This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

Special Education Hearing Officer

Decision

Due Process Hearing

For

N.C.

Date of Birth: [redacted]

Date of Hearing: August 17, September 11, 13, October 26, 27, November 6, 2006

Closed Hearing

Parties to the Hearing:	Representative:
Parent[s]	Caryl Oberman, Esquire Grove Summit Office Park 607 A North Easton Road Willow Grove, PA 19090 edlaw@caryloberman.com
Montgomery County Intermediate Unit/EI Program 1605 West Main Street Norristown, PA 19403-3290 rboehning@mcMCIU.org	Karl Romberger, Esquire Fox Rothschild O'Brien & Frankel, LLP 1250 S. Broad Street, P.O. Box 431 Lansdale, PA 19446-0431 kromberger@foxrothschild

Transcript Received: November 15, 2006

Record Closed: December 5, 2006

Date of Decision: December 14, 2006

Hearing Officer: Max Wald, Ed.D.

Background

[Redacted] (hereinafter Student) is a [preschool-aged] eligible child living with [Parent(s)] within the Montgomery County Intermediate Unit (hereinafter IU)

The Student was evaluated by the Children's Hospital of Philadelphia's Neonatal Follow-up Program on September 24, 2004 using the Bayley Scales of Infant Development, 2nd edition, when [Student] was 18 months of age, in order to determine [Student's] developmental progress and to make recommendations for interventions. The Student was found to be in the mildly delayed range of overall cognitive development. Recommendations for [Student's] IFSP goals included occupational therapy, speech therapy, and other activities to further [Student's] play and cognitive skills.

At age 26 months the Student participated in the Autistic Diagnostic Observation Schedule – Module I and met the criteria for placement on the Autistic Spectrum in both the areas of communication and social interaction and was subsequently identified with a diagnosis of PDD-NOS. [Student's] score on the Childhood Autism Rating Scale, however, is in the non-autistic range.

The Student has been involved in an early intervention program and receives services privately as well. [Student] attends a private pre-school with typically developing students and receives early intervention services at that location.

Upon transitioning into the IU on April 3, 2006 and transferring from an Individualized Family Service Plan to an Individualized Education Program the IU recommended, as a result of their evaluation, a reduction in the length of time and range of services offered to the Student both at school and at home.

When the IU and the Parent could not reach an agreement as to these services, the Parent requested a due process hearing whereupon the IFSP remained pendant while the hearing progressed through 6 sessions.

Findings of Fact

1. The Student is a [preschool-aged] child born [redacted] after some complications which appeared at the time to resolve themselves. Subsequently the Student was found to experience neo-natal seizures (NT 563, 564).

2. Private OT intervention services were provided to the Student until early PT intervention services were initiated for one hour per week on July 14, 2003. (NT 567-568, P-1 at 11),

3. Two hours per week of Occupational Therapy were added to the Student's IFSP to begin on December 11, 2003. (NT 570, P-2 at 3).

4. The IU Psychologist, specializing in autism, recommended for inclusion in the 8/22/2006 IEP, after research and review of available data, that the Student should attend pre-school 9 hours per week supported by a one-on-one aide for that period of time. ABA services should be provided for 5 hours per week in the home. (NT 65, 70, 74-75, 159, IU-30 A at 42).

5. The IU June 26, 2006 Evaluation Report has raised a question regarding the Students diagnosis of PDD-NOS and recommended that a consulting psychiatrist be engaged to make a differential diagnosis. (NT 99, 196, IU 29 at 11).

6. The IU evaluator spoke with multiple experts in the field of autism in order to identify an appropriate response to intervention model. In addition records of children with comparable skills and disabilities were reviewed in order to review and match progress. The recommendation of the Association for Education of Young Children was identified as five hours per week of pre-school, but in order to accommodate the Student, was expanded to nine hours. The recommendations would be reviewed at the end of four months and based on the Students progress services could be increased. (NT 77, 79, 8l, IU 30A at 42).

7. The Student's behavior at home and at school was consistent with one another leading to the conclusion that the observation reports were reliable. The observations at school and home were done one week apart. (NT 83, 140, 143, 995A-996A, 1006 A, P 28 at 4).

8. "Floortime" as a teaching tool has limited supporting research conclusions as compared to Applied Behavior Analysis which is an evidence based practice. The Student has been receiving Floortime therapy since October 2005 at the rate of 2 hours per week. (NT 104-105, 599, 825, 827, 1007).

9. In past years IU approved home based ABA programs ranging from 15-30 hours per week. (NT 110).

10. The Student's production and peer interaction was consistently better when attended to by a one-on-one aide. (NT 120).

11. During the observations of the Student on 6/5/2006 there was no evidence of "non prompted" parallel play though prompted parallel play and prompted peer interaction was evident. Intervention utilizing tangible reinforcement was lacking. (NT 124-125).

12. The Student had no difficulty transitioning from one activity and/or area of the room to another during the 6/5/2006 observation (NT 130).

