DECISION

IN THE MATTER OF THE REQUEST FOR DUE PROCESS

FOR

VS.

JACKSON PUBLIC SCHOOL DISTRICT

Due Process Hearing Officer: Roger Clifford Clapp
P. O. Box 521
Florence, Mississippi 39073-0521
Telephone/fax 601-845-2529

INTRODUCTION

The parent (mother) requested due process on November 14, 2008, represented by an attorney (parent's counsel), which request was received and dated November 17, 2008 by the Mississippi State Department of Education (MDE). A Hearing Officer (HO) was assigned by MDE on November 20, 2008, at which time the end of the Resolution Period was defined as December 17, 2008 and the 45-day IDEIA Decision deadline was set as January 31, 2009. A Pre-Hearing Conference was scheduled for December 11, 2008 and a Due Process Hearing for December 30, 2008, but the initially assigned HO was obliged to recuse himself, and the present HO was assigned the case on December 4, 2008.

The Pre-Hearing Conference was rescheduled for January 7, 2009 and the Due Process Hearing was set to begin January 21, 2009. Then by agreement of counsel for the parties the hearing was reset to begin January 22, 2009. The Pre-Hearing Conference was held as scheduled, at which time the issues and other arrangements were agreed and upon joint request of the parties and good cause shown, the HO rescheduled the Hearing for February 10 and 11, 2009 and extended the decision deadline to March 2, 2009. On January 30, 2009 on joint motion by the parties and upon good cause shown, the HO postponed the hearing to March 26-27, 2009 and the decision deadline to May 1, 2009.

The resolution process and mediation efforts were unsuccessful, although some of the matters brought up during the hearing had been resolved during mediation of a closely related previous Request For Due Process (RFDP) from the parent. Efforts at settlement during the Pre-hearing Conference were likewise unsuccessful.

During the second day of the hearing, it became obvious that much more time would be required if the parent's case proceeded as slowly as it began with the numerous witnesses proposed. Upon joint motion by the parties and upon good cause shown, the HO set additional hearing dates on May 5 through 7, requested counsel to provide at least four additional agreed dates (avoiding several periods not available to the HO), and extended the decision deadline to July 30, 2009.

Before the continued hearing, parent's counsel properly disclosed that the transcript of the first two days of hearing, which had been provided to one of the parent's expert witnesses, had been seen also by three other named witnesses at the Private School. This resulted in erudite letter briefs from counsel, arguing the merits of the district's strong objection to and motion for exclusion of testimony by these witnesses. The off record arguments and consideration of this situation were largely repeated on record at the continued hearing, consuming additional hearing time.

During the fifth day of hearing, upon joint motion of the parties and good cause shown, the hearing was continued to July 28-30 and August 25-28, 2009, the earliest dates available to counsel and HO. The IDEIA deadline was extended to September 28, 2009.

The next delay in this extraordinarily drawn out case was an unfortunate medical need for parent's counsel to request continuances and an extension of the deadline. Upon motion

ore tenus on behalf of the parent and upon good cause shown, without objection on July 27, 2009 the hearing was continued to August 25-28 and the HO again requested sufficient additional agreed dates to complete the hearing. The IDEIA deadline was extended, for the fifth time, to November 27, 2009.

Parent's counsel was unable to resume the hearing in August, but the parties agreed to eight continued hearing dates on October 20, 21, 27, 28, 29 and November 3, 4, and 5, 2009. Neither counsel anticipated a need for further extensions of the deadline. The HO requested that any briefs be provided by November 16, 2009, to allow time for a decision.

During the last day of the hearing on November 5, 2009, counsel agreed that more days would be needed to complete the case. Upon joint motion and good cause shown, the HO continued the hearing to February 9-12, 2010, and extended the IDEIA deadline for the sixth time to March 31, 2010. The HO requested that any briefs be delivered by March 16, 2010.

Following a telephone conference with counsel, upon joint motion ore tenus based upon good cause shown, the HO granted a seventh and final extension of the IDEIA deadline to April 30, 2010 and extended the deadline for briefs to April 16, 2010.

The hearing was severely fragmented and occasionally contentious, extending over twelve months on sixteen days. The process required dozens of communications by telephone, email, and regular correspondence. There was testimony from twenty-seven (27) different witnesses, some more than once on several different dates and some experts reciting extensive qualifications and giving lengthy opinions. The official record occupies 3465 pages and contains almost 100 exhibits, many of them multi-paged, plus over a dozen exhibits marked for identification only. There are over 300 pages of personal HO notes made during the hearing and many more in the file for this matter. The challenge of rendering an articulate, timely and correct decision was considerable.

Other comments on the proceedings may or may not be appropriate, but the reader of the cold record may be at a disadvantage without them. The record does not reflect the innumerable times when there was a significant pause between questions by counsel, which accounts for much of the unusual amount of time it took to complete the hearing. Only occasionally did the HO break the silence to ask if there were more questions or to ask counsel to move along. This effort to minimize the delay that plagued this matter may have affected the attitude of counsel, although the attorneys for both sides have certainly faced more impatient judges in formal litigation. To the surprise of the HO, parent's counsel occasionally suggested concerns, to put it politely, about the fairness of the hearing from the parent's side and opined early on that whatever the result, this matter would be appealed. This sentiment prevailed and was indirectly or directly expressed on almost every day of the hearing, in spite of the usually strict attention on the part of the HO to minimize perceptions of partiality. Eventually the HO asked if recusal was desired by the Parent's counsel, but counsel deferred to the HO who declined to recuse. Several hours of HO and counsel effort on and off record were required to deal with the

District's objection to any testimony by the Private School witnesses who reviewed the transcript of the first two days of hearing, arguably a violation of the rule of sequestration causing prejudice against the District. Ultimately the objection was overruled, in favor of maximizing HO understanding of the Child's case. Similarly throughout the hearing, in an effort to hear the entire story and preserve all arguably relevant facts for possible review, the HO frequently overruled objections, made exceptions excusing violations of normal hearing procedure, and exercised the discretion permitted in administrative law proceedings in favor of allowing into the record testimony and documents that in his previous life as a trial judge he probably would not have disallowed. These leniencies enlarged the record somewhat, but it created the opportunity to address the six identified issues in an expansive fashion. Accordingly, the decision below attempts to give due respect to all the pertinent evidence and arguments of counsel and, when possible, gives some deference to observations of demeanor and inconsistencies and how some witnesses or part of their testimony seemed less credible or convincing than some others.

