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Pennsylvania  
Special Education Hearing Officer

DECISION

Child's Name: CG

Date of Birth: xx/xx/xx

Dates of Hearing:

November 30, 2006, December 21, 2006, January 9, 2007, January 23, 2007,  
February 8, 2007, February 22, 2007, February 27, 2007

CLOSED HEARING  
ODR #6936/ 06-07 AS

Parties to the Hearing:

Representative:

Mr. and Mrs.

Scranton City School District  
425 North Washington Avenue  
Scranton, PA 18503-1305

Harry P. McGrath, Esquire  
McGrath Law Offices  
Bank Towers Building Suite 600  
321 Spruce Street  
Scranton, PA 18503

Date Record Closed:

March 7, 2007

Date of Decision:

March 22, 2007

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION

Student is a xx year old eligible student in the Scranton School District. (NT 18-21 to 23, 1356-19.) The Student has been diagnosed with Down Syndrome and mental retardation. (NT 18-9 to 16, 1358-2 to 3) He has numerous congenital disorders, several of which are highly disabling. (FF 18; NT 1358-16 to 1359-21, 1362-9 to 1356-19.) His functional disabilities impair his ability to eat and digest food, to communicate, to ambulate and to participate in an age appropriate fashion with other children. (NT 1366-25 to 1376-21.) He is chronically underweight and small for his age, and therefore requires careful attention to nutrition. (NT 1392-17 to 1393-9, 1401-10 to 1402-11.)

The Parents contend that the Student's eating disorders are life threatening and therefore constitute the most important in his constellation of disabilities. (NT 1382-25 to 1383-4.) They contend that the District assessed these disorders inadequately and therefore is not in a position to provide safe, sufficient feeding during school hours to enable the Student to obtain meaningful educational benefit. They also contend that the District failed to provide an adequate evaluation of the Student's communication disabilities, and that the District's evaluator was not sufficiently qualified to provide a sufficiently comprehensive evaluation. Finally, they contend that the District failed to provide an adequate assessment of the Student's academic and communicative capabilities with assistive technology.

The District found that the Student was eligible for special education services and consistently averred that it was prepared to provide individualized special education services to the Student in order to meet all of his needs. It brought this request for due process and requests a decision that its evaluation was appropriate, so that it will not be required to provide an independent evaluation at public expense in the three areas listed above.

## PROCEDURAL HISTORY

In March 2006 the Parents requested the Student's enrollment and requested a multidisciplinary evaluation. (FF-1, 2, 3.) In April 2006, the District declined to evaluate the Student's feeding, speech and language and assistive technology needs, (FF 5), and in May 2006 the Parents requested due process. (NT 46-21 to 47-1, 1008-8 to 111-13; P-7 p. 1, 2, 3.) The parties settled the due process matter, (NT 112-13 to 113-1, 168-19 to 169-20, 239-22 to 240-7), and in August 2006, the District completed an educational evaluation and provided a draft ER which included observations and reports concerning the three areas in which the Parents had requested evaluation. (S-50.)<sup>1</sup> On August 23, 2006, the District convened a meeting to discuss the draft ER and formulate an IEP. The

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<sup>1</sup> Although the document was dated June 8, 2006, the record showed that the report was issued in August 2006. (P-26.)

parents expressed dissatisfaction with the ER and terminated the meeting. (FF 7.)

On September 9, 2006, the District filed the instant request for due process. The Parents moved for a sufficiency determination, and the hearing officer found the complaint notice to be insufficient. On October 18, 2007, the hearing officer received the District's amended complaint notice, which on a second challenge, the hearing officer found to be sufficient, determining that the District's complaint notice raised only the issue of the appropriateness of the District's evaluation. During the hearing, the hearing officer ruled that any issue of compliance with the settlement agreement in the prior due process proceeding was not before him. (NT 288-23 to 296-17.) Subsequently, the Parents filed a request for due process to determine whether or not the agreement had been complied with. (NT 1103-13 to 23.) That due process request was assigned to another hearing officer. This matter was heard in seven hearing sessions<sup>2</sup> from November 30, 2006 until February 27, 2006.<sup>3</sup>

## ISSUES

1. Was the District's fact finding regarding the Student's feeding needs inadequately comprehensive, conducted by insufficiently qualified individuals or otherwise conducted in an inappropriate manner, so as to render its educational evaluation of August 2006 inappropriate?
2. Was the District's fact finding regarding the Student's speech and language needs inadequately comprehensive, conducted by insufficiently qualified individuals or otherwise conducted in an inappropriate manner, so as to render its educational evaluation of August 2006 inappropriate?
3. Was the District's fact finding regarding the Student's assistive technology needs inadequately comprehensive, conducted by insufficiently qualified individuals or otherwise conducted in an inappropriate manner, so as to render its educational evaluation of August 2006 inappropriate?

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<sup>2</sup> Several of the hearing sessions were truncated due to the parties' schedules; in addition, the Student's feeding schedule necessitated early adjournments and delays in one or two instances, because the Student's mother was unable to attend during large blocks of the business day while feeding the Student twice a day. In addition, at least two sessions were adjourned due to illness of the hearing officer and a state of emergency due to a winter snow storm.

<sup>3</sup> The record closed on March 7, 2007, the deadline for submission of written closing statements. The parties agreed to receive service of the hearing officer's decision electronically, by attachment to email. (NT 1619-17 to 1620-3, 1624-1 to 1625-3.)