13. The Student demonstrated developmental delays in four of the seven domains evaluated by the Battelle Developmental Inventory, 2nd Edition. Delays or below average scores were also noted in the Pre-school Language Scale-4 (PLS-4, Peabody Developmental Tutor Scale-2, Sensory Profile, and The Peabody Motor Scales. IU-30A at 4-5).

14. Expressive Communication, Apraxia Profile, and the Language Sample are in the normal range. (IU – 30A at 4-5).

15. The Student is able to learn in a one-on-one setting and is able to generalize this learning to [Student's] classroom. No data was available to indicate whether the Student could learn in a group situation. (NT 146, 147, 148).

16. The National Research Council's book on Educating Children with Autism recommends a minimum of 25 hours per week of home based ABA 12 months a year for children with significant needs. (NT 151-152).

17. The IU through their research was unable to determine the appropriate level of service for a child receiving a home based ABA program. (NT 151).

18. The Student was compared to a group of four children assigned to a mixed category, non-inclusive special education class for children with more significant needs. None of the children had the combination of typical pre-school with some one-on-one support being recommended for the Student. (NT 155-156, 215).

19. During the Student's early intervention period (birth to three) [Student] received varying hours of service ranging in time from 8 hours to 15 hours per week. There was no correlation attempted by the IU to determine at a particular time whether the Student was making more progress at a greater speed with more hours. (NT 165)

20. The 8/17/2006 IEP does not recommend a number of hours to be used for team meetings. The IU's intention, however, was to hold at least one team meeting per month for up to 3 hours. (NT 182, IU 30 at 42).

21. The Student's progress will be reviewed at four month intervals and the level of services reassessed with a view toward increasing them if the Student has not achieved a 75 percent criterion. Though stated in the IEP this intention is not sufficiently specific. (NT 183, 185, IU 30A at 38)

22. The Student is currently enrolled in a typical pre-school for 12 hours each week and receives 15 hours of home based Applied Behavioral Analysis training (ABA). These services commenced at this level on June 26, 2006 and are being partially paid for by the Parent. The Student, as indicated in the pendent IFSP, receives Occupational Therapy, Physical Therapy, and "Floortime" services. (NT 186-187, 188, 230, 597-599, P-15 at 16-17, 22-24)

23. The Student is able to speak to [Student's] mother using three and four word phrases and sentences. (NT-193)

24. The IU Psychologist specializing in autism, after conferring with the ABA specialist, agreed on the school program, the 1:1 aide, and that more home ABA hours were needed. There was disagreement on the number of hours of service. This resulted in the imposition of a "Response to Intervention" model. (NT-242)

25. The Student's language skills fell within the mildly delayed range. Expressive communication is in the low average range and articulation was well within normal limits. There were no Praxia characteristics present. (NT 263, 267, 271, IU 29 at 5, 15).

26. The Parent reported through completion of the Clinical Evaluation of Language Fundamentals (CELF), a checklist relating to language development that the Student's language skills are inadequate for functional communication. (NT 269-270, 271, 314, (IU 29 at 16).

27. The IU Speech and Language Pathologist, after evaluation of the Student, determined a need for speech and language services. The recommendation as noted in the offered IEP was two 30 minute sessions per week in a group and consultation with the Personal Care Assistant (PCA) for up to one hour per month and then re-evaluation. Group therapy was recommended to facilitate interaction with peers. (NT 274-275, IU 30-A at 42).

28. The private evaluation of speech and language skills presented to the IU contained results that differed somewhat but not greatly with the IU evaluation. The IU's therapist, however, does not doubt the accuracy of the report. (NT 280-281, 330, 358, P-49 at 4).

29. The Peabody Picture Vocabulary Test administered by the Parents private evaluator indicates a score within the low average range for the Student. (NT 282-283, P-49 at 4).

30. The private Speech and Language Evaluation report presented to the IU by the Parent is consistent with the IU's findings that places the Student in the mild to moderately delayed range of speech and language development (NT 286-287, P-49A at 3).

31. The Student has difficulty with rate, pitch and intensity of speech and has needs in the area of pragmatic language skills that include joining play groups, turn taking, saying "excuse me," starting new conversational topics, maintaining attention, asking for permission to play, asking questions for information, reading and talking about past experiences. (NT 324, IU 27 at 17).

32. The Student has gross motor delays that are reflected in motor control and motor learning. These deficits impacted [Student's] functioning and [Student's] functional skills. (NT 387).

33. The IU physical therapist recommends physical therapy services for the Student twice a week for 30 minutes each session. (NT 388, IU at 27, IU 30A at 43)

34. The Student experiences some safety issues such as postural control, positioning [Student's] head in space so as to visually monitor where [Student] is walking and how [Student] is moving. At times the Student disregards natural obstacles and walks into them. (NT 399-420, 611, IU 30A at 24).

35. The Student was found eligible to receive Occupational Therapy to remediate fine motor delays and sensory motor needs. (NT 411-4122, 487, IU 29 at-23

36. During [Student's] sensory evaluation the Student displayed caution around equipment such as a glider swing, balance beam, and therapy balls to make certain that [Student] did not fall. (NT 419-420, 470).