Throughout the record, it will be obvious in an analysis by any careful reader that Parent's counsel skillfully and repeatedly tried to elicit testimony from witnesses in terms of words or phrases from the Federal Code or case law governing IDEIA matters, being particularly aggressive in cross-examination of District witnesses. With few exceptions, District employees declined these invitations to characterize facts against the district's interests, rarely responding in the affirmative to recitations that implied violations of IDEIA. Similarly, the Parent's witnesses from the Private School confirmed facts that tended to favor the Child's case and even implied some agreement with Parent's allegations of District violations of the law. The familiar task of the HO was to weigh all testimony, especially conflicting presentations, in the light of presumed or observed indications of proprietary interests or prejudice or advocacy that might be attributable to each witness.

There were also several repeatedly brought in to discredit District employees and bolster the attack on the District's omissions and commissions. Some of these receive comment in the findings of fact. In general, the testimony of both the District and the Private School employees was quite sincere and largely believable, given the differences in funding, educational methodology, class room size, witness credentials and experience levels, as well as technical testing protocols, how much the Child had aged since he left the District Kindergarten, MDE policies, etc. The passionate desire of the District employees, especially those who had personally tested and/or worked with the Child, to be part of his educational experience and assure that he returned to and stayed on a regular diploma track with ample regular classroom time with non-disabled peers, was more impressive than the somewhat defensively expressed desire of the Private School witnesses to continue indefinitely with the Child. The Private School personnel were advocates for their school as well as the Child. They were quite convinced of the advantages of their smaller classroom settings, the association method of teaching, the activities outside the regular classroom with disabled peers, and the several corrective measures being employed to address the Child's specifically identified physical weaknesses. While comparative teacher and therapist credentials, motivation, and objectively measured success rates in educating a pupil are not the decisive tests

under the law, the HO concluded that there were different advantages offered and weaknesses evidenced when comparing the actual ongoing Private School programs with the past and proposed District special education approach. The Private School offered more individualized attention to more of the problems the Child exhibited as he grew from age six to eight enrolled at that school, compared to the attention given him earlier by the District under pre-kindergarten and kindergarten Individual Education Plans (IEPs), when he was only four and five years old and had not yet demonstrated some of those problems (other than speech/language deficits) to an extent that significantly distinguished him from many of his public school peers. On the other hand, in terms of credentials, personal unbiased motivation, and objective test results, the Child's teachers, therapists, and testers in the District rightfully claimed a documented history of real, if not ideal, educational progress for the child in a Least Restrictive Environment envisioned and required by the law. This positive history was projected in proposed IEPs fashioned with the latest test information and offered in case the Child were to be re-enrolled in the District in response to its continuous invitation.

All of the above is offered to aid in a fair understanding of the reasoning behind the following findings and conclusions.

STATEMENT OF ISSUES AND RELIEF REQUESTED

The issues agreed upon at the Prehearing Conference were as follows:

1. Whether (the Child) had a qualifying speech language disorder in 2007 making him eligible for district services based on his speech and language deficiencies.

2. Whether (the Child) was making academic progress under the district IEP before his withdrawal in favor of private schooling.

3. Whether the district should be required to pay for private school and related services obtained for (the Child) upon withdrawal.

4. Whether the district should pay for the Child's continued enrollment at (the Private School).

5. Whether the district should be required to propose a specific IEP or detailed service plan before the parent re-enrolls (the Child) in district school.

6. Whether the district should be required to pay the costs incurred by the Child's parent incidental to his withdrawal from District school and enrollment in private school.

The relief requested was as follows:

A finding on Issue No. 1 that the Child had such a qualifying speech language disorder in 2007 would invalidate the contrary conclusion that followed the 2007 comprehensive re-evaluation by the District and its eligibility meeting on December 5, 2007. The applicable relief is subsumed in other issues, as is the relief available if the Child was not making academic progress under the District IEP before withdrawal (Issue No. 2). The relief requested by the Parent was that the district be required to pay for all private school and related service expenses and all incidental costs of withdrawal and enrollment incurred since his withdrawal from the District, including his brief tenure at a parochial school and his following and continuing enrollment at the Private School (Issues Nos. 3, 4, and 6). In addition, the Parent asked for relief in the form of a requirement for the District to propose a specific IEP or detailed service plan before the Child re-enrolls in District school (Issue No. 5).

FINDINGS OF FACT

A. Summary

A summary of events in chronological order, as compared to the actual order of proof, would have been helpful and is attempted here with considerable difficulty. The inclusion, omission, or incomplete rendition here of any particular fact or alleged event does not necessarily indicate consideration was either given or not given to the same by the HO. For example, no attempt is made to list every one of the myriad of tests administered to the Child over the five year period covered by the evidence, even though test results figured importantly in the ultimate findings. The meticulous reader will notice that some facts, such as the date certain data became available to the District, post-date the beginning of the extended hearing. This complicated some of the HO rulings on admissibility, considering the issues identified in the Pre-hearing Conference and the federal rules applying to production of documents before the due process hearing.

