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

DECISION

Due Process Hearing for RM

ODR File No. 7788/06-07 KE

Date of Birth: xx/xx/xx

Dates of Hearing: July 30, September 4, October 8, October 26, November 8, November 20, 2007, January 2, January 4, 2008 – Open Hearing

Parties to the Hearing:	Representative:
Mr. & Mrs.	Vivian Narehood, Esq. Gibbel, Kraybill & Hess 41 East Orange Street Lancaster, PA 17602
Elizabethtown Area School District 600 East High Street Elizabethtown, PA 17022	Jeffrey Champagne, Esq. McNees, Wallace & Nurick 100 Pine Street P.O. Box 1166 Harrisburg, PA 17108-1166

Hearing Officer: Debra K. Wallet, Esq.

Record Closed: January 24, 2008

Date of Decision: February 8, 2008

BACKGROUND:

Student is a xx-year-old (date of birth xx/xx/xx) who resides with both Parents within the Elizabethtown Area School District [hereinafter School District]. Student received services as a gifted student until he sustained a severe head injury in an August 2, 2005 automobile accident. Student remains at a Level III on the Rancho Los Amigos scale with movement limited to eye blinks, a left hand squeeze, and some control of the right thumb. Since Student's discharge from the hospital, the School District has provided educational services to him in his home.

Parents allege that Student has been denied a Free Appropriate Public Education [hereinafter FAPE] since January 2006. Their primary disagreement with the provided services is the School District's emphasis on establishing a reliable form of communication. Parents contend that the Individualized Education Programs [hereinafter IEPs] are inappropriate because they fail to provide positive therapy and grossly underestimate Student's ability to comprehend his surroundings.

The School District contends that the five day per week in-home services beginning in the fall of 2006 provided FAPE. The School District argues that there is no evidence that more or different in-home services would benefit Student unless or until there is a consistent way of communicating with him.

ISSUES:

1. Was Student denied FAPE from 1/16/06 to 6/7/06?

2. Was Student denied ESY during the summer of 2006?

3. Was Student's November 2006 IEP appropriate?

4. Were Student's three 2007 IEP's appropriate?

FINDINGS OF FACT:

1. Student is a xx-year-old (date of birth xxx/xx/xx) enrolled in the Elizabethtown Area School District [hereinafter School District], the district in which both Parents reside.

2. Prior to his automobile accident, Student was in the School District's gifted program. (N.T. 1680).

3. On August 2, 2005, Student was in an automobile accident which left him with a closed head injury. He needs total assistance for all his personal care, has a tracheostomy, uses assisted ventilation, has a feeding tube and uses supportive positioning equipment. (S-3.1; P-10, pg. 5).

4. On June 8, 2007, Parent requested a Due Process Hearing seeking, *inter alia*, additional services beginning January 2006 to the present, an extended school year [hereinafter ESY], and transition planning.

5. Both parties participated in a pre-hearing telephone conference with the Hearing Officer on July 23, 2007.

6. The Hearing Officer took testimony and received documentary evidence at eight due process hearings on July 30, September 4, October 8, October 26, November 8 and November 20, 2007, January 2 and 4, 2008.

7. The following exhibits were admitted: Hearing Officer Exhibits HO-1 and HO-2; Parent Exhibits P-1 through P-17; P-20 through P-25; and School District Exhibits S-1 through S-9; S-11 through S-20; S-22 through S-28; S-34 through S-53. (N.T. 128, 135, 380-384, 560, 562-563, 684-686, 814, 1193, 1839, 1847, 1850-1851, 1856, 1858-1860). One of the Parent exhibits and some of these School District exhibits were admitted for limited purposes. (N.T. 381-384, 1839, 1856).

8. Twelve witnesses testified: a consultative speech and language pathologist; attending pediatrician with expertise in traumatic brain injuries; two LPN's who have provided home care; Father; School District supervisor of speech, physical and occupational therapy; School District special education consultant; occupational therapist; physical therapist; speech/language pathologist; special education teacher; and special education supervisor.

Augmentative Communication Evaluation

9. Mr. L holds a Masters Degree in speech/language pathology and works for the Alfred I. DuPont Hospital for Children in Wilmington, Delaware. He performed an interdisciplinary Speech-Language Pathology/Occupational Therapy Evaluation of Student on March 21, 2007. L's recommendations are based upon standards which he uses as a professional. (P-14, N.T. 69).

10. During this evaluation Student produced no expressive language, speech, or sign. He did produce communicative gestures in the form of a thumb up movement of his right hand. Student made repeated thumbs up affirmative responses. Student can squeeze with his left hand but does not have a release. (N.T. 53-58).