## FINDINGS OF FACT

1. From November 2002, when he was three years old, the student received early intervention from the Northeastern Educational Intermediate Unit (NEIU) and was attending a private preschool program. (NT 44-11 to 12, 45-3 to 5; S-50 p. 1, S-104 p. 68.)
2. On Friday March 30, 2006, the Parents sent a letter by certified mail to the District notifying it of their intent to enroll the Student in the District's schools and of their request for a multidisciplinary evaluation. (NT 43-13 to 44-1; P-1.)
3. On or about April 12, 2006, the Parents requested specific evaluation of the Student's feeding. (P-3 p. 4.)
4. On April 25, 2006, the District's representatives met with the Parents to plan for the requested enrollment and evaluation. (NT 44-18 to 22.)
5. On April 26, 2006, the Parents sent a letter to the District requesting evaluation of the Student's assistive technology needs. (P-4.)
6. Between April 26, 2006 and July 21, 2006, the District performed an initial educational evaluation of the Student, including testing by the District's diagnostician, school psychologist, speech and language therapist, and occupational therapist, review of records, various observations and interviews with the Parents. (S-50.)
7. On August 16, the District mailed a notice to the Parents inviting them to a meeting to discuss both the draft ER that had been forwarded to them, and a proposed IEP for the Student. It convened the meeting on August 23, 2006. The Parents discussed the ER briefly and then terminated the meeting. No other meetings were held. (NT65-5 to 23, 72-16 to 22, 74-5 to 78-5, 181-16 to 185-6, 397-23 to 399-2, 403-16 to 404-21, 504-25 to 505, 620-10 to 20, 711-19 to 712-20, 812-3 to 22, 901-17 to 902-2; S-31.)
8. The District's initial evaluation report provides detailed information on the Student's needs, including his evaluated hearing and vision, attention and focus, behavioral issues in group and preschool settings, social skills levels, academic achievement in spelling, reading and mathematics, language processing, gross motor and fine motor functioning, speech and language abilities, self help and activities of daily living, toileting, feeding, nutritional issues, medical

issues and utilization of assistive technology, including computer hardware and software. (NT 948-4 to 952-3; S-50.)

9. The ER incorporates the Parents' reports and concerns regarding the Student's medical and physical conditions, as well as his functioning in social, behavioral, academic, language, self help, activities of daily living, toileting, feeding, and utilization of assistive technology. (NT 444—12 to 16, 580-4 to 582-17, 585-15 to 586-24; S-50.)
10. The ER incorporates the reports of a special needs instructor, a pre-school teacher and a private therapist. (NT 586-19 to 588-10; S-50.)
11. The ER incorporates two observations of the Student in the pre-school setting. (NT 583-9 to 584-14; S-50.)
12. The ER incorporates the results of the administration or attempted administration of a variety of psychological tests and instruments, including two standardized intelligence instruments, developmental inventories, curriculum - based instruments and behavior and social-emotional assessment scales from both Parents and teachers. (NT 449-23 to 450-8, 453-10 to 456-11, 462-5 to 25, 465-20 to 466-17467-7 to 469-22476-8 to 479-25, 486-12 to 18, 490-22 to 497-5, 589-16 to 600-4, 1046-13 to 1051-18; S-50 p. 10 to 46.)
13. The ER identifies the Student as a student with a disability and in need of specially designed instruction in the form of support services in the areas of academics, self help, socialization, communication, fine motor and gross motor. (NT 66-2 to 25, 497-15 to 498-18; S-50 p. 70.)
14. The ER does not specify the services to be provided to the Student in the areas of feeding, speech and language and assistive technology. (S-50 p. 70.)
15. It is the District's practice to make specific recommendations for specially designed instruction in the IEP. (NT70-14 to 71-13.)
16. The ER served as the basis for the production of a draft IEP. (NT1289-10 to 25.)

## Feeding

17. The Student suffers from dysphagia, a severe eating disorder of the process of eating that results in the inability to swallow, or in difficulty in swallowing. The Student displays oral motor dysfunction, inconsistent swallowing, inability to chew, inability to use the tongue properly for eating, and sensory deficits. (NT 1366-11 to 19, 1402-12 to 1408-10; S-50 p. 1 to 4, 7 to 9, S-83, S-70, S-71, S-85, P-51.)
18. The Student has a history of gastrointestinal problems, sudden vomiting, tooth decay and extractions due to the absence of enamel on his teeth, as well as chronic sinusitis that contributes to his feeding difficulties. (NT 1363-8 to 25, 1365-7 to 1366-10; S-50 p. 1.)
19. The Student is spoon fed a mechanical liquid diet and receives both hydration and nutritional supplements from a bottle. He does not eat independently. (NT 1370-24 to 1371-17, 1383-5 to 1393-18; S-50 p. 1, S-70, S-71, S-85.)
20. Regarding feeding, the District relied upon approximately ten reports of private medical evaluations obtained in 2004, 2005 and 2006 by the Parents from [redacted] Medical Center and from a rehabilitation hospital that treated the Student on an outpatient basis named [redacted] Services. These reports included recommendations for necessary feeding services to be provided by the District. (NT 59-11 to 61-7; S-1 p.27, S-50 p. 3 to 4, 7 to 8, S-70, 71, S-95 to 97, 99 to 103.)
21. Regarding feeding, the District relied also upon a physical therapy evaluation by the physical therapist provided by the NEIU. (NT63-8 to 12; S-50 p. 3 to 4, 7 to 8.)
22. Regarding feeding, the District relied also upon records of the NEIU, which contained assessments of the Student's feeding from age three in 2002 until age seven in 2006. (NT64-9; S-50 p. 3 to 4, 7 to 8, S-104.)
23. Regarding feeding, the District relied also upon occupational therapy and physical therapy reports from [redacted] Center, a rehabilitation service that evaluated the Student in April and May 2006. (S-50 p.4, 7 to 8, S-75.)
24. The District did not perform or obtain its own medical evaluation of the Student's feeding disabilities. It relied upon the prescriptions of

