuals With Disabilities Education Act (IDEA) to ensure that all children with disabilities have access to a public education. IDEA requires school districts to provide children with a free appropriate public education ("FAPE"), 20 USC §1412(1). *See also, Beth B. v. Van Clay*, 282 F.3d 493, 497 (7<sup>th</sup> Cir. 2002). A free appropriate public education is an education "specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982). In *Rowley*, the United States Supreme Court set forth a two pronged test to determine whether a school district has offered a student FAPE. The first inquiry to be made is whether the school district has complied with the statutory procedures required by IDEA. (20 USC §§1401 et seq.) The second prong of the *Rowley* test is whether the district has developed an IEP (Individualized Education Program) reasonably calculated to enable the child to receive an educational benefit. *Rowley* at 206-07. To meet that obligation, *Rowley* requires a school district to provide a "basic floor of opportunity" in the form of specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. *Id.* at 201. As will be discussed more fully below, the evidence demonstrates that the District committed both procedural and substantive violations that denied Michael FAPE.

1. *Whether the District failed to provide an appropriate evaluation in a timely manner in order to adequately identify the nature and extent of Michael's disabilities.*

Under Illinois law a district must conduct a full and individual evaluation that includes all relevant domains. 23 ILAC § 226.120<sup>15</sup> The failure to fully evaluate a student can result in the denial of a FAPE. Illustrative is *Board of Education of Oak Park v. I.S.B.E. and Kelly E.*, 21 F.Supp.2d 862 (N.D. Il. 1998).

In *Kelly E.* the court considered whether a District's failure to conduct an LD evaluation on a child resulted in a denial of FAPE. The high school student was already receiving specialized services under an eligibility determination of behavior disorder. The student's parent requested

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<sup>15</sup> The evaluation must cover all domains that are relevant to the child including, among other areas, general intelligence, academic performance and **communication status**. *Id.* at § 226.75 (emphasis added.)



that she be tested for a possible learning disability. Though the MDC team requested a psychological evaluation, the school psychologist chose not to administer one, instead relying on a previous evaluation that indicated a lack of a learning disability. (*Id.* at 870) The school district argued that its failure to conduct an LD evaluation did not result in a denial of FAPE to the student because her needs were being met regardless of her categorization. (*Id.* at 875) The court disagreed stating:

An appropriate education specific to a disabled child's needs must begin with full recognition of the disability and assessment of its extent. School authorities cannot properly address problems which they do not understand. The School District did not merely mislabel or mischaracterize Kelly's disabilities, it failed to fully evaluate and understand them. (*Id.*)

Like the school district in *Kelly E.*, CPS failed to fully evaluate and understand Michael's learning problems. Specifically, the record confirms that in late October of 2004, just prior to transferring to Steinmetz, Michael was given a psychological evaluation by a bilingual evaluator, Rosa Lopez. (JX 2) Ms. Lopez concluded that Michael's WISC IV scores indicated that he was functioning in the mild mental retardation range of cognitive ability. (*Id.* at PD 141) Ms. Lopez, however, was concerned that Michael's "extremely limited language development" was unusual and pointed to a "possible severe communication disorder." (*Id.*) She recommended that Michael's failure to develop language skills be "explored further" and suggested that Michael's poor language skills might hinder his ability to demonstrate greater skills. (*Id.*)

Michael's CPS case manager, Ms. Stacy, testified that shortly after Michael arrived at Steinmetz, the team conducted a domain meeting to plan a three year reevaluation for Michael. (11/20 Tr. p. 32 ) Prior to the domain meeting, both Ms. Stacy and Dr. Davis reviewed and discussed Ms. Lopez's report that recommended Michael receive a language evaluation. The domain team, however did not recommend that Michael receive a language evaluation as part of his three year reevaluation. (JX 3)

CPS school psychologist, Dr. Davis, confirmed that she reviewed the report prior to conducting a three year reevaluation of Michael in May of 2005. She made clear, in fact, that she gave the report great weight because it was administered by a bilingual clinician. (11/21 Tr. p.171) Indeed, Dr. Davis relied on Ms. Lopez's results for the WISC IV rather than administering the test herself. (JX 13) Dr. Davis administered other assessments, including the Kaufman Test of Educational Achievement, and two of the four subtests of the Vineland Adaptive Scale. (JX 13) Based in large part on her "interpretation" of Lopez's WISC scores, Dr. Davis concluded that Michael was cognitively delayed. (*Id.*)