The Child was born in . He was enrolled by the Parent in the appropriate District Elementary School in Pre-Kindergarten (Pre-K) in September, 2005 at age four. The Pre-K Teacher became very interested in the Child and gave him much individual and small group attention in the regular classroom. Based upon conferences with the Parent and observation of the Child in the classroom, the teacher referred the Child to the District for an evaluation of his speech and language difficulties (noticeable in comparison with his peers) but not for other less distinguishable characteristics that were not unusual in her experience among Pre-K pupils, such as dexterity problems, attention span difficulties, etc. On October 24, 2005 Tanielle Barbour, a highly qualified and extensively experienced District Speech Pathologist, tested the Child, and on November 7, 2005 at a meeting attended by the Parent the Child was ruled eligible for Special Education in the area of Speech/Language. An IEP was developed and the Child began receiving therapy by the assigned school therapist. According to his Pre-K teacher, the Child made academic progress in Pre-K, to the extent such progress can be measured at that level. According to the speech/language therapist, who collaborated with the teacher in working with the Child, his therapy also produced positive results. There was no provision at that time for Extended School Year (ESY) for Pre-K children rising to Kindergarten (K) even if eligible for special education. The Parent worked with the Child over the summer on various exercises addressing his continuing speech and language difficulties, using ideas from various sources including the Pre-K teacher.

The Child was enrolled in Kindergarten (K) at the same school in September 2006. According to his K teacher, who like his Pre-K teacher became very fond of the Child and worked hard in collaboration with the speech therapist, the Child again made academic progress during the year. The teacher began informal enhanced attention to the Child as a new "three tier intervention" program began to be used in the District. According to the speech/language therapist his therapy again produced positive results. He did not qualify at that time for the Extended School Year (ESY) continuing special education available to some pupils under extraordinary circumstances, which would have afforded him speech/language therapy during that summer.

The Parent was admirably involved with the Child's education. She and the highly qualified and experienced K teacher conferred appropriately concerning the Child's continuing problems, but the Parent developed an unfortunate mistrust of the teacher that was generally characteristic of all her relationships with the District. Due to a misunderstanding and great offense taken by the Parent concerning good faith comments to her by the K teacher (that the Child's behavior was possibly suggestive some of the symptoms found in high functioning autistic children), the school Principal became involved. Late in the school year, all three conferred about the difficulty the Child would face if promoted to Grade 1. The Parent recalls that at some point she told the District she was thinking about withdrawing the Child from District school. The Parent declined the Principal's invitation to look at Grade 1 level work and observe a first grade class at another District school, apparently having lost confidence in the District's ability to serve the Child adequately. To District personnel, the Child's mother did not desire testing for possible Attention Deficit Hyperactive Disorder (ADHD) or autism at that time, and she appeared to be against retention of the Child in K, one of the many factors considered in the District promotion decision. He was promoted with District consensus that he would have difficulty doing Grade 1 work.

Without notice to the District, the Parent enrolled the Child at a [redacted] on August 7, , where he was tested and placed in the first grade. He was unable to do that school's grade level work, and the school conveyed that evaluation to the Parent by letter. Because he was only there a few weeks, the District speech therapist who was assigned under IDEIA to serve that school did not develop a service plan of speech/language therapy for the Child. The Child's was examined by a Private Psychologist, who on September 26, 2007 diagnosed the Child with ADHD. The Child began taking medication, which required adjustment from time to time thereafter but made a positive difference in his behavior.

The parent withdrew the Child from the [redacted] and, again without notice to the District, on October 9, 2007 enrolled the Child in a very [redacted] within the District's jurisdiction that specialized in education for children with speech and language difficulties. The [redacted] school had done an initial assessment of the Child on September 11, 2007, and it did extensive further testing in October. Over the next two years, the [redacted] school administered several tests which pinpointed some physical deficits for which he had only been screened earlier by the District, and these were addressed by specialists, including an Occupational Therapist. On October 16, 2007 the Parent met with District administrators, revealed for the first time the Child's earlier placement in the Private School, and agreed to a District offer of a comprehensive evaluation of the Child. This assessment included consideration of most of the results of the Private School testing that had been done on October 12, 2007. The District psychometrist, Randye Belokon, and Tenielle Barbour also extensively tested the Child again. All the test results known to and made available to the District at the time, which did not include one of the important tests done at the School, were considered at an eligibility meeting attended by the Parent on December 5, 2007. The test results did not show a significant discrepancy (defined by MDE policy as 15 points) between the Child's standardized

composite IQ (mental ability as determined by a recognized and timely test that is more reliable than other some short form IQ tests available) and the Child's standardized performance scores on at least two similar tests. The tests consistently confirmed deficits in various speech/language related areas such as reading and listening comprehension as well as receptive and expressive language. As a result of consideration of all the various facts known to the District about the Child, he was ruled no longer eligible for Speech/Language special education, although there was no disagreement about his continuing to have speech and language difficulties and continuing to need attention to these deficits. He was ruled eligible for special education under [illegible]) for [illegible]. A proposed IEP was developed by the District, but the Child remained at the [illegible], which because of its recognized specialty had always declined to accept District speech/language services available to private institutions within the district.

The parent expressed disagreement with the [illegible] at the eligibility meeting. She later requested an IEE, which not denied but was delayed for various reasons. Discussions directly with the Parent eventually resulted in her choice of Laskin Therapy Group (Laskin) for the IEE, over her initial preference for some individual she knew who was no longer at DuBard School for Language Disorders at the University of Southern Mississippi (DuBard). Various further delays resulted from miscommunication, an intervening holiday, and the need for District Board of Trustees approval at a regular monthly meeting. On July 16, 2008 the Parent filed a Request for Due Process (RFDP), and on August 4, 2008 it was settled and withdrawn. On August 25, 2008 by agreement the District psychologist, Dr. Anita Craft, who has excellent credentials and an extensive educational background, observed the Child in the classroom at the [illegible]. She also accompanied Ms. Barbour and other District employees in an observation on March 4, 2009. Laskin's IEE of September 13, 2008 showed that a significant discrepancy existed among some of the Child's standardized achievement scores, but not between its IQ tests and those scores. On October 16, 2008 the District decided that based on information available to it at that time, the Child was still not eligible for a language/speech ruling.