the Student's existing medical and rehabilitation service providers. This is consistent with the ordinary practice of speech and language therapists, and was sufficient for purposes of the evaluation. (NT 60-22 to 61-4, 151-1 to 21, 157-1 to 163-12, 174-24 to 175-2, 241-4 to 250-8, 277-7 to 23, 558-18 to 561-14, 669-4 to 671-15, 672-15 to 21, 675-10 to 25, 680-18 to 682-22, 971-22 to 991-11, 1151-8 to 1154-12.)

25. The District did not provide a registered dietician, medical doctor or specialist in feeding disorders to evaluate the Student. (NT 147-2 to 6, 251-8 to 253-3.)
26. Three District staff observed the student's Mother feeding the Student on May 25, 2006 in a room at the school to which the Student would be assigned, the [redacted] School. (NT 239-4 to 19; S-50 p. 65.)
27. These were the occupational therapist, two school nurses and the speech and language therapist. (NT62-2 to 14, 169-24 to 173-1, 210-13 to 20, 240-14 to 19, 776-6 to 16, 956-6 to 971-21, 1250-1 to 17.)
28. The District staff performing the feeding observation were qualified under Pennsylvania law to perform educational evaluations for purposes of special education programming. These staff had experience with providing services to children with special needs, and two of them were experienced with children with eating disorders. (NT 258-14 to 260-11, 575-18 to 578-2, 674-19 to 675-9, 676-16 to 677-6, 746-10 to 20, 753-1 to 9, 1240-11 to 1241-23, 1297-9 to 13.)
29. The District's occupational therapist was qualified to evaluate the Student's feeding needs through her Master's degree in occupational therapy, Pennsylvania licensure, and experience with a variety of adults and children experiencing eating disorders, in both educational and medical settings. She had experience doing eating and feeding evaluations. (NT925-25 to 930-19, 934-25 to 935-21, 953-19 to 956-5, 998-16 to 1000-1, 1129-10 to 1144-8, 1206-18 to 1208-5.)
30. The speech and language therapist was not experienced in feeding evaluations and believed that her certification and training did not make her competent to conduct feeding evaluations. (NT 773-12 to 14, 821-19 to 23.)

31. The speech and language therapist observed in order to provide communication assistance if necessary. She considered her role not to be as an observer, not as an evaluator. (NT 771-7 to 22, 774-9 to 775-8, 838-4 to 25, 842-7 to 18, 848-6 to 9, 852-5 to 6.)
32. The speech and language therapist was experienced in oral motor exercises that would be similar to those needed for eating. She was competent to provide such exercises if ordered by a physician or occupational therapist. (NT 771-7 to 22, 774-9 to 775-8, 838-4 to 25, 842-7 to 18, 848-6 to 9, 1301-22 to 25, 1317-7 to 1318-4.)
33. District evaluators interviewed the Student's parents regarding the Student's feeding needs. (S-50 p. 65.)
34. The District's Occupational Therapist also evaluated the Student for approximately 45 minutes in May 2006, with detailed attention to the Student's oral motor functioning, and noting that the Student appeared to "have some oral motor sensitivity" due to his habit of mouthing unfamiliar objects. (NT 666-16 to 667-8, 942-21 to 947-7, 952-4 to 953-18; S-50 p. 64.)
35. The District's speech therapist deferred a physical oral peripheral examination of the Student with a tongue depressor, because she felt the need to establish better rapport and trust with the Student, and because the Student's mother indicated discomfort with this examination. The therapist determined that she had enough information from reports in the record that she did not need to personally examine the Student's oral peripheral movements at that time. (NT 332-8 to 24, 422-15 to 423-16, 805-2 to 807-23, 920-22 to 922-25.)
36. The District's ER summarized the information from the various reports and interviews and the observation of feeding at School. The ER recorded the current nutritional regime, the techniques and exercises recommended in the various reports, the techniques and exercises used by the Mother during the observation, goals posited by the treating agencies for both physical and instructional needs during feeding, as well as progress in meeting the goals. The District personnel reasonably relied upon these records. (NT 933-20 to 934-4, 939-1 to 941-2; S-50 p. 3 to 4, 7 to 8, 65.)
37. The District was prepared to specify, in the IEP, procedures and techniques to train the Student in oral motor skills, as directed by his existing medical and rehabilitation service providers. (NT 162-15 to 167-14, 267-1 to 271-12, 277-18 to 278-23, 1211-12 to 1212-9, 1214-2 to 1215-7, 1244-5 to 1248-8; S-29 p. 18, 21, 22.)



38. The District was prepared to offer to provide a transition period during the school year in which the Parent would feed the Student in the school and gradually turn over necessary aspects of the feeding process to a specially appointed school staff person. (NT 93-25 to 94-24, 177-5 to 13.)
39. The District was prepared to create a new position for a one - to - one aide for the Student. This position would be for a paraprofessional who would not be a nurse, speech therapist, occupational therapist or physical therapist, but would be supervised by the school nurse, a registered nurse. Another aide would be trained to fill in should the assigned aide be absent. (NT 147-7 to 20, 280-14 to 20, 367-23 to 373-20, 418-23 to 419-10, 1243-4 to 11; S-29 p. 37.)
40. This new position was not filled at the time of the August 23, 2006 meeting. (NT 147-23 to 148-3.)