In reaching that conclusion, Davis' report makes no mention of Ms. Lopez's concern that Michael's low scores might be due to a severe communication disorder. Nor does it mention Lopez's recommendation for a follow up language evaluation. (JX 13) Particularly given Davis' reliance on, and stated confidence in Lopez's WISC IV results, CPS' failure to heed Lopez's recommendation and conduct a language evaluation of Michael was a failure to fully evaluate Michael.

Significantly, at the hearing, CPS did not deny that Michael should have received a language evaluation. Instead, Dr. Davis asserted that she offered a language evaluation for Michael on two occasions -- in June 2005 IEP conference and at the resolution session -- but that Mrs. S. refused. The weight of the evidence simply does not support Dr. Davis' assertion that she made these offers.<sup>16</sup> First, as stated above, Dr. Davis' report is completely silent on Lopez's finding and recommendation. Indeed, Dr. Davis includes several explicit recommendations in her report. Yet there is no mention that Michael should be given a speech and language evaluation. (See Jx 13) Neither is there any mention in the June 2 IEP, or the report of the Resolution Session that Mrs. S. refused an offer of a speech and language evaluation. Significantly, while the Resolution Session Agreement makes no mention of a speech and language evaluation, it expressly memorializes CPS' offer of an AT evaluation. (JX 15) It simply isn't credible that an offer twice made and twice rejected would go unrecorded -- particularly at the Resolution Session, when the parties would have had heightened sensitivity to documenting what transpired. Finally, none of the other witnesses who attended these meetings --Ms. Stacey, Ms. Kern and Mrs S. corroborate Dr. Davis' account. CPS' failure to fully assess and identify Michael's disabilities precluded CPS from fully understanding and addressing the nature of Michaels' learning problems, resulting in a denial of FAPE.

2. *Whether the District failed to develop individualized goals/objectives based on accurate present levels of performance in Michael's IEPs;*<sup>17</sup>

Once it is determined that a student is eligible to receive specialized services a team must develop an individualized educational program (IEP) that is tailored to meet the unique needs of that student. (20 USC §1401(9); 23 ILAC §226.230) The key component of the IEP is a statement of measurable annual goals which are designed to meet each of the child's educational needs resulting from that child's disability. (*Id.* at § 226.230 (a)(2)(A)) To that end, the IEP must include the child's present levels of performance to allow the team to measure whether the child has made progress on the IEP's annual goals and benchmarks. *Id.* Substantively, an IEP that does not allow a student to make adequate progress on measurable goals does not provide a student with meaningful benefit. *Florence County School District Four v. Shannon Carter*, 510 U.S. 7 (1993). Finally, a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is "likely to produce progress, not regression." *Walczak v. Florida Union Free S.D.*, 142 F.3d 119, 130 (2d Cir. 1998). Applying these legal requirements to the evidence in this matter confirms that CPS failed to develop an appropriate IEP for Michael with individualized, measurable goals based on his present levels of performance.

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<sup>16</sup> Dr. Davis claimed that she offered Ms. S. several evaluations, and that Mrs. S. denied all of them. In addition to the offers for a language evaluation that she claims to have made, she also asserts she offered an AT evaluation at the June 2005 IEP conference, and a bilingual psychological evaluation at the Resolution session (11/22 Tr. pp. 164-65). Beyond Davis' assertions, there is no evidence to indicate that these offers were made. The only offer that is supported by documentary evidence is an AT evaluation in the Resolution session. (JX 15) Tellingly, Mrs. S. accepted that offer.

<sup>17</sup> While I will address each of the Parents' Issues, I have taken them out of order.