The Parent filed the pending RFDP on November 11, 2008, represented by present counsel of record. On December 9, 2008, the Child was evaluated at DuBard at the Parent's request through referral by the [illegible] The December 16, 2008 DuBard report was not provided to the District until the sharing of documents immediately before the first two days of hearing in this matter in late March of 2009.

On March 9, 2009 by agreement District administrative personnel, including Tenielle Barbour and Dr. Craft (for a second time), observed the Child in the Private School second grade classroom. They were not allowed to question the classroom teacher, which limited their inquiry, and Mrs. Barbour shared some of Dr. Craft's earlier and renewed concerns regarding observed level of instruction and absence of non-disabled peers. On July 13, 2009, the District documented an eligibility meeting for which the very useful DuBard report was available to be considered for the first time, resulting in a finding of a significant discrepancy between mental ability and speech/language

performance. In additional to eligibility under OHI (ADHD), the Child was given a ruling of speech/language eligibility and an IEP for the 2009-2010 school year was prepared in anticipation of possible enrollment in the District at Woodville Heights Elementary School. The Child remained enrolled at the Private School.

B. Selected chronological findings with citations to record:

Note: As usual, it is difficult to cleanly separate fact and law when attempting to isolate findings from conclusions, so some of the following may be a mixture of both.

The Child scored low on the April 2005 pre-tests, as did all the children admitted to the Pre-K program. 3-26-09: pp. 53,54. The Pre-K teacher quickly recognized the Child's comparatively severe difficulties with speech and with the Parent's permission referred him for evaluation by District licensed speech pathologist (LSP), Tenielle Barbour. 3-26-09 pp. 60, 65, 72. Apparently the Parent had not particularly noticed the Child's abnormalities, perhaps masked by his tonsillectomy, or his differences from his older brother, until the Child entered school and the District Pre-K teacher discussed his difficulties with her in a parent-teacher conference. 10-29-09, p 149, 155-164.

I was concerned about the Parent's candor on several occasions as she was obliged to correct prior statements and when her recollections of meetings with District personnel differed dramatically from theirs. For example, I find it hard to believe the Parent's testimony to the effect that no District teacher or speech pathologist ever gave her any input about the child before she went to the Principal (10-29-09 pp. 180-182), and that nobody at the District did anything about her Child's speech language issue (11-3-09 p. 48), and that her Child made no progress in Pre-K or K and that several District personnel told her over the telephone that she had no right to an IEE (11-3-09 pp. 53, 56). The Parent's clear statement on direct and cross-examination that she never heard "language" disorder (as distinguished from speech) until the Child was in the Private School was absolutely refuted by documentation she had clearly signed showing repeated references to District concern with "articulation and language" and "moderate/severe language disorder." 11-4-09 pp. 28-33. In addition, cross-examination revealed some examples of selective memory that detracted from the Parent's credibility. 11-4-09 pp. 45-50. I acknowledge that some of this hyperbole or lack of candor may be attributed to her valiant and admirable dedication to helping the Child with his problems, her demonstrated tendency to mistrust and misunderstand District personnel, her extreme disappointment with her Child's development compared to normal children like his older brother, and her understandable hope to prevail in this matter after presumably investing heavily in her excellent legal representation. While I sympathize with the Parent's jaded recollection of all things negative about the District and her thankfulness for the Child's perceived progress in the Private School, I find the District witnesses more credible with respect to disputed facts.

The Child initially was ruled eligible for speech/language special education without a determination of standard score discrepancy compared to IQ because he was too young for meaningful IQ measurement. 5-6-09 p. 80. A speech/language IEP was prepared and

approved at an IEP Committee meeting on November 7, 2005 attended by the Parent, Pre-K teacher, and LSP. Exhibit P-3. The Child made progress academically, socially, in the general curriculum, and with his speech therapy in Pre-K, meeting some but not all of the educational benchmarks. 3-26-09 pp. 59,60, 64, 65, 80; 5-5-09 pp. 185-187, 216. The speech pathologist, Ms Tanielle Barbour and the Pre-K teacher collaborated closely in carrying out the IEP prepared for the Child, with therapy provided in and out of the classroom. 3-26-09 pp. 76, 77, 87, 89, 122, 123; 5-5-09 pp. 170, 175-183; 10-20-09 pp. 185-214. The teacher recommended that the Parent put the Child in some summer program, since no District program was available for him. 3-26-09 p. 126. I find that the Pre-K teacher and the LSP were quite competent and credible, and they remained confident and convincing under intense cross-examination. I find that the IEP for 2005-2006, although shown to be imperfect, was reasonably calculated to enable the Child to obtain some meaningful educational benefit and that he did so and progressed academically during that year.

An IEP was prepared for the Child for the 2006-2007 school year at a meeting of the IEP Committee on May 3, 2006 attended by the Parent, Pre-K teacher, and the LSP. Exhibit P- 5. The Child's K teacher survived vigorous cross-examination, especially about her ill-fated but good faith mentioning to the Parent that the Child exhibited some red flags of autistic-like characteristics. 3-26-09 p. 141. She inadvertently made matters worse by following with a necessary explanation of autism and unfortunately mentioned the movie "Rain Man" which ultimately greatly offended the Parent, who made it clear to the teacher that testing was not desired. 3-26-09 pp. 142, 151. Repeated examination of the K teacher and several other witnesses on the subject of the alleged labeling of the Child as autistic was apparently a red herring designed discredit District employees, but instead I find that it tended to illustrate the Parent's unusual capacity to misunderstand and mistrust them. The Parent reacted defensively to the teacher and even asked the Principal to move the Child out of that class. 3-27-09 p. 259. The K teacher worked hard with the Child, and on cross-examination she credibly defended his promotion from K at the end of the year even though he did not master all objectives and was below K level in several areas. 3-26-09 pp. 175-179, 188-192. During the school year the teacher collaborated with the LSP, Talitha Bingham, who worked with the Child in small speech therapy groups and occasionally one-on-one in the classroom. 10-20-09 pp. 168, 171, 184, 208. The Parent did not want the child tested for non-academic deficits. 3-26-09 pp. 234, 235. I find that the child made meaningful progress in K. 3-26-09 pp. 216, 229, 230; 5-6-09 p. 18; 2-9-10 pp. 6-9.