#### Speech and Language

41. Regarding speech and language, the District relied upon the reports of a private speech and language therapist and a special needs instructor, both of whom had seen the Student for more than one year. (NT 340-6 to 12; S-50 p. 5, 9, S-91.)
42. Regarding speech and language, the District's speech therapist conducted a speech and language evaluation, administering four diagnostic instruments during three one hour sessions. (NT 334-22 to 5, 755-22 to 770-17, 777-14 to 778-17, 781-10 to 790-21; S-50 p. 63.)
43. The District's speech and language therapist has a Bachelor's degree but does not have a Masters degree. The therapist holds a Pennsylvania certificate in speech and language correction, and was experienced in dealing with children with Downs Syndrome. She was competent to administer and interpret the instruments she used in evaluating the Student. Her certification allowed her to train the Student in oral motor exercises. (NT330-14 to 18, 746-10 to 20, 753-1 to 9, 821-1 to 18.)
44. The therapist was careful to ensure that her testing would be performed under standard conditions, by insisting that it be conducted in the school setting. This precluded the use of assistive

technology in testing, which would have departed from standard conditions. (NT 752-4 to 10, 904-1 to 905-6.)

45. The therapist reviewed the medical reports provided by the Parents as part of her evaluation. (NT 906-1 to 907-9.)
46. The District's Speech and Language report included both raw scores and age equivalencies, details on testing behavior and performance, and the mother's report of the Student's strengths. (S-50 p. 63.)
47. The District was prepared to offer specially designed instruction to the Student in speech and language, addressing goals in articulation, receptive language and phonemic awareness. (S-29 p. 19, 20.)

#### Assistive Technology

48. Regarding assistive technology, the District relied upon the reports of a private speech and language therapist and a special needs instructor, both of whom had seen the Student for more than one year. (NT 1034-10 to 1036-11; S-50 p. 5, 9, S-91.)
49. Regarding assistive technology, the District accepted the recommendation of the private speech and language therapist to utilize a hand held communication device called the Dynavox MT4 in the school setting. (NT 639-18 to 22, 706-24 to 707-20; S-50 p. 5, 9.)
50. The District relied upon an observation of the Student's use of computer technology in his home environment on July 21, 2006. The observation was conducted by the District's School Psychologist, Speech Therapist and Occupational Therapist for approximately one hour. (NT 311-14 to 24, 616-20 to 25, 795-5 to 11; S-50 p. 66 to 70.)
51. The District staff performing the feeding observation were qualified under Pennsylvania law to perform educational evaluations in conjunction with a multidisciplinary team for purposes of special education programming. The psychologist was experienced in assistive technology evaluations, and had utilized the DynaVox device for non-evaluative purposes. (NT 575-18 to 578-2, 626-15 to 21, 628-6 to 11, 639-14 to 17.)

52. The occupational therapist was experienced in performing assistive technology evaluations as part of a team. She utilized the SETT evaluation format. She was familiar with utilizing an augmentative communication device in the classroom. (NT934-25 to 935-2, 936-3 to 938-6, 1008-13 to 1014-1, 1018-11 to 20, 1079-2 to 19.)
53. The District's speech and language therapist was not experienced or qualified to perform an assistive technology evaluation; however, she was qualified to participate in the evaluation team as an observer, and to utilize assistive technology in speech and language therapy within the educational setting. (NT 320-4 to 322-7, 795-5 to 18, 1297-9 to 13, 1316-13 to 1318-4.)
54. The District's diagnostician observed the Student utilizing manipulatives during diagnostic testing sessions. (NT 562-25 to 563-16.)
55. The ER and proposed IEP refer to several "low tech" assistive technologies in addition to the computer technologies that were addressed in the ER. (S-29 p. 25 to 31, S-50 p. 68, 69.)
56. The District personnel observed the Student utilizing a home computer but did not observe the student utilizing a hand held augmented communication device such as a DynaVox. (NT 141-17 to 144-19, 601-5 to 606-5, 629-21 to 631-5.)
57. The District did not have such a device available at the time of the observation and did not schedule a session for observing his use of such a device. (NT 145-13 to 23, 312-15 to 314-2, 323-25 to 324-2, 328-22 to 329-9, 1335-22 to 1337-1, 1344-2 to 23.)
58. During the observation, the District did not introduce technologies other than what the Parents had available in the home; it did not seek to assess or test the Student's ability to utilize various forms of assistive technologies, such as alternative software programs and alternative augmentative communication devices. (NT 313-24 to 316-5.)
59. The District determined that further assessment was needed in the utilization of the hand held augmentative communication device in the school setting, and was prepared to provide a six week assessment period during which it would observe the Student utilizing such a device, beginning about three weeks after the start of the school year. (NT 144-17 to 19, 285-13 to 18, 287-12 to 25, 301-4 to 19, 303-7 to 305-7, 317-7 to 11, 318-16 to 19, 382-21 to 384-24, 385-2 to 389-11, 392-18 to 25, 704-12 to 706-23, 1041-16

to 1042-25, 1043-15 to 1044-18, 1119-14 to 19, 1186-6 to 1192-19; S-29 p. 14, 35, 37.)