37. Based upon The Peabody Development Motor Scale-2 and the Sensory Profile, the Student was observed to be typical in three areas: Oral, Sensitivity, and Sedentary. In *probable sensory dysfunction* there were also three areas: Sensory Seeking, Emotionally Reactive, and Poor Registration. There were also three areas of *definite differences or dysfunction*: Low Endurance and Tone, Inattention and Distractibility, and Sensory Sensitivity. (NT 421-422, IU 29 at 19).

38. The Student's functioning in the Peabody Developmental Motor Scales-2 placed [Student] in the 2nd percentile of the fine motor skills portion of the assessment. The Student's motor skills, as measured, as poor when compared to [Student's] typically developing peers. (NT 227, 488, IU 29 at 21).

39. The IU's occupational therapist determined that the Student requires direct OT twice each week along with two 30 minute sessions per month of consultation at [Student's] preschool. (NT 432, 438, 479, 507).

40. The Sensory Profile Questionnaire completed by The Parent indicated in "The Summarized results (*3 categories: Sensory Processing, Modulation, Behavioral and Emotional Responses*) 8 areas in which there was a "Definite Difference" (2 S.D. below the mean), 4 areas in which there was probable differences (l S.D. below the mean) and 2 areas in which there was typical performance. (NT 483, (IU 29 at 19-20).

41. The Student's pendent IFSP requires [Student] to receive one hour per week of direct individual OT, the evaluating IU occupational therapist recommends two weekly sessions of OT of 30 minutes each, and the request from the Parent is one 45 minute weekly session of sensory integration based OT and one 45 minute

session of fine motor based OT along with accompanying "consults." The OT's recommendation is based upon [Student] perception of the Students" need and the Student's ability to pay attention. (NT 506-507, IU 30A at 43).

42. The Student with a chronological age of [redacted] achieved an overall developmental age of 26 months on the Battelle Developmental Inventory, 2nd Edition. This indicates that [Student] is exceptional and eligible for services. (NT 529, (IU 29 at 13).

43. At age 26 months the Student did the Autistic Diagnostic Observation Schedule – Module I at Children's Seashore House and met the criteria for Autistic Spectrum in both the areas of communication and social interaction and was subsequently identified with a diagnosis of PDD-NOS. [Student's] score of 27 on the Autism Rating Scale however is in the non-autistic range. (NT 593-594, 825, P-14 at 6)

44. The Student is due compensatory education because of lapsed services in the areas of PT, OT and Speech Therapy. This is stipulated by the IU with the amount to be determined. (NT 623-624, 687).

45. The Student's IFSP dated 1/23/06 called for services at the time of transition to "early intervention" as follows: Behavioral Program 15 hours; OT 1 hour weekly; PT 2 hours weekly, and speech therapy 1 hour weekly. Floor time will continue at 2 hours per week. In addition 12 hours per month of ABA supervision; 3 hours per week of 1: ABA Shadow, team meeting time. (NT 627, 680, 723, 805, P 21 at 3, P22 at 1 IU-27 at 1-2).

46. The IU's evaluation report in preparation for the Student's "arrival" in the spring of 2006 did not include current information from [Student]'s servicing therapists. All assessment noted in the ER were from previous assessments conducted in July, 2005 (NT 646, 654-655 (IU-13).

47. The Parent asserted that the IU reduced services to the Student without justification. The IU had not discussed the Students needs with [Student's] current therapists and had not conducted an appropriate evaluation in that information was outdated and drawn from assessment results obtained in July, 2005. (NT 662-623, 665)

48. The Parent rejected the Notice of Recommended Educational Placement (NOREP) dated 3/30/2006. (NT 678, IU 21-1-2).

49. At the resolution meeting held on 5/4/2006 the District requested postponement of the mediation session scheduled for 5/5/2006. Another resolution meeting was scheduled for 7/27/2006. (NT 679, 723, 737, 755, P-22 at 3).

50. When providing ABA services in the home, the IU requires the Parent to pay the provider for the services and subsequently, the IU will reimburse the Parent with

no guarantee as to reimbursement. The Parent refused to agree with this arrangement. The IU continued, nevertheless, to provide the services. (NT 689, 691, 1017, P-39 at 1-4).

51. [Student]'s self stimulating behavior increased in March 2005 when OT service was reduced. In addition [Student's] interaction with peers is brief and limited. (NT 735-736, 752, 823-824, 1015A, P-45 at 10).

52. Information and assessments available from the Student's current therapists were not included in the June 22 and June 26, 2006 Evaluation Report. (NT 745-747, IU 29 at 5-6, P-22 at 32-33, P-44).

53. The goals submitted for consideration by the therapist providing ABA training were not included in the Student's 8/22/2006 IEP. Nor were the goals submitted by [Student's] current physical therapist included in this IEP. (NT 768-769, P 53, P 51).