The K teacher and LSP provided information for the development of the IEP, including new accommodations and modifications addressing his speech/language disability for the 2007-2008 year, and they were part of the committee that attended the IEP meeting along with the Parent on April 30, 2007. 3-26-09, p. 194; Exhibit P-13; 5-6-09 p. 17. The Principal and K teacher discussed with the Parent the rigors of First Grade level work and the ramifications of promotion. 3-26-09 pp. 241-243. The Parent was not in favor of retention. 2-9-10 p. 68. I questioned the K teacher almost as rigorously as Parent's counsel, and she responded convincingly about the methodology employed and tailored for the Child, emotionally expressing personal concern over the Parent's reluctance to

recognize the problems the Child would face in the First Grade. 2-9-10 p. 72-74. I find that the 2006-2007 IEP was reasonably calculated to enable the Child to obtain some meaningful educational benefit and that he did so and progressed academically in the District K. I further find that based upon the information available at the time, the IEP proposed for 2007-2008 was likewise reasonably calculated to provide educational benefit and academic progress had the Child been enrolled in the District for that year.

I find that although the Child was properly found not to qualify for ESY (and therefore received no speech/language therapy during the summer of 2007), the Parent accepted and the Child benefited by the District's invitation to enroll the child in its four week Boost program for children promoted from or retained in K without having mastered all the benchmarks. 5-5-09 pp. 52, 60, 67, 73, 94, 95. The Child made limited progress in Boost, sometimes appearing bored and not cooperating or staying on task. 5-6-09 pp. 156-160. He made some improvement and did better on post-testing than on pre-testing for Boost, unlike some others in the class. 2-10-10 pp. 112-113; Exhibit D-1. The Boost teacher felt that he should not be retained in K. 5-6-09 pp. 236, 237. I find that the laborious examination of the Boost teacher aimed at criticizing the lack of ESY and summer speech/language therapy, which consumed the better part of a day and added dozens of pages of exhibits, was unconvincing on the question of whether the District was providing the Free Appropriate Public Education (FAPE) required under IDEIA. Based upon a preponderance of the evidence, I find that the District was providing FAPE before the Child was unilaterally enrolled in private schools.

In the fall of 2007, the Child did not return to District school for first grade but was enrolled in private schools. The Parent did not give notice of the unilateral enrollments (11-4-09 p. 57) , until she met with Dr. Brenda Ann Heidleburg Robie, the District Lead Elementary Learning Specialist, on October 16, 2007 and agreed to comprehensive reevaluation of the Child. 10-20-09 pp. 138, 139; 10-21-09 p. 22. Not unlike her difficulties with other District employees, the Parent perceived Dr. Robie as rude or inconsiderate, revealing a tendency to misunderstand or be overly sensitive about the Child. 10-21-09 pp. 47, 48. I find this tendency of the Parent explains some of her negative reactions to the District's ongoing god faith efforts to discuss the Child and provide FAPE. I further find that the mistrust that permeates the Parent's interactions with District personnel is illustrated by her refusal to meet with District administration on January 17, 2008 because she was deeply offended by not being allowed to record the meeting. 10-21-09 p. 66.

In addition to multiple tests administered by the Private School, clinical psychologist John Jolly, Ph.D., tested the Child on 9-26-07. The results were probably somewhat unstable because of the Child's age and may have been affected by his language disorder (3-27-09 pp. 124, 133, 145), but Dr. Jolly defended his Wechsler IQ test (and his much lower IQ finding, typical for him according to the District psychometrist) against the Reynolds test favored by every other expert. 3-27-09 pp. 162, 163; 5-7-09 p. 58. I find that the timely Reynolds IQ scores used by the District and others to evaluate the Child over the years are more reliable than the IQ reported by Dr. Jolly at that time.

The Child was referred by his pediatrician to be examined and tested by Dr. Paula Webb Rawson at University of Mississippi Medical Center Child Development Clinic on December 4, 2007. As an expert witness for the Parent, she recommended that the Child remain in the Private School setting to help him achieve, but faced with a comparison of her test results to the lower scores in the December 9, 2008 Dubard results, she admitted that the child was not obtaining the skills he should have during that year at the Private School. 3-27-09 pp. 218, 238, 239. Another witness for the Parent, Dr. Maureen K. Martin, a highly qualified and experienced expert at DuBard, recommended that the Child continue under the association method used at the Private School and historically championed by DuBard. However, she reluctantly agreed on cross examination that the comparison of DuBard results with earlier tests indicated that the Child was not performing as well in December, 2008 as he was two years earlier when he was in the District school. 3-27-09 pp. 90. I find the recommendation of the Private School from these two experts to be unconvincing and inconsistent with their admissions about the Child's regression while at the Private School I find that although the Child benefited from the attention to his various deficits at the Private School, the "big picture" question of whether he was making appropriate academic progress there is at best highly debatable and in the balance must answered in the negative.