60. The District's report included a detailed depiction of the Student's behavior while utilizing computer technology, as well as the hardware and software that the Student utilized. It included detailed references to the Mother's reports on other assistive technology that the Student uses, as well as technologies that the Student does not use or that the Mother felt would not be appropriate, and references to reports from other agencies. (NT 1018-21 to 1029-1; S-50 p. 66 to 70.)
61. The District's report lists the physical and behavioral supports and accommodations that were utilized during the observation, as well as the Student's level of physical and academic performance during the observation, including his performance with letters, numbers, words and concepts. (S-50 p. 66 to 70.)
62. The District was prepared to utilize the DynaVox communication instrument during an evaluation, and then assess whether or not the instrument would support the Student's learning in the school environment and with the District's curriculum. (NT 82-5 to 86-15, 304-19 to 308-25, 322-25 to 323-13, 1003-14 to 1005-23.)

## CREDIBILITY

The hearing officer carefully evaluated the demeanor and testimony of each witness, and found all to be credible. Despite sometimes bruising – though appropriate - cross examination, the District witnesses generally refrained from embellishment and combativeness. In most instances, they were careful and precise about what they did and did not know. In no instances did any of the witnesses detectibly dissemble or falsely testify. Similarly, the Student's mother, his only witness, appeared to be sincere in her beliefs, and intending at all times to tell the truth. In specific instances, the hearing officer did not accept witnesses' testimony for reasons explained below, but in no case was that based upon lack of veracity.

## DISCUSSION AND CONCLUSIONS OF LAW

The issue in this matter is how thorough a District's evaluation must be under the IDEA. The District argues that the law requires it to evaluate every area of disability and identify the Student's needs for special education. It asserts that its evaluation was broad enough and deep enough to satisfy that

requirement, and that further detail would have been provided in the IEP if the Parents had not terminated their participation. The Parents argue that the District's evaluation in the areas of feeding, speech and language, and assistive technology were so shallow as to fail to provide the data required by law. They argue that the District should have performed physical examinations of the Student's mouth, tongue and swallowing mechanism. They contend that the District should have brought various assistive technology devices to the Student to test him on how he utilized these instruments, so that a device could be selected, from a number of choices, before the beginning of the school year. They argue that the speech and language professional who tested the Student was not qualified to perform testing and should have utilized assistive technology devices in testing because the Student was able to employ a larger range of vocabulary through such devices, as opposed to oral speech.

It first must be noted that the Evaluation required in the IDEA is an educational evaluation, not a medical one. The IDEA repeatedly characterizes the evaluation as educational. The parental right that triggered the District's instant request for due process is set forth in 20 U.S.C. §1415(b)(1). The Act entitles a parent to an independent "educational" evaluation at public expense, *id.*, not to an independent medical evaluation. At §1414(a)(1)(C)(i)(I), the Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to "determine the educational needs of such child ... ." In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed at enabling the child to participate in the "general education curriculum" and "determining an appropriate educational program" for the child. The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally ... ." 20 U.S.C. §1414(b)(3)(A)(ii). See also, 20 U.S.C. §1414(b)(3)(C) ("educational needs"); 20 U.S.C. §1414(b)(4)(A) (same); 20 U.S.C. §1414(c)(1)(B)(i)(same).

The regulations define "evaluation" to be:

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

Further, the regulations require that the evaluation procedures "assist in determining ... [t]he content of the child's IEP. 34 C.F.R. §300.532(b)(2). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs ... ." 34 C.F.R. §300.532(h). Part of any initial evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.533(a)(1)(i).

The law does not preclude medical testing in all instances. Medical services, defined as "services provided by a licensed physician to determine a

child's medically related disability that results in the child's need for special education and related services", 34 C.F.R. §300.34(c)(5), must be provided as "related services" when they are "required" to provide FAPE to a child. 20 U.S.C. §1401(26)(A). Thus, the issue regarding the Parents' insistence upon medical testing of the Student is whether or not it was "required" in order to provide him with access to an educational program with the District.

Intertwined with the question of whether or not medical testing was "required" in this matter is the issue of how detailed and specific an evaluation needs to be. The Parents essentially argue that the District's evaluation needed to be a highly specific medical evaluation of the Student's functioning because his eating disorder was his greatest disability and posed a life-threatening danger to him, as well as isolating him socially because of the need to feed him in private with specially designed formulae through a bottle over lengthy periods of time.

Clearly, the Act does not direct school districts to determine the medical needs of children, unless that is necessary for determining "educational needs." In addition, the assessment tools required by the Act are those that "may assist in determining ... [eligibility and ] the content of the child's individualized education program ... ." 20 U.S.C. §1414(b)(4)(A) (same); 20 U.S.C. §1414(b)(2)(A),(B). It is clear that the IEP is required to address how the child functions for educational purposes, rather than provide a complete depiction of the child's medical conditions. 20 U.S.C. §1414(d)(1)(A)(i). The Ninth Circuit Court of Appeals reached a similar conclusion in Park v. Anaheim Union High School District, 464 F.3d 1025 (9 Cir. 2006). There, parents argued that an evaluation was inadequate because the district's vision assessment did not determine whether the student's visual impairment was caused by double vision or optic nerve damage, due to the assessor's lack of qualifications to make such a diagnosis. Id. at 1032. The court held that it was sufficient for the district to determine that the student's visual impairment did not hinder his education. Id. at 1032-33. In Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25, the court found an educational evaluation without diagnostic auditory testing to be "sufficient to develop an appropriate IEP", and approved the district's evaluation based in part upon a standard speech and hearing evaluation.