54. The IEP allocation of time for occupational and physical therapy is fully devoted to direct service to the child. The allocation in the IFSP includes time for note writing at the conclusion of the service. (NT 821).

55. [Student]'s learning through the ABA program is dependent upon the number of hours appropriated to the process. The more hours the more learned. All of the things being taught through ABA need to be reviewed at each session. (NT 873, 886, 1016A – P 20 at 11).

56. The Student scored at the lower end of the two year nine month level in the Peabody Picture Vocabulary Test –III (Form B) administered on 7/17/2006. This places [Student] in the 37th percentile. (NT 923, 951, P 49A at 1, 5).

57. The Student was administered the Clinical Evaluation of Language Fundamentals (CELF) on 7/17/2006. A scaled score of 7-10 is in the low average range. The Student scored as follows: Sentence Structure 8, Word Structure 4, Expressive Vocabulary 7, Concepts and following directions 6, Recalling Sentences 6, Basic Concepts 7, all of these scores are for receptive language. (NT 930, P 49A at 2).

58. The Student's scores on the CELF administered on 7/17/2006 were of questionable reliability because [Student] often seemed "tuned out" or inattentive to the tasks presented. The Student's "age equivalent" scores were less than "3" in all categories of the test. (NT 944-945, 949, P 49A at 3, P-49 at 9).

59. Some of the goals prepared for the ABA program replicate those prepared for the OT, PT, and speech and language programs. (NT 967, P 53).

60. An increase in a child's ABA time does not yield additional chargeable time for the professional supervising the service. (NT 995, 1000).

61. [Redacted] Company, provides a "Floor time informed therapist" for cases when "other traditional formats are either not deemed appropriate or haven't worked." The Student started "floor time" on 9/29/2005. (NT 1050. P-32, P 58 at 1-3).

62. Though present at the March 2006 IEP meeting, the "Floor time" therapist was not asked for information nor contacted for information outside of the meeting. (NT 1081-82, 1089).

63. The Student receives physical therapy services twice each week for one hour from [Redacted] Pediatric Therapy. The Student has been a client of this therapist since the age of four months. (NT 1099-1100).

64. The Physical Therapist prepared a summary of the Student's needs and strengths along with a set of goals to address them. She was not consulted by the IU in the preparation of the Student's 3/28/2006 IEP. (NT 1101-11102, 1108, P 31, P 36).

65. The Physical Therapist's goals were designed to address the Student's need to safely navigate [Student's] environment. This was a past need and remains a present need. (NT 1102, 1111, P-31, P-51).

66. The Student performs better when by [Student's] self or in [Student's] home environment than when [Student] is surrounded by adults and children (NT 1107, 1114-1115, 1123-11224, 1165, P 31 at 5).

67. "Floor Time" was recommended for [Student] as part of [Student's] IFSP after the Parent made it known to the Executive Director of "Early Childhood Assessment Services" that she had observed the Student engage in a social interaction following the implementation of a strategy taught to the Parent by the Executive Director. (NT 1126-1127).

68. Throughout [Student] first year at pre-school which began in September, 2005 the pre-school teacher noted that the Student's need for a 1:1 aide increased because typical students were progressing at a faster rate than [Student]. [Student] would always need someone to assist [Student] into joining the group. The one hour per day 1:1 aide assigned in late spring was beneficial. (NT 1143, 1146, 1150).

69. By June 2006 the Student knew [Student's] colors and animals better than most children in the class but maintained difficulty in socializing with other children. (NT 1149).

70. The Student responds well to one-on-one teaching. [Student] learns [Student's] (ABA) skills quickly and is able to generalize them to [Student's] environment in a relatively short time. (NT 1162, 1173).

Stipulations

1. There was no appropriate IEP issued until August 17, 2006. Compensatory Education is due up to and including the date on which the IEP was offered to the Parents on August 24, 2006. (NT 250, 761)

2. The IU will reimburse the Parents for the cost of Student's pre-school program beginning April 3, 2006, the date of the Student's transition, until such time as there is a final order in this matter where there is a subsequent agreement of the parties, up to nine hours per week. (NT 251)

3. The IU will reimburse the Parents for up to nine hours per week of one-on-one support for the Student at the typical pre-school less any number of hours already provided under [Student's] pendant IFSP beginning form the date of [Student's] transition on April3, 2006 and continuing until there is a final order and subsequent agreement of the parties. (NT 251)

4. The pendant IEP (IFSP) except as modified by the stipulations remains in full effect until such time as the due process hearing is concluded. The IU will pay for IFSP services under pendency as opposed to under a separate contract. (NT 251-252, 890)

5. The IU also concedes that it owes compensatory education for services that had not been delivered as required under the Student's IFSP and will provide compensatory education for these services. The IU agrees that the Parents have prevailed as to these services based on hearing. (NT 252-253, 623-624)

The stipulations as written were prepared by the representatives for the Intermediate Unit and the Parents. They were read into the record by the representative for the Parents and agreed to, on the record, by the representative for the Intermediate Unit. (NT-250-253)

Issues

1. Is the current Individualized Education Program being offered to the Student appropriate in that it meets the obligation of the Intermediate Unit's obligation to provide the Student a Free Appropriate Public Education (FAPE)?