11. The best movement to train Student to use is the upward movement of his right thumb. (N.T. 59-60).

12. Mr. L observed more active hand movements when Student was interacting with someone rather than simply producing a result. (N.T. 67).

13. Mr. L explained that Student responded in different ways to questions that had social interactions as opposed to those that did not. (N.T. 96-100).

14. Mr. L did not reach any conclusions regarding the proper Rancho Los Amigos level at which Student was functioning. He administered no diagnostic test to determine his receptive language abilities or his expressive language abilities. (N.T. 102).

15. Mr. L testified that Student understands cause and effect, but he could give no convincing reasons to support this conclusion. The Hearing Officer declines to accept all of the conclusions reached by Mr. L because he seemed unable to explain exactly how he reached them. Consequently, the Hearing Officer fails to adopt any finding that Student understands cause and effect. (N.T. 104-105).

16. Mr. L concluded, and the Hearing Officer so finds, that because there was no apparent change in Student's eye opening or closing when lights were turned from dim to full brightness, assistive technology and augmentative communication dependent on visual information would not be appropriate for Student. (N.T. 118-119).

17. Mr. L recommended use of a TASH MicroLight switch which was actually tried with Student and a jumbo universal remote control which was not tried. (N.T. 119-121).

Medical Condition

18. Dr. R., has been director and attending physician for the [redacted] Hospital Rehabilitation Unit for seven years and associated with this facility for an additional five years. She is board certified in pediatrics and genetics. (N.T. 136-137).

19. The pediatric medical rehabilitation unit treats children who have traumatic brain injuries, spinal cord injuries, or neurologically-based problems. The mission is to advance skill levels so that the family is able to take care of patients without the need for a daily therapist. (N.T. 136-137).

20. Dr. R becomes involved with education-related recommendations and participates at times in IEP team meetings. (N.T. 138).

21. Although Dr. R had seen Student while he was an inpatient in the acute unit, she began to take care of him in September 2005, when he was transferred to the rehabilitation unit. Student was hospitalized until October 25, 2005. (N.T. 140; S-5).

22. Initial brain scans did not show that Student had a great deal of damage. Later scans showed some areas of damage, but when he was admitted to the rehabilitation unit improvement in his status was anticipated. This improvement did not occur. Student is relatively unresponsive at a Rancho Los Amigos Level III with minimal visible response to the environment around him. (N.T. 141-143).

23. The Hearing Officer accepts the doctor's classification of Student at Level III in the Rancho Los Amigos Levels of Cognitive Functioning which is generally described as "localized response: total assistance." Descriptors for an individual at Level III include: turns toward or away from auditory stimuli, follows moving objects passed in a visual field, responds inconsistently to simple commands, and may respond to some persons such as family or friends but not to others. (S-50.1).

24. Dr. R described Student as an early Rancho Level III, being inconsistent in responses to the environment that are not necessarily purposeful. However, she testified to some level of awareness such as visual fixation and perhaps occasional following of commands. (N.T. 165; 192).

25. Dr. R's medical opinion is that Student suffered significant damage to the deep brain structure. This is often hard to see on the scan. (N.T. 160; P-16, pg. 5).

26. On July 26, 2006, Dr. R stated that it is difficult to know whether Student is aware of his environment. It is hard to measure alertness because inconsistency of response is very characteristic of someone at this level of recovery. There are many inconsistencies in Student's ability to respond. (N.T. 161; P-16, pg. 5).

27. Student has progressed more to the end of Rancho Level III as of June 2007. This is based on sometimes appropriate responses such as the squeezing of hands and facial changes in response to spoken words or music. (N.T. 167).

28. Dr. R did observe what she believed to be volitional movement by Student. (N.T. 150-151).

29. Student's range of motion is generally good and his ankles can dorsiflex to neutral. (N.T. 154).

30. Dr. R has prescribed electrical stimulation which sends electrical signals to the muscles of the fingers through the pathways back into the brain in the hope of allowing Student to regain some control over his movement. (N.T. 146-147).

31. Between December 2005 and March 2006, Student was frequently in and out of the hospital because of breathing problems. During this time, there was a decrease in alertness. (N.T. 152).

32. Seizure activity has also decreased Student's awareness. He has been on medication for seizures and this medication can also decrease levels of alertness and awareness. (N.T. 162).

33. Dr. R does not know whether Student may be "locked in" in the sense that he may be fully aware in thinking but cannot initiate movement. (N.T. 178-180; P-16, pg. 11).

34. Dr. R recommended the assistive technology