Facially, the District's educational evaluation complied with the explicit requirements of the IDEA. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002).

The District utilized a variety of tools and strategies to gather relevant information, 20 U.S.C. §1412(b)(2)(A). (FF 6, 8, 9, 10, 11, 12, 20, 21, 22, 23, 26, 33, 34, 41, 42, 48, 50, 54, 59.) These strategies derived information relevant to "functional, developmental, and academic" functioning, ibid. (FF 8, 9, 12, 13, 21, 22, 24, 34, 36, 42.) The District utilized information provided by the parent, ibid.

(FF 4, 6, 7, 8, 9.) The determination of eligibility and the identification of program needs were not based upon any single measure or assessment, 20 U.S.C. §1412(b)(2)(B). (FF 8, 12, 34, 42.) The Student was assessed in all areas of suspected disability. 20 U.S.C. §1412(b)(3)(B). (FF 8.) The parents were consulted adequately and offered an opportunity to provide input to the ER itself, 20 U.S.C. §1412(b)(4)(A). (FF 4, 6, 7, 8, 9.) The report included review of existing evaluation data provided by the parents, observations by teachers and service providers, and identification of additional data needed. 20 U.S.C. §1412(c)(2)(A). (FF 9, 10, 20, 21, 23.) The ER served as the basis for development of a draft IEP. (FF 16.)

There was no issue in the hearing regarding the instruments used – whether or not they were technically sound, 20 U.S.C. §1412(b)(2)(C), properly administered, 20 U.S.C. §1412(b)(3)(A), or discriminatory, *ibid*. There was no issue as to qualifications of the District’s school psychologist to administer the psychological testing instruments utilized in the evaluation, 20 U.S.C. §1412(b)(3)(A).

### Feeding

The Parents argue that the District had an obligation to perform a fresh medical evaluation on the Student regarding his feeding problems.<sup>4</sup> They point out that the District personnel did not physically examine the functioning of the Student’s lips, jaw, tongue and swallowing mechanism. (FF 17, 19, 24, 25, 35, 36.) They suggest that such physical examination was necessary to ensure an adequate plan for training the Student to eat independently. The District counters that it was sufficient to accept and rely upon the medical examinations and evaluations provided to it by the Parents. (FF 20, 21, 22, 23, 24.) The hearing officer agrees with the District. (FF 24, 36.) The Parents provided numerous reports by reputable medical service providers who had performed medical evaluations of the Student’s feeding and eating over a period of at least two years. (FF 20.) These evaluations were current, and contained prescriptions on techniques and procedures to be utilized by the Parents during feeding in order to encourage the proper muscular and sensory utilization of the Student’s

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<sup>4</sup> During the hearing, much was made of the asserted agreement between the District and the Parents under which the Parents expected the District to perform such an evaluation. (NT 168-5 to 169-20.) In response to objection, the hearing officer declined to include this issue within the scope of the hearing. (NT 288-23 to 296-14.) The 2004 amendments to the IDEA make it clear that due process hearings may not include issues not raised in the complaint notice used to request due process. 20 U.S.C. § 1415(f)(3)(B). Here, the District’s request for due process did not encompass the issue of whether or not the District complied with the settlement agreement. The Parents did not request due process on this issue prior to the commencement of the hearing and the listing of issues after opening statements. (NT 39-12 to 40-13.) Therefore, the issue was not before this hearing officer. The hearing officer also expressed reservation as to whether or not he had the authority to enforce a settlement agreement from a previous request for due process (NT 1101-12 to 23), but this was an alternate ground for the ruling and was not briefed.

lips, jaw, tongue, swallowing mechanism, as well as proper coordination with trunk posture and hand movements, such as grasping a spoon and raising it to the mouth. (FF 36, 37.)

The District had every reason to believe that these medical service providers would continue to both evaluate the Student in the future and provide prescriptions for such techniques and procedures, in order to improve the Student's ability to feed himself independently. Under these circumstances, the District could and did offer an appropriate educational program based upon the reports of the existing private medical service providers. Based upon their recommended feeding techniques and procedures, the District was able to offer and provide specially designed instruction in the area of feeding that would be reasonably calculated to provide meaningful educational benefit to the Student. (FF 24, 35, 36, 37, 38.) Therefore, it was not "required", 20 U.S.C. §1401(26)(A), that the District purchase an independent educational evaluation of feeding, in order to offer FAPE to the Student.

The Parents argue that the team assigned to perform the feeding evaluation part of the initial evaluation were not qualified. (FF 27, 30.) On the contrary, the record shows that those assigned were qualified to evaluate the "educational needs" of the Student – exactly what the initial evaluation is aimed at determining. 20 U.S.C. §1414(a)(1)(C)(i)(I). (FF 28, 29, 31, 32.) Staff qualifications are those set by state law as incorporated in the Act. 20 U.S.C. §1412(a)(14)(B). The occupational therapist who participated in the feeding observation credibly testified that she was specifically experienced in dealing with a variety of eating and feeding disorders, both in medical and educational settings. (FF 29.)