2. If the IEP is not appropriate is the Student entitled to compensatory education?

Discussion and Conclusions of Law

This has been a long and significant process which took place over the past four months and required six sessions to obtain all of the information required to bring about this decision. Fortunately, the parties were able to reach an understanding on a variety of issues and these points of agreement are listed above as stipulations.

The issues that remain have to do with FAPE and the appropriateness of the IEP offered to this Student. The specific issues that remain to be resolved are essentially the amount of service to be provided to this child. Needless to say, the IU wishes to offer the baseline of services that they believe to represent an offer of FAPE and an appropriate IEP. The Parents, on the other hand, have a conflicting definition of the baseline and want the maximum of services that they feel will enable their child to reach the maximum of [Student'd] potential. Somewhere between the offer and the demand lie the appropriate IEP and FAPE.

Specifically the services in question include: pre-school, a one-on aide, Applied Behavioral Analysis Training, Floortime, Occupational Therapy, Physical Therapy, and Speech Therapy along with supervision and consultation times for all of the mentioned services.

The IU has made a specific offer through the IEP. The Parent has rejected this officer by refusing to sign the Notice of Recommended Educational Placement (NOREP).

After carefully reviewing the testimony of the witnesses and exhibits presented this Hearing Officer has concluded that the IEP as presented is not appropriate.

The Student has been identified as an eligible child with a diagnosis of Pervasive Developmental Disability-Not Otherwise Specified (PDD-NOS).

IDEIA defines this as:

> **§ 300.8 Child with a disability.**
> (a) *General.*
>
> (1) *Child with a* disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as ''emotional disturbance''), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.
>
> (2)(i) Subject to paragraph (a) (2) (ii) of this section, if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the

> child is not a child with a disability under this part. (ii) If, consistent with § 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.
>
> (b) *Children aged three through nine experiencing developmental delays. Child with a disability* for children aged three through nine (or any subset of that age range, including ages three through five), may, subject to the conditions described in § 300.111(b), include a child—
>
> > (1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and (2) Who, by reason thereof, needs special education and related services.
>
> (c) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:
>
> > (1)(i) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section. (iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

The IEP as constituted is not appropriate. An IEP as should contain a variety of features. It must among other features:

- list the appropriate program and services being provided to the child;
- it must address the needs of the child;
- it must provide services in the least restrictive environment that meets the Student's needs;
- it must include measurable annual academic and functional goals;
- and it must be reviewed at least annually.

The issue here is whether or not the IEP meets the needs of the Student. There is no dispute regarding the identification of [Student] as an eligible child under IDEA. [Student] has met the criteria for being placed on the autistic spectrum and this status has been accepted by both the IU and the Parent. The various services are also not a factor in this dispute. What is in dispute is the amount of service being offered by the IU and, one area of program, "Floortime."

Specifically, the following list describes the differences between the parties:

- **Pre-School**- the IU offer is 9 hours per week, the Parents want 12 hours,
- **One-on-one support**- the IU offer is 9 hours per week, the Parents want 12 hours,
- **Applied Behavior Analysis Training** (ABA)- the IU offer is 5 hours per week, the Parents want 20 hours per week along with 12 hours per month of ABA supervision, as well as training hours for team members,
- **Occupational Therapy**- The IU has offered two 30 minute sessions per week and one hour of OT consultation per month, The Parents want two 45 minute sessions per week,
- **Physical Therapy**- The IU has offered two 30 minute sessions per week, the Parents want two 60 minute sessions per week.
- **Speech Therapy**- The IU is offering two 30 minute group sessions per week, the Parents want two 30 minute individual sessions per week and one 30 minute group session per week,
- **"Floortime"-** The IU offers no Floortime, the Parents want two hours per week.

The Student is currently being served under the provisions of an Individualized Family Service Plan (IFSP) that was in effect when the Student transitioned to the IU [redacted]. The pendent IFSP is currently being honored by the IU under the "stay put" provision of the IDEIA provides the following services:

- **Pre-School**- 12 hours per week ,
- **One-on-one support**- 3 hours per week
- **Applied Behavior Analysis Training** (ABA)- 15 hours per week,
- **ABA Supervision-**12 hours per month
- **Occupational Therapy**- One hour per week
- **Physical Therapy**- Two hours per week
- **Speech Therapy**- One hour per week
- **DIR/"Floortime"[1]-** Two hours per week

Therefore, after examining the differences among what is given, what is offered, and what is wanted, this Hearing officer finds what is in dispute is:

[1] DIR=Developmental, Individual-difference, Relationship based

- 3 hours per week of typical **pre-school**,
- 9 hours per week of **one-on-one support**,
- 15 hours per week of **ABA Training**,
- 30 minutes per week of **Occupational Therapy**,
- 60 minutes per week of **Physical Therapy**,
- 30 minutes per week and the nature of **Speech Therapy**,
- 2 hours of Floortime continuation.