The District psychologist, Dr. Anita Craft, Mrs. Tanielle Barbour, and others observed the Child in the Private School second grade classroom, where he and half a dozen other disabled classmates were doing rote exercises on skills considered by District personnel to be Pre-K or K level, and where the Child was comparatively unchallenged and more mature than the others. 5-6-09 pp. 84-88. Dr. Craft documented her opinions that the level of instruction was not on grade level either of the two times she visited and that the Child was more mature and much less challenged than his disabled classmates. 10-20-09 pp. 91-95. The Private School language department manager described the Child as not having mastered things that his District K report card indicated he had mastered, describing him as a child who had not benefited for his Public School experience. 10-28-09 pp. 182-184. I find that this witness for the Parent was easily led without objection to the form of many questions, effectively criticizing the District's general education classroom approach, the specific 2005-2006 IEP, and the specific 2006-2007 IEP. 10-28-09 pp. 195-200. While I do not doubt her loyalty to the Private School, its association teaching method, its small group and one-on-one instruction and therapy, and its desire to keep the child there for his sake, nevertheless I strongly sensed and noted that the one sided advocacy of her testimony was exceeded only by that of the Executive Director of the school. The Private School Occupational Therapist reported that she eventually tested the Child and detected visual perception deficits, gross motor delay, and trouble with self help skills and sensory integration, and she described a truly wonderful therapeutic PE program that helped the Child. 10-29-09 pp. 25-28, 38-48. There was no proof that the District would not or could not provide OT comparable to the Private School. The Private School speech therapist who worked with the Child was very spontaneous, enthusiastic and dedicated to expertly addressing his several problems with a hands-on approach that she said was producing steady progress, possibly unaware of the objective test scores indicating regression during two years at the school. 10-28-09 pp. 114-123 The Private School audiologist described some very technical tests and

results and systems that gave attention to the child's auditory processing deficits. 10-20-09 pp. 101-116. I find that if the Child were re-enrolled in the District school he would have much more productive exposure to non-disabled peers in a regular classroom (LRE) and would remain on a regular diploma track, something the Private School intended for him at some unspecified future time. There was no proof that the District could not or would not address the Child's physical needs detected while he attended the Private School.

The Parent disagreed with the eligibility decision of December 5, 2007, and eventually she obtained a representative. At some point documents authorizing that representation and requesting an Independent Evaluation (IEE) for the Child were received on dates and under circumstances that resulted in confusion not cleared up by testimony. The first undisputed request for an IEE was by Parent's letter of April 21, 2008, leaving some question about the former representation. I find based on a preponderance of the evidence, with no evidence to the contrary, that the District never denied the request for an IEE and never considered filing a Request For Due Process (RFDP), believing that the Parent understood her right to an IEE from her receipt of Procedural Safeguards and from having her request granted directly and specifically, subject only to her selection of an evaluator. 5-7-09 pp. 159-160, 235; 10-21-09 pp. 140-143, 146. However, the parties shared in causing or allowing significant confusion and delay before the IEE was actually done. For example, at first the District had mistakenly directed the Parent to a psychologist for the IEE, angering and confusing her about her right to chose someone to address the Child's speech/language deficits. District employees recalled that the Parent changed her mind, dropped the request, and planned to re-enroll the child under the proposed 2008-2009 IEP. 5-7-09 pp. 159-160; 10-21-09 pp. 146 On July 16, 2008 the Parent filed a RFDP, again clearly asking for an IEE. This RFDP was withdrawn when the parties reached an agreement in mediation documented on August 4, 2008, under which Laskin was to conduct the IEE as soon as board approval was received. Exhibit D-4. The Parent could have chosen DuBard at this point but chose Laskin. 11-4-09 p. 24. The District tried to expedite the IEE by broadly wording its request to the Board of Trustees. 10-21-09 p. 168. I find from a preponderance of the credible evidence that the unfortunate confusion and delay of the IEE during the period from April to July, 2008 was not the result of any bad faith or intentional act of omission or commission by the District and that the Parent shared in delaying the matter even though her actions were likewise not unreasonable.

Arguably the mediation agreement decided the issue of whether the IEE was unreasonably delayed, but the HO (possibly erroneously) overruled District counsel's objection to evidence relating to the delay. The matter is addressed under Conclusions of Law below. Because the delay in obtaining an IEE may be one of the most potentially incriminating of all the facts skillfully portrayed by counsel against the District, I now explore the question of how the delay affected the Child. If the Parent had understood her rights under the direct statements from District personnel and from the Procedural Safeguards she received, and if she had selected Laskin promptly in March or April of 2008, and if the District had gotten prompt authority from the Board of Trustees to pay Laskin, and if the Child had been evaluated by Laskin soon thereafter with the same test

results, then whether on not the Child remained enrolled at the Private School the District reevaluation would have produced the same result: not eligible for Speech/language services according to information available at the time in this hypothetical. There is no evidence to suggest Laskin's result would have been different in early 2008. I find that an earlier IEE and ruling of non-eligibility would not result in any entitlement to any of the relief requested by the Parent in this case.

The July 15, 2008 RFDP that was settled by mediation and withdrawn on August 4, 2008 not only specifically cited delay and alleged refusal of an IEE as an issue but also specifically requested temporary funding for the Child's attendance at the Private School. Exhibit D-11. By implication, the settlement and withdrawal settled not only the IEE delay issue up to that point but also the issue of payment for Private School up to that point, Issue No. 3 in the case sub judice. This is addressed in Conclusions of Law below.