First, of the three IEPs at issue in this proceeding -- March 28, 2005, June 2, 2005, and May 18, 2006 -- only the June 2, 2005 IEP provides Michael's present levels of performance in a way that makes it possible to measure Michael's progress. (See JX 4, 5, 6) Specifically, that IEP includes Michael's scores on the Kaufman Test of Academic Achievement. (*Id.* JX 5) Those scores showed Michael's reading decoding and reading comprehension scores to be below first grade level, listening comprehension at a grade level of 2.5, and math skills at a grade level of late second to early third grade. (*Id.*) The March 2005 and May 2006 IEPs do not include present levels of performance that allow Michael's progress to be objectively measured. Instead, these IEPs include such statements as, "Michael has a difficult time with reading ..." (JX 4), or "In physics, [Michael] will discover how his field of interest [automobile mechanics] is related to the subject." (JX 5)

Second, many if not most of the goals and benchmarks on Michael's IEP's are not individualized to address Michael's educational needs and his levels of performance. This is true of all three of the IEP's. Specifically, despite recognizing that Michael reads on a first grade level and experiences significant difficulties with basic encoding and decoding skills, the IEP is devoid of any goals that are aimed at teaching Michael to read. Nor are there any goals intended to help Michael improve his writing skills. Instead, Ms. Kern testified that she selected goals from a state list of standardized curriculum goals for all Illinois high school students. (11/22 Tr. pp. 20-21) Recognizing that Michael could not succeed on these state goals, the team significantly lowered the grading requirements, allowing Michael to be "successful" by achieving levels of 40-60% accuracy. (See JX 4, 5, 6)

That these goals and benchmarks failed to address Michael's educational needs is starkly illustrated when considering Michael's English/reading goals. Though Michael is virtually a non-reader and needs the most basic reading skills, the team selected the following goals and benchmarks.

- "[Michael will] expand knowledge of word origins and derivations and use idioms, analogies, metaphors and similes to extend vocabulary development with 40% accuracy." (JX 4 & JX 5)
- "[Michael will] "preview reading materials, clarify meaning, analyze overall thesis and coherence and relate reading with information from other sources with 40% accuracy." (JX 4)
- "Compare the meaning of words and use analogies to explain relationships among them with 50% accuracy." (JX 5)
- "Understand how literary elements and techniques are used to convey meaning with 60% accuracy." (JX 6)
- "Discuss and elevate motive, resulting behavior and consequences demonstrated in literature with 60% accuracy." (*Id.*)

The team's failure to address Michael's specific needs and levels of performance is evident in goals for other subject areas as well. Goals and benchmarks for science, social studies and history include:

- “Formulate hypotheses referencing prior research and knowledge with 50% accuracy” (JX 5)
- “Explain, using a practical example, why experimental replication and peer review are essential to scientific claims with 60% accuracy.” (JX 6)
- “Apply the skills of historical analysis and interpretation with \_\_\_% accuracy.” (JX 6) (This benchmark, like several others on the May 2006 IEP, omits any expected level of accuracy.)<sup>18</sup>

Perhaps the most compelling evidence that Michael’s IEPs did not satisfy the requirements of FAPE came from the testimony of Ms. Kern who conceded that rather than making progress, Michael was “regressing” during the 2005-06 school year. (11/22 Tr. pp. 49-50, 76-77, 136-37 ) For that reason, according to Ms. Kern, the IEP team simply lowered their expectations for Michael even further. Specifically, the June 2005 IEP included a modified criteria that allowed teacher to reduce Michael’s report card grading scale by 30%. (JX 5, PD 39). The May 2006 IEP, however, lowered Michael’s passing percentage to 50%. (JX 6, PD 22). Ms. Kern also testified that because Michael was regressing, the team decided he would not benefit from ESY for the summer of 2006, and therefore did not recommend it for Michael, even as a means of assisting him in retaining skills he had already acquired. (11/22 Tr. pp. 80-81)

While the team’s strategy of lowering the bar of expectation ensures that Michael will pass his courses at Steinmetz, it falls far short of *Rowley’s* requirement that the IEP confer some educational benefit on the student. It cannot credibly be argued that Michael was making progress at the same time he was regressing. In short, the evidence confirms that the District denied Michael a FAPE because it failed to provide him with an appropriate IEP that enabled him to receive some educational benefit.