It is clear that staff can be qualified to conduct an educational assessment even though they are not qualified to provide more specialized medical assessments, if those medical assessments are not required for educational purposes. See Park, 444 F.3d at 1154-55. Here, medical assessments were available. There is no evidence to suggest that those assessments were erroneous or inadequate. Indeed, they were provided by the Parents themselves. The District was prepared to be governed by the recommendations in these assessments. (FF 24, 36.) Since adequate, up to date medical assessments were available, and the District was prepared to follow their recommendations, additional medical assessment was unnecessary and therefore the Act did not require additional qualifications in the team beyond those necessary for educational purposes.<sup>5</sup>

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<sup>5</sup> The Parents argued that the speech and language therapist who participated in the feeding observation had confessed that she was not qualified to perform a feeding evaluation. (FF 30.) The evaluation was written by two highly qualified additional team members. (NT 340-6 to 22.) Thus, the therapist's qualifications did not vitiate the validity and appropriateness of the feeding evaluation.



The Parents argued that the feeding observation was inadequate because the staff did not see the Student's typical eating behaviors during the feeding observation; the Student's mother testified that the school setting for the feeding observation was cramped and "circus like" and the Student did not receive adequate nutrition in that atmosphere. (NT 1415-5 to 1416-19.) The implication was that the demonstration generated inadequate or misleading data for those observing, and therefore led to an inadequate evaluation. The hearing officer does not accept this chain of inferences. The setting may well have emulated a typical school setting, where it is not always possible to isolate a student for feeding purposes; thus, the observation may have provided useful information to school staff, who will need to feed the Student in the less controllable school setting. Moreover, the District's witnesses, all of whom are qualified and experienced in educational evaluation, generally testified that the observation provided useful data, and that, combined with record reviews and the team's collective data gathering, formed the basis of an appropriate evaluation. Given the qualifications of the District's personnel, the hearing officer must accord them more weight on the professional issue of the relevance and utility of the observation data.

The Parents argue that the evaluation should have had more specific recommendations regarding the mechanism by which the District would feed the Student, and convey important information among staff as to the Student's needs. (FF 37, 38, 39, 40.) As the Student's mother opined: "There isn't any wiggle room in his [eating] regimen. There's no room for error. There's no room for deviation whatsoever." (NT 1440-25 to 1441-2.) Specifically the Parents argued that the District's ER should have listed the procedure for feeding the Student, (FF 14, 15, 16), and should have included a form in which the Student's food allergies were listed, and which included specific directions for clearing aspirated food. (NT 136-13 to 139-7.) While these ideas may seem facially plausible to the Parents, they are not mandated by the law to be included in evaluation reports. While the governing regulations require the evaluation to be sufficiently comprehensive to identify all of the student's related services needs, the courts have not interpreted this to require the ER to spell out the specially designed instruction, nor to specify procedures for feeding a child who is determined to need assistance in feeding. Rather, as set forth above, the courts have approved evaluations when they are shown to have complied with the procedures set forth in the law for initial evaluations. Thus, this hearing officer will not find that the District's ER was deficient for failing to spell out how the Student would be fed, or for failing to set forth procedures for that process. Rather, this hearing officer agrees with the District that such detail is called for in the IEP, not the ER. (FF 37, 38, 39.)

The Parents suggested that the evaluation was inadequate because the one-to-one aide that would be feeding the Student had not been hired and had not participated in the evaluation. (FF 39, 40.) This hearing officer finds the argument unpersuasive. The District did not need such a person's participation

in order to perform an educational evaluation. Moreover, it would have been premature to hire that person because the IEP had not been signed.

### Speech and Language

The record was less extensive regarding the Parents' challenge to the speech and language evaluation. Essentially, they argued that the District's speech and language therapist was not qualified to assist the Student, because his needs require the services of a speech language pathologist, a qualification that the therapist does not possess. (NT 1481-3 to 22.) (FF 43, 46.) Moreover, the Parents argued that the therapist erred in failing to incorporate assistive technology in her evaluation, because the Student's performance is palpably higher when using computers. (NT 1450-4 to 17.) The hearing officer does not accept these arguments. (FF 43, 44, 45, 47.) Staff qualifications are those set by state law as incorporated in the Act. 20 U.S.C. §1412(a)(14)(B). The speech and language therapist was qualified under Pennsylvania law to perform evaluations and provide therapeutic and educational interventions in the area of speech and language. (FF 43.)

The decision not to use computers to assess the Student's performance was within her professional competence, and she made that choice in order to preserve the standard conditions of her evaluative process, a reasonable basis for such a decision. (FF 44.) Evaluations are required to be conducted in the language or mode calculated to "yield accurate information." 20 U.S.C. §1412(b)(3)(A)(ii). This is required "unless it is not feasible ... ." *Ibid.* If utilizing an atypical communication mode disturbs the validity of an instrument or test, its use is considered "not feasible." 20 U.S.C. §1412(b)(3)(A). *See, e.g., Park*, 444 F.3d at 1155 (hearing officer decision based upon finding that use of Korean interpreter during testing would have invalidated scores).

Moreover, the Parents introduced no expert evidence to contradict this decision. With all due respect to the Student's mother's extensive experience and knowledge regarding the Student and his needs, she was not qualified as an expert to provide opinions regarding the proper contents and scope of an ER in this hearing. (NT 1451-7 to 1453-24, 1580-9 to 1581-16.)