As the evaluation of the Child agreed to in mediation came to completion, the District scheduled an eligibility meeting, attended by the Parent on October 16, 2008. The District psychometrist who attended had tested the Child and had been involved in the comprehensive reevaluation begun in November, 2007, the results of which were decided and announced on December 5, 2007. Under intense cross-examination, she insisted that the District had used the IEE reported by Laskin, and she rejected the repeated urging of Parent's counsel that it was not a factor in the evaluation. She clearly explained how test data was used in determining if a significant discrepancy exists between IQ and performance as one of the considerations in the evaluation. 5-7-09 pp. 30, 36, 40-57, 67-68, 103-111. Tenielle Barbour testified that in order to make a determination of eligibility there must be two separate timely and similar skill test results to establish the discrepancy, if any, between current IQ scores. 5-6-09 pp. 54-57, 60. I find that the District evaluated all the data reasonably available, including the Laskin report, in reconsidering the Child's eligibility and reasonably found that the Child's primary eligibility should be OHI ADHD and not speed/language under MDE guidelines (not having the benefit of the DuBard report, which was received in document production just before the hearing). I find the District psychometrist's testimony to be credible and to bolster an affirmative answer to the question of whether the District was in good faith while it prepared under MDE guidelines to accept the Child if reenrolled. I find that the District in 2008 continued to be reasonably prepared, as it was in 2007 (5-6-09 pp. 116, 119), to address his ADHD through special education along with collaboration for speech/language accommodations and modifications. At that meeting, the Parent declined the District's invitation for her to observe grade level inclusion classrooms at Woodville Heights Elementary School where the Child could be enrolled. 2-10-10 pp. 44-45, 50, 108, 121-122.

The District Executive Director of Exceptional Education Services, Dr. Gwendolyn Colleen Sanders, like Dr. Craft and other witnesses, explained that the discrepancy between IQ test scores and language skill scores is not the only thing considered in determining eligibility. 10-22-09 pp. 118-120; 2-10-10 pp. 168-171. Based on the preponderance of the evidence, and despite an impressive effort by Parent's counsel to

cleverly elicit statements to the contrary, I find that the discrepancy between mental ability standard scores and standardized skill scores is not the sole criterion used by the District to determine eligibility vel non.

The Parent filed the pending RFDP on November 11, 2008, represented by present counsel of record. On December 9, 2008, the Child was evaluated at DuBard at the Parent's request through referral by the Private School. The December 16, 2008 DuBard report was not provided to the District until the sharing of documents immediately before the first two days of hearing in this matter in late March of 2009. On March 9, 2009 by agreement District administrative personnel, including Tenielle Barbour and Dr. Craft (for a second time), observed the Child in the Private School second grade classroom. They were not allowed to question the classroom teacher, which limited their inquiry, and Mrs. Barbour shared some of Dr. Craft's earlier and renewed concerns regarding observed level of instruction and absence of non-disabled peers. On July 13, 2009, the District documented an eligibility meeting for which the very useful DuBard report was available to be considered for the first time, resulting in a finding of a significant discrepancy between mental ability and speech/language performance. In additional to eligibility under OHI (ADHD), the Child was given a ruling of speech/language eligibility and an IEP for the 2009-2010 school year was carefully prepared in anticipation of possible enrollment in the District at Woodville Heights Elementary School. 2-9-10 pp. 161-171; Exhibit D-12. The Child remained enrolled at the Private School. I find that based upon the information available at the time, the IEP proposed for 2009-2010 was reasonably calculated to provide educational benefit and academic progress had the Child been enrolled in the District for that year.

Incidentally, I find it hard to believe that the Child was totally unaffected by the dozens of tests administered to him over the past five years, but it is impossible to evaluate that effect, and it did not bother the many experts who tested him. Similarly his ADHD was not deemed a factor by testers, as mentioned by the DuBard expert who said the absence of comment on ADHD meant there was no effect. 3-27-09 pp. 95-98. I also cannot help but wonder about how the Child's aging from five to eight years of age and his eventual adjustment to ADHD medication affected even the standardized test results, although the experts in this case apparently were not concerned. Having stated this reservation, I do find that with few unimportant exceptions the test results presented by both parties were valid measurements of the Child's IQ and skill levels at the times they were administered.

Based upon a preponderance of the evidence, which only slightly favors this finding, I believe that the Private School may have been an appropriate setting for the Child for a year or so as he received one-on-one attention to his various deficits as confirmed and revealed by excellent testing done there. However, objective test data shows the Child's standardized scores were lower in 2009, after two years in the Private School, compared to the same tests given in 2007. 11-4-09 pp. 124-126. This stark truth diminishes the credibility of the Parent's witnesses who claimed that the Child made progress throughout his time in the Private School. The District Exceptional Education Learning Specialist, an experienced Board Certified classroom teacher who has a Masters Degree in Special Education and is a doctoral candidate, observed the Child in his Private School

classroom for the purpose of writing instruction accommodations as part of the proposed IEP for 2009-2010 (Exhibit D-12) and became convinced that the Private School was not an appropriate LRE setting for the Child. 2-10-10 pp. 4-9. She, like other observers, found him among only less mature disabled peers, unchallenged with the below-grade-level work. 2-10-10 pp. 9-13, 78-81. Based on these observations and review of the teacher's schedule of reading and math instruction time (not being allowed to talk with the teacher), this District expert believed that the Child was not on a regular diploma track at the Private School. 2-10-10 pp. 19-22. I closely questioned this District witness about her criticism of the Private School, her role in preparation of the 2009-2010 IEP, and her responses to hard cross-examination by Parent's counsel, and I became convinced of her expertise, sincerity, credibility, and lack of undue bias. Dr. Craft agreed with her. 2-10-10 pp. 148-152. I also carefully considered the articulate advocacy for the Private School by its Executive Director, her demeanor as she convincingly described the advantages the Child enjoyed in her school, and her passionate criticism of District teaching methods and MDE policy regarding discrepancies between IQ and performance test results. 10-28-09 pp. 22-102; 11-4-09 pp. 36, 82. I find the Executive Director's institutional pride to be well justified but her proprietary insistence on more time for the Child in her institution to be mistaken, in view of the more convincing descriptions by District personnel of the advantages offered the Child in free District schools. I find from the above observations and from a preponderance of the evidence that continued enrollment at the Private School is not appropriate for the Child.