3. *Whether the District failed to provide an appropriate educational program/placement based on scientific, researched based evidence, and related services with sufficient intensity to meet Michael’s educational needs 8/18/04 to present;*

A school district has wide latitude in establishing its own curriculum and instructional programs to use with students so long as they provide a student with FAPE. In order to sufficiently individualize a student’s IEP, a district must adequately tailor its methodology to allow a student to benefit from that methodology. *T.H. v. Board of Education*, 55 F.Supp.2d 830 (N.D.II 1999) Here, the evidence is irrefutable that Michael’s primary deficit was in reading -- encoding, decoding, and comprehension. (See, e.g., JX 2, JX 13, JX 8) Yet there is no debate about whether the District provided Michael with the appropriate reading methodology, for the record is clear that the District did not provide Michael with any systematic reading instruction. Indeed, even Dr. Davis’s modest recommendation that Michael be taught sight words from the Dolch list

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<sup>18</sup> I do not mean to suggest that selecting a state curriculum goal with modifications and accommodations would never be appropriate for Michael. But relying on these goals to the exclusion of any goals that are individualized to address Michael’s areas of weakness -- particularly reading and writing--fails to address Michael’s educational needs.

was ignored. Moreover, Michael's IEP's and testimony from his teachers establish that rather than trying to teach him to read, Michael's teachers "modified his curriculum" by reading to him in class. (*See, e.g.*, JX 4,5,6, 11/21 Tr. 77-79, 100-103)

When questioned about the type of reading instruction Michael received, Ms. Kern could only describe a practice whereby Michael's English teacher read a passage to him and then asked him to draw a picture of what he had just heard. (11/22 Tr. 68-69) Though it may have been a tool to help assess Michael's comprehension, that is not a methodology for teaching a student to read. Nor did the District agree to Mrs. S.'s request for a tutor to provide Michael with reading instruction. (*Id.* at 37-38) The IEP team refused her request, telling her that tutoring was available for students only in regular education subjects. (*Id.*) In short, the District did nothing to try to help Michael improve his reading skills, even though reading was his area of greatest deficit. The evidence, therefore, supports the Parents' position that the District denied Michael FAPE because it failed to provide him with an appropriate educational program for reading with sufficient intensity to meet his needs.

4. *Whether the District failed to identify in a timely manner and then provide appropriate assistive technology in the classroom setting and for all school work;*

As discussed in Section One above, once the determination is made that a student is to be evaluated, a district has the responsibility to conduct a full and individual evaluation. That includes a responsibility to evaluate whether a student needs related services such as assistive technology in order to receive FAPE. (*See Letter to Fisher*, 23 IDELR 565 (OSEP 1995)) Such evaluations must assess whether the student's functional capabilities may be increased, maintained or improved by the use of assistive technology devices. 34 C.F.R. § 300.532 Here, the record is clear that, prior to the parents' request for a due process hearing, CPS did not evaluate Michael's need for assistive technology. The IEP team rejected the possibility of assistive technology for Michael at each of the three IEP conferences without conducting an evaluation. (*See* JX 4, JX 5, JX 6)

Since the Parents filed their request for a due process hearing, both CPS and Dr. Marsden-Johnson have conducted AT assessments of Michael. (*See* JX 16 and JX 8) Both agreed that Michael responded well to assistive technology, and that the use of AT devices and software would significantly benefit him in accessing the curriculum. (*Id.*) Indeed, both recommended many of the same software programs and devices including Co: Writer, Write:Outloud, Draft:Builder, and Kurzweil 3000. (*Id.*) Dr. Marsden-Johnson also recommended materials to assist Michael with reading, such as Read:Outloud and Start-to-Finish books. The District's failure to assess Michael's need for assistive technology denied him an important learning tool that both evaluators agree could have greatly assisted Michael in accessing the curriculum. Indeed, assistive technology could have alleviated Michael's almost total dependence on others to read to him and write for him. The District's failure to conduct an AT assessment and provide Michael with assistive technology, therefore, denied Michael FAPE.