There is no dispute as to whether or not the Student requires these services. The dispute revolves around the quantity of services that are to be delivered.

The services that are to be delivered are contained in the Student's Individualized Education Program (IEP). An IEP to be appropriate must meet the following description:

An appropriate IEP is one that meets the procedural and substantive regulatory requirements and is designed to provide meaningful educational benefit to the child. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. The IEP must afford the child with special needs an education that would confer meaningful benefit. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Diamond, held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The Diamond and Polk standard based on meaningful educational benefit is incorporated into state regulations wherein FAPE is defined at 22 Pa. Code §14.1 in part as:

> (iv) individualized to meet the educational or early intervention needs of the student; (v) reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; (vi) provided in conformity with an IEP.

The IU has the responsibility of providing the Student with a Free Appropriate Public Education (FAPE).

The individuals with Disabilities Education Act (IDEA) requires that states receiving federal funds for education must provide every child with a disability with a free appropriate public education (FAPE). This entitlement is delivered by way of the IEP. A detailed written statement arrived at by the IEP team which summarizes the child's' abilities, outlines goals for the child's education and specifies the services the child will receive. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir.1993). A school district's failure to offer an IEP reasonably calculated to enable the child to receive meaningful educational benefit will be deemed a denial of FAPE. Board of Education v.Rowley, 458 U.S. 176, 102 S.Ct... 3034 (1982). Where violations of IDEA procedural safeguards result in the loss of educational opportunity, a denial of FAPE also will be found. W.G.

v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Ben G., Special Education Opinion No. 555 (1992).

The IEP as it was constructed by the team is well developed, contains all of the components of a meaningful IEP, and was designed with caring and good intentions on the part of the participants. In other words the professionals on this team care about the outcomes and the service being delivered to this child. The Hearing Officer, however, was unable to discern why the services were reduced with the assumption that educational progress would continue without interruption or diminution. This is not to say that progress with the level of service offered was not possible.

My concern is illustrated in the well known parable of the farmer and the mule. When hit with hard economic times, the farmer halved the feed to his mule in order to save funds. When he found that the level of the mule's production continued, he halved the feed again and still the mule functioned. Eventually, however with less and less feed going to the animal, functioning stopped altogether because the animal starved. The farmer did not know at what point to stop halving the food going to the mule.

What we are dealing with is a child who according to the assessments available has been making some progress. In the set of assessments administered in July, 2005 (IU-13 at 6) by the Student's current therapists the results indicated at least a 25% delay in the areas of Cognitive Development, Communications Development, Social/Emotional Development, Fine Motor Development (Grasp), and Gross Motor Development. There was a 4 month delay in Visual Motor Development and a 3 month delay in Adaptive Development which represented somewhat less than a 25% delay.

Based upon these results, the IU in the IEP offered and rejected on March 30, 2006 offered no pre-school, 30 minutes weekly of Speech/Language, Occupational Therapy, OT consult, two 30 minute sessions of Physical Therapy, two 30 minute sessions with an itinerant teacher, and no ABA Training. They had relied on a year old assessment to craft this offer.

The IU, after appropriate consultation and dispute resolution with the Parents undertook a second evaluation in order to obtain recent progress levels. The ER was issued on June 26, 2006 and concluded that there was at least a 25% delay in the areas of Social/Emotional Development, Fine Motor Development, Gross Motor Development, and Adaptive Development... This represented some regression in Adaptive Development (IU 29 at 29-30).

The offer in the new IEP (IU 30A) was elevated to two 30 minute group speech sessions, two 30 minute OT sessions, two 30 minute monthly OT consultations, two 30 minute PT sessions and 5 hours of home based ABA. All services being provided weekly. No specific reasons were provided for the increase in services over the previous offer or the decrease in services from the IFSP. None of the recommendations of the therapists upon whose assessments the IU had previously relied were included in the new document.

It was somewhat difficult to compare the results of the July, 2005 and the May/June, 2006 Evaluations because of the substantial use of different instruments and subjective observations. Parties observing the same event often come away with different perceptions and different conclusions. The conclusions, however, were sufficiently similar to allow the parties to reach the same conclusion that this was a child with a disability who had a 25% developmental delay in most areas of development.

The ER concluded (IU at 30) that [Student] is a child in the Disability Category of Autism (PDD-NOS). What is disturbing is that within the same report there is contradictory information which was not acted upon, i.e. "Since there is a question regarding the diagnosis of PDD-NOS, it is suggested that a consulting psychiatrist evaluate [Student] in an effort to make a differential diagnosis." (IU 29 at 11) Additionally, the ER goes on to recommend "While [Student] demonstrates some difficulty with social interaction with peers and mild delays in expressive and receptive language, [Student's] relatedness, [Student's] willing to "perform" for others and [Student's] consistent ability to initiate and sustain joint attention would appear to recommend against such a diagnosis. Lack of stereotypic or atypical behaviors would also serve to recommend against the diagnosis.