CONCLUSIONS OF LAW

Note: As usual, it is difficult to cleanly separate fact and law when attempting to isolate conclusions of law, so some of the following may be a mixture of both.

1. The Child did not have a qualifying speech disorder in 2007 that made him eligible for District special education services for his speech/language deficits under MDE policy guidelines, and the Parent did not carry the burden of proof to the contrary.

2. The Child was making academic progress under the District IEP before his withdrawal in favor of private schooling.

3. The District should not be required to pay for Private School and related services obtained for the Child upon withdrawal because (a) the settlement and withdrawal of the Parent's previous RFDP at the conclusion of mediation on August 4, 2008 precludes part of the relief under Issue No. 3 by barring the request for payment for Private School and related expenses before that date, (b) the IEPs calling for placement in the District school for 2006-2007, 2007-2008, 2008-2009, and 2009-2010 made FAPE available to the Child and were not inappropriate, (c) placement at the Private School was not appropriate except for year 2007-2008, and (d) meaningful educational progress for the Child was reasonably anticipated by all three District proposed IEPs for 2007-2008, 2008-2009, and 2009-2010, which would have provided him with FAPE in the Least Restrictive Environment.

4. The district should not be required to pay for the Child's continued enrollment at the Private School, because (a) the IEPs calling for placement in the District school for 2006-2007, 2007-2008, 2008-2009, and 2009-2010 made FAPE available to the Child and were not inappropriate, (b) placement at the Private School was not appropriate except for year 2007-2008, and (c) meaningful educational progress for the Child was reasonably anticipated by all three District proposed IEPs for 2007-2008, 2008-2009, and 2009-2010, which would have provided him with FAPE in the Least Restrictive Environment.

5. The District should be required to propose a specific IEP before the Parent re-enrolls the Child in District school.

6. The District should not be required to pay the costs incurred by the Child's Parent incidental to his withdrawal from District school and enrollment in private school because (a) the settlement and withdrawal of the Parent's previous RFDP at the conclusion of mediation on August 4, 2008 precludes part of the relief under Issue No. 6 by barring the request for payment for Private School and related expenses before that date, (b) the IEPs calling for placement in the District school for 2006-2007, 2007-2008, 2008-2009, and 2009-2010 made FAPE available to the Child and were not inappropriate, (c) placement at the Private School was not appropriate except for year 2007-2008, and (d) meaningful educational progress for the Child was reasonably

anticipated by all three District proposed IEPs for 2007-2008, 2008-2009, and 2009-2010, which would have provided him with FAPE in the Least Restrictive Environment.

7. The data and information reasonable available to and properly used by the District in its development of IEPs for the Child and in its determinations of eligibility were sufficiently inclusive and were applied with the necessary expertise from appropriate personnel.

8. The discrepancy between standardized scores, comparing the Child's mental ability (IQ) with his performance and particularly with skills in expressive and receptive language, was not the sole determining factor considered by the District in evaluating and re-evaluating the Child's eligibility for special education services.

9. The Parent failed to give notice to the District concerning the Child's unilateral placement in private schools, including the Parochial School where he was briefly in 2007 and the Private School where he has been enrolled since then.

10. The District did not violate its duty under the IDEIA by any unreasonable delay in its election to grant an IEE and not to file a RFDP.

11. The Parent's disagreement with the eligibility ruling announced at the December 5, 2007 meeting was not an exercise of her right to request an IEE, and her disagreement did not trigger a requirement for the District at that time to either grant an IEE or file a RFDP.

12. Because of the previously established relationship between the District and the Private School, which declined speech/language services thereby avoiding duplication of the services in which that school specializes, there was no requirement for the District to offer a service plan for the Private School.

13. All issues related to the delay experienced by the Parent in obtaining an IEE and any failure of the District to grant the same or file a RFDP in 2008 were resolved with finality by the August 4, 2008 mediation agreement between the parties.

14. The settlement and withdrawal of the Parent's previous RFDP at the conclusion of mediation on August 4, 2008 bars consideration of whether the IEE had been unreasonably delayed as of that date.

ORDER

1. The Parent's request for the district be required to pay for all private school and related service expenses and all incidental costs of withdrawal and enrollment incurred since his withdrawal from the District, including his brief tenure at a parochial school and his following and continuing enrollment at the Private School (Issues Nos. 3, 4, and 6), should be and is hereby denied.

2. The Parent's request that the District be required to propose a specific IEP or detailed service plan before the Child re-enrolls in District school, which is Issue No. 5 and may be moot according to the evidence that this has been done, should be and is hereby granted.

RESPECTFULLY SUBMITTED on this the 30th day of April 2010:

ROGER CLIFFORD CLAPP
Due Process Hearing Officer

APPEAL PROCESS

Any party aggrieved by the above findings and decision shall have ninety (90) days from this date to file a civil action with respect to the issues presented at the due process hearing, in a District Court of the United States as provided in the IDEIA.

APPENDIX "A" CONFIDENTIALITY LEGEND

Terms used in decision	*Identification*
The Child	[redacted] (born [redacted])
The Parent	[redacted] mother
The District	Jackson (Mississippi) Public School District
District Elementary School	Timberlawn Elementary
School Principle	Dr. Carrie Williams Pillars
Pre-Kindergarten (Pre-K) Teacher	Ms. Deshundra Tucker
Kindergarten (K) Teacher	Ms. Emily Josanne Zetterholm
District Boost Teacher	Ms. Sharon Blackmon Davis
District Psychometrist	Randilyn Easley Belokon
Parochial School	St. Theresa Catholic School, Jackson MS
Private Psychologist	Dr. John Holly
Private School	Magnolia Speech School (not-for-profit school in Jackson, Mississippi)
Private School speech/language therapist	Julie K. Tullos
Private School Manager of Language Dept	Nancy Luttrell Davis
Private School Occupational Therapist	Jessica McDonald Nichols
Parent's counsel	[redacted] Esq.