### Assistive Technology

The District's evaluation of the Student's assistive technology needs included a review of reports from his special needs instructor and speech and language therapist, as well as an interview and demonstration in the home by the Student's mother. (FF 48, 49, 50, 55, 56.) Multidisciplinary Evaluation Team members observed the Student's performance with a home computer and software familiar to the Student for about one hour. (FF 50, 56, 60.) The

District's occupational therapist reported on her observations, addressing the Student's physical use of the keyboard and touch screen, seat positioning, and the degree of physical assistance provided by his mother and by the occupational therapist herself. (FF 61.) The District's psychologist assessed the degree of cognitive functioning demonstrated during this demonstration. (FF 50, 54, 61.) The hearing officer finds that these procedures meet the requirements of the IDEA and that the resulting data were sufficient to support the District's finding that the Student needs assistive technology to derive educational benefit from the District's curriculum in both regular and specially designed classroom settings.

The Parents argue that the District's evaluation of the Student's need for assistive technology was inadequate because the District did not test or assess the Student's performance on a variety of computer modalities during the home observation, including educational software programs and hand held augmentative communication devices. (FF 56, 57, 58.) The District responds that its sources of information were adequate at that stage to identify the Student's needs, and that further detail was impossible because it was necessary to observe the Student in the District's curriculum and in the school setting before any conclusions could be drawn about the utility of any particular educational software or device. (FF 59.) The plan – consistent with District policy and procedures for assistive technology - was to start the Student in the curriculum for two to three weeks and identify his functioning within the curriculum in more detail; then, an IEP meeting would be convened, at which time a consultant would work with the team to identify assistive technology to be utilized for a six week trial period in the context of the Student's curriculum. (FF 59, 62.) The plan was to begin by assessing the utility of the software and augmentative communication device with which the Student was already familiar, and with which he had demonstrated educational success. (FF 62.)

The omission to test out different devices and software options in the home does not render the evaluation inadequate. On the contrary, the record supports the conclusion more than preponderantly that the District's strategy was necessary to select assistive technology that would in fact support the Student's learning in the District's classrooms. The Parent would have the District rely solely upon assessments conducted at home or in the Student's preschool setting in order to select appropriate computer technology.<sup>6</sup> Far from being a fault, the District's decision not to rely solely upon data collected outside the Student's assigned classrooms was calculated to provide more useful data in a more efficient manner than the testing approach suggested by the Parents.

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<sup>6</sup> The District's evaluation and proposed IEP would have offered a full range of assistive technology, including "low tech" assistive devices and tools. (FF 55.) However, the Parents did not challenge these proposals. Thus, the hearing officer does not address them, except to note that their consideration and proposal raises an inference that the assistive technology evaluation was comprehensive as required by the IDEA, and therefore supports the finding that this aspect of the evaluation was more than appropriate.

Indeed, the IDEA authorizes local educational agencies to make such choices by its provision for a determination that additional data are needed. 20 U.S.C. §1414(c)(1)(B).

The Parents argue that the evaluation was inappropriate because the District failed to provide an evaluator with adequate training and qualifications to make assistive technology determinations. They rely upon the admission of the District's speech and language therapist that she did not consider herself qualified to conduct such an evaluation. (FF 53.) This in itself does not render the evaluation inappropriate. The therapist was only one in a team of three who observed the Student's use of assistive technology in the home, and the other two team members were clearly both experienced and qualified to perform the evaluation. (FF 51, 52.) In particular, the occupational therapist credibly testified that she had experience in assistive technology evaluations and in working with a student who utilized an augmentative communication device in the classroom. (FF 52.) While the occupational therapist was not an expert in the devices themselves<sup>7</sup>, the District was prepared, according to its regular procedures, to consult with the NEIU assistive technology specialist before making an initial selection of assistive technology. (FF 59, 62.) Thus, the decisions would not have been reliant upon the speech and language therapist's judgment alone at any stage. Moreover, the District's director of special education testified credibly that she believed the therapist to be qualified to contribute to the assistive technology assessment. (FF 53.) Thus, the record supports the conclusion preponderantly that any deficiencies in the therapist's qualifications would not be a fatal flaw in the evaluation, and that the therapist was reasonably deemed likely to provide a positive contribution to the assessment.

## CONCLUSION

The District demonstrated by more than a preponderance of the evidence of record that its evaluation was appropriate. It complied with the procedures required by law. It was comprehensive in scope and utilized a variety of valid data gathering techniques. It solicited and relied upon data and medical reports provided by the Parents. Its findings regarding the Student's needs in feeding, speech and language and assistive technology were more than adequate, and

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<sup>7</sup> The Parents in cross examination dwelt extensively upon the occupational therapist's unfamiliarity with a series of named technology devices, presumably to undercut both her credibility and her expertise. This hearing officer finds the Parents' challenge unpersuasive. It is a matter of common knowledge that there is an explosion of technological devices and approaches, both generally and in education. It is unreasonable to expect anyone to have an encyclopedic knowledge of specific devices. The hearing officer was far more impressed with the approach to fitting the Student with appropriate devices from this cornucopia of devices. The occupational therapist satisfied this hearing officer that she and the District were sufficiently knowledgeable and were employing an adequate approach to provide meaningful benefit to the Student.

the staff who provided these findings were qualified. Therefore, there is no need for an independent educational evaluation at public expense.

#### ORDER

1. The District's fact finding regarding the Student's feeding needs was adequately comprehensive, conducted by sufficiently qualified individuals, and conducted in an appropriate manner.
2. The District's fact finding regarding the Student's speech and language needs was adequately comprehensive, conducted by sufficiently qualified individuals, and conducted in an appropriate manner.
3. The District's fact finding regarding the Student's assistive technology needs was adequately comprehensive, conducted by sufficiently qualified individuals, and conducted in an appropriate manner.

March 22, 2007

*William F. Culleton, Jr.*

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