The evaluation completed at [redacted] at 26 months of age provided a diagnosis of PDD-NOS, but also indicated that [Student]'s score on the Autistic Rating Scale was in the non-autistic range. (P-14 at 6)

This is not to say that the Student's current diagnosis/identification is incorrect. The witnesses presented by the IU as well as those presented by the Parent were credible, reliable, professional, and appeared, with the exception of the "autism specialist" to have no doubt regarding this diagnosis. (NT-62:25-63:1) Their testimony focused on the extent of the services to be provided and the level of services to be "demanded." Nevertheless, I offer as dicta, a recommendation that the matter of an accurate undisputable diagnosis be pursued in the near future.

The initial level of services offered by the IU was stipulated to be inadequate (NT 760-761). The level of services subsequently offered was increased but not to the level of the services called for in the IFSP. There was no specific reason given for the increase in services or the refusal to continue the services provided for in the IFSP. Though the IU testified as to the adequacy of their offerings in the areas of pre-school attendance, PT, OT, Speech/Language there was no convincing evidence that they could continue [Student]'s achievement with fewer hours of service. Stating that the job could be done in fewer hours did not persuade or convince this Hearing Officer that this was possible.

The Student is currently in the "stay-put" provision of the IDEA. The 2006 IDEA REGULATIONS AT 34 CFR 300.518(A) state that, except in connection with disputes about discipline "during the pendency of any administrative or judicial proceedings regarding a complaint under [34 CFR 300.507], unless the State or local educational agency and the parents of the child otherwise agree, the child involved in the complaint must remain in his or her current educational placement." When the parties are unable to

agree, the placement in effect when the request for due process was made, the last uncontroverted placement, generally is the status quo.

Each of the therapists testified as to the extent of the Student's need for a particular type of therapy. The IU's therapists testified as to the need for less and the Parent's therapists testified as to the need for more.

Testimony implied, for example, that the IU had placed a ceiling on the amount of ABA training that a youngster might receive at home. In the past the IU had approved home based ABA programs ranging from 15 to 30 hours per week. This was not disputed. The IU had offered [Student] 5 hours per week of ABA training. The basis for this offer was a comparison of the Student with a group of 4 somewhat older special education students that the IU believed had similar needs. The children's scores on "preschool testing" were matched to [Student]'s (NT 155) in order to help determine [Student's] program. The testimony offered indicated that these children had more significant needs. The point being that the services provided them were compared to the "demand" from the Parents to then determine how much service [Student] would require. These children, it was testified, (NT 157) were in a program unlike that which was being recommended for [Student]. This method of determining need, based on the witnesses own testimony was not appropriate.

The same witness for the IU testified in terms of programming for autistic children that "what is needed is what their needs indicate. The amount of service correlates as to what their needs indicate." (NT 153:5)

As previously indicated, it is not fruitful to begin a point by point comparison of the various therapist testimonies as to the Student's needs and how much time it will take to remediate these needs. As previous stated, there is no dispute as to the Student's needs in each of the therapeutic areas. There is no dispute that the Student requires intervention. There is no significant dispute over [Student]'s current levels. The dispute as previously stated is over the amount of service. The IU states that the Student through their offered IEP can provide meaningful educational benefit to the child. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996))and that the IEP will be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)].

The IU asserts that the task of education and accommodating the Student can be accomplished in fewer hours of therapy than that demanded by the Parents. Upon implementation of this IEP with the offered program the IU was willing to reassess the results of their efforts after four months to determine whether there had been regression or progress (IU-30Aat 38). Assessment is most certainly an ongoing process and it is not unreasonable to assess at brief intervals. It appears, however, that such an assessment could be made from a position of strength rather than potential weakness. That is to say that service could be reduced if a child is making more progress than a "baseline" of

appropriate service could provide, rather then attempt to play "catch-up" should the child regress because of insufficient service.

The IU undertook what it referred to as a "Response to Intervention" model approach to the providing of a FAPE to the Student (NT 77).

Response to Intervention RTI as described by Ms. M, the director of this program in Pennsylvania is:

- A comprehensive, multi-tiered intervention strategy to enable early identification and intervention for students at academic or behavior risk.
- An alternative to the discrepancy model for the identification of students with learning disabilities.

Key Characteristics of RTI are:

- Universal screening of academics and behavior,
- Multiple tiers of increasingly intense interventions,
- Differentiated curriculum-tiered intervention strategy,
- Use of scientifically research based interventions,
- Continuous monitoring of student performance
- Benchmark/Outcome assessment.

Pennsylvania has a Three-tiered model, each tier carrying with it a higher and more intense level of intervention. The program is carefully planned, well conceived, and designed to bring students into a sequence that will enable them to receive help and interventions at as early a time as possible so as to prevent falling behind in academics, appropriate behaviors, and appropriate development in a variety of areas. The key to all of this is to address the need as quickly as possible on the lowest possible tier, adding resources and changing tiers as needed.