5. *Whether the District failed to accurately and objectively report to the parents the lack of Michael's progress in the CPS offered services and programs;*

*Rowley's* first prong establishes that a district must comply with various statutory procedures, or procedural safeguards, in order to meet the requirements of IDEA. Some of these safeguards include the obligation that a school district provide parents with timely written notice on such occasions as the child's initial referral for evaluation, an IEP meeting, and request for consent for reevaluation. 23 ILAC § 226.510 Districts also are required to provide parents with a full explanation of their rights, and to assure that parents are given the opportunity to meaningfully participate in the development of their child's IEP. *Id.* at §§ 226.500-550 All of these communications must be in a language the parents understand. *Id.* at § 226.500. Finally, a district also has a duty to inform parents about a student's progress. 34 C.F.R. § 300.320 (a)(3). Procedural violations cause a denial of FAPE when they "seriously infringe the parents' opportunity to participate in the [IEP] formulation process." *W.G. v Board of Trustees*, 960 F.2d 1479, 1484 (9th Circuit 1992) Here, the District has committed several procedural violations in communicating with the S.'s, one of which is so substantial that it resulted in a denial of FAPE to Michael.

First, the District has a responsibility to provide parents with timely written notice concerning evaluations, proposed placement of a student, as well as notification of parental rights "in the primary language... of the respective parent." 23 ILAC § 226.500 During the hearing, Michael's case manager could not specifically confirm that she sent the S.'s timely notification of conferences. She stated, however, that it was her practice to do so. (11/20 Tr. pp. 38-39 ) Even assuming, however, that the case manager sent all of the required notices in a timely manner, CPS' actions still constitute a procedural violation because Ms. Stacey admitted that many of the notices that she sent to the S.'s -- conference notifications, conference recommendations and a consent for re-evaluation --were in English. (*Id.* at 154-55)

Mrs. S.'s testimony confirms that she received documents and forms from CPS. She also states that she didn't understand what the forms said because they were in English, and no one explained them to her. (Tr. p. 185) Though, CPS failed in its responsibility to send the S.'s notifications in Spanish, this failure did not constitute a denial of FAPE to Michael because it did not "seriously infringe on the parents' opportunity to participate in the [IEP] formulation process." *W.G.*, at 1484. Indeed, the record indicates that Mrs. S. attended all the three IEP conferences and took an active role in each one.

More troubling, but inconclusive, is the possibility that CPS did not provide the S.'s with a copy of their rights in Spanish. Again, the case manager could not conclusively affirm that she complied with this critical procedural requirement, but she testified that it was her standard practice to do so. (11/20 Tr. pp. 151-52 ) Mrs. S., however, maintains that she never received notification of her parental rights written in Spanish until September 15, 2006 -- the date of the resolution conference. (Tr. p188) The only evidence on this point is the testimony of Ms. Stacy and Mrs. S., and both witnesses were credible. The evidence is inconclusive, and, therefore, insufficient to prove that CPS failed to provide the S.'s with a copy of their rights in Spanish.

There is another way, however, that CPS failed to provide notification to Michael's parents that clearly resulted in a denial of FAPE for Michael -- particularly when taken together with CPS' other procedural violations. Specifically, each term, the District reported to the S.'s about Michael's progress through IEP report cards. (*See, e.g.* JX 25) Ms. Kern prepared these report

cards with input from Michael's teachers. (11/22 Tr. pp. 52-54 ) The IEP report cards did not include grades, but reported whether Michael was making progress on his IEP benchmarks. Teachers also could provide written comments. The IEP report cards for the 2005 -06 school year all state that Michael was making progress on and/or meeting his IEP benchmarks. (JX 25) But while CPS led the S.'s to believe from these report cards that Michael was making progress, Ms. Kern testified that, in fact, Michael's teachers were telling her that Michael was "regressing." (*Id.* 136-37) For some inexplicable reason, though, CPS failed to share this information with the S.'s. (*Id.*) According to Ms. Kern, the District did not give the S.'s any indication that Michael was regressing until it the June 2005 IEP conference when it lowered the grading criteria on Michael's IEP for the following school year. (*See* JX 6) Even then, it is not clear that anyone on the IEP team expressly stated to Mrs. S. that Michael was regressing. CPS' failure to inform the S.'s that Michael was regressing misled them to believe that Michael was receiving benefit from his IEP when he wasn't. The IEP report cards should have made clear that Michael was regressing. CPS, in short, failed to inform the S.'s about Michael's (lack of) progress, which in turn, denied the S.'s the opportunity to request an appropriate IEP for Michael and participate in the formulation process. That is a denial of FAPE.