It appears to this Hearing Officer that the intent of this excellently conceived program was not to bring each child already receiving services back to a common baseline with all other children. It appears that as with all good educational programs you begin with the child where [Student] is and move on from that point. In other words, the Student should have, for the most part, been permitted to retain the services that [Student] was receiving and that had been successful to this point. If there was a filter through services could and should be reviewed it should have been through the filter of the "key characteristics of RTI." The program demands the use of scientifically research-based interventions.

Attention must also be given to the demands of the Parents. This Hearing Officer has already listed these demands which will be addressed at this time. The 6th Circuit's opinion, by which I might add we are not bound, in Doe v. Board of Education of Tullahoma City Schools, 20 IDELR 617 (6th Cir. 1993) stated that FAPE does not require a "Cadillac," but it does require a "Chevrolet."

The Supreme Court, in Board of Education of the Henrick Hudson Central School District v. Rowley, 553IDELR 656 (EHLR 553:656) (U.S. 1982) was quite explicit when it ruled that a school district or in this case an intermediate unit does not need to provide the best program and services available to a child. The program need only be appropriate and enable the student to make meaningful progress, that is to say more than de minimus. What is appropriate is of course the question that brought the parties to this due process hearing.

This hearing officer has already indicated that in his opinion the level of services in the IEP offered on August 17, 2006 (IU-30A) are not appropriate and will issue an order to that effect.

The Parents demands on the other hand were in excess, in some instances, of the services to which they willingly agreed when crafting the Student's IFSP. It is the intention of this Hearing Officer to order the continuation of, with some modification, the services indicated in the IFSP.

The Parent has requested an increase of 5 hours of home based ABA service. In view of the fact that ABA services were increased in the IFSP by 3 hours as recently as February 27, 2006 (P-25 at 1) and progress is being made, it is too soon to consider additional service at this time.

A review of the evaluations provided by the therapists in July 2005, as previously stated indicated a 25 % developmental delay in virtually all areas (IU at 6). A review of the evaluation results of the ER issued on 6/26/06 also indicated a 25% developmental delay in most areas (P-45 at 34). The therapies address are primarily Speech and Language, PT, OT, and ABA training, along with pre-school attendance. In approximately one year's time, the Student was able to remain in the 25% area without losing ground as [Student] continued to develop. There were areas in which improvement was evident. This indicated to this Hearing Officer that the Student was "holding [Student's] own" and in view of [Student's] abilities was doing well and making more than de minimus progress.

There is no compelling evidence to persuade this Hearing Officer to change the level of service currently being provided other than in one area. It is there this Hearing Officer's intention to order the following levels of service as being appropriate:

Pre-School- 12 hours per week
One-on-one-support 9 hours per week
Applied Behavior Analysis Training-15 hours per week
Occupational Therapy-One hour per week
Physical Therapy- Two hours per week
Speech Therapy- One hour per week.

Floortime is not being awarded. DIR/Floortime is undoubted a valuable and worthwhile program for many children. However it appears that many of the benefits available from this program should be replicable in the typical classroom which the Student will be

attending. This is especially so since the services of the one-on-one aide are being increased by six hours per week. In addition, since the IU has placed great emphasis on the implementation of research based programs and strategies, a practice with which this Hearing Officer does not find fault, but encourages, it is important that new programs be supported by solid evidence. Supportive information regarding the research substantiating the validity, reliability, and efficacy of this program was not presented at hearing.

Missing also is reference to supervision and consulting time. Consulting time for PT and OT as indicated in the IFSP is to continue. Supervision of ABA is also to continue. However, since ABA, as provided by the IU might have supervision already built into their contract with the provider it is not being addressed. Should this not be the case, Supervision is to be provided as indicated in the IFSP.

Compensatory education and reimbursement is awarded to the Student as stipulated by the parties and is as follows:

2005-2006 Tuition		$750
Summer 2006 Tuition		$899
2006-2007 Tuition		$2089
Shadow Comp. Education (4/3/06-7/10/06)		$1575
Shadow Reimbursement (7/11/06-11/26/06		$1035
Group Speech	17.5 Hours	
ABA	47.5 Hours	
OT	6 Hours	
PT	6 Hours	
Speech	8 Hours	

The above compensatory hours have been set through stipulation and the agreement of the parties.

No other compensatory education is awarded. The service provided under the pendent IFSP meets the level of service to be ordered by this Hearing Officer.

Order

It is hereby ordered that:

1. The Intermediate Unit did not offer the Student an appropriate Individualized Education Program and did not meet its' obligation to provide a Free Appropriate Public Education.

2. The Intermediate Unit is to reconvene the IEP Team, revise the Student's IEP based upon the services noted in the Student's pendent Individualized Family Service Plan and as previously indicated in above discussion. A NOREP is to be issued following the revision and completion of the IEP.

3. The Student is awarded compensatory education and reimbursement as previously stipulated and previously noted in this decision. No additional compensatory education is awarded.

December 13, 2006
Date

Max Wald, Ed.D.
Max Wald, Ed.D.
Hearing Officer