6. *Whether the District failed to consider Michael's educational need for ESY 2005 and ESY 2006;*

The evidence does not support the Parents' contention that the District failed to consider Michael's need for ESY 2005, but it supports the Parents' contention that the District failed to appropriately consider Michael's educational need for ESY 2006. Specifically, the Parents' proof concerning 2005 was based on Mrs. S.' belief that the literature class Michael attended was not a special education class because it was too difficult for him. (11/20 Tr. pp. 196-97 ) Mindy Mack, a special education teacher at Steinmetz, testified that she worked as a consult teacher in ESY 2005. She confirmed that the class Michael attended, an English literature class taught by Ms. Bradco, was indeed a special education, ESY class. (11/21 Tr. pp. 54-55 ) Alternatively, the Parents may also have intended to show that, even if the class was a special education class, it failed to meet Michael's needs. Evidence was insufficient to meet their burden of proof on that issue.

With respect to ESY 2006, Mrs. S. testified that the District did not offer it to Michael. Her testimony is supported by Ms. Kern who testified that because of his "regression," the District did not offer ESY 2006 to Michael since the team believed he would not benefit from it. (11/22 Tr. pp. 81-83 ) Unlike Ms. Kern and Mrs. S., Ms. Stacy recalled a different version of events. She testified that ESY was offered, but that Mrs. S. did not accept it, reasoning that Michael did not enjoy it the year before, and he needed a break from school. ( 11/20 Tr. pp. 51-52 ) Ms. Stacy's testimony notwithstanding, the weight of evidence supports a finding that the District did not offer Michael ESY services in 2006. Both Mrs. S. and Ms. Kern testified to that fact. Moreover, the relevant IEP (May 2006) simply records that the student does not need ESY. There is no indication that Mrs. S. was offered ESY but refused. (*See* JX 6)

Though Ms. Kern testified that the team believed Michael's regression led them to conclude he would not benefit from ESY, her testimony should have led the team to reach the opposite

conclusion. If Michael was not making sufficient progress during the regular school, FAPE required that he receive ESY services to provide additional instructional support.

7. *Whether the District failed to offer appropriate compensatory services for the lack of IEP implementation as well as failure to complete a full evaluation and develop appropriate IEPs.*

Because the Parents have demonstrated that the District has failed to provide Michael with FAPE in the above described ways, the student will be entitled to compensatory services as specified in the provision of relief.

**IT IS HEREBY ORDERED:**

1. That Michael S. shall be placed at Acacia Academy at the District's expense immediately upon receipt of this order for the remainder of the 2006-07 school year, including any extended school year services called for by the IEP to be developed by the Acacia IEP team as described in paragraph 2 below;
2. That an IEP meeting shall be convened with staff at Acacia Academy for the purpose of developing an IEP appropriate to Michael's needs including intensive reading instruction through a scientifically based approach that the team deems best suited to Michael's needs; related services in the areas of speech/language and assistive technology, as well as an appropriate transition plan;
3. That Michael shall be placed at Acacia Academy at District expense for the 2007-08 school year as compensation for past denial of a free appropriate education, including any related services and ESY required by the 2007-08 IEP;
4. Safe and reliable transportation shall be provided to and from the Student's place of residence and Acacia Academy each school day at District expense;
5. That the District shall reimburse the Parents for the fees of independent evaluator Dr. Janet Marsden- Johnson for her independent speech and language evaluation. The District shall not be required to reimburse Dr. Marsden- Johnson for her assistive technology evaluation of Michael since the District conducted its own AT evaluation. The District shall reimburse Dr. Michelle Rosen, for her neuropsychological evaluation;



6. That the District shall provide proof of compliance with the aforesaid orders to the Illinois State Board of Education, Compliance Division, 100 no. First St., Springfield, Il. 62777-001, on or before February 7, 2007.

DATED: January 10, 2007

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Kristine L. Anderson  
Impartial Hearing Officer

P.O. Box 7065  
Evanston, Il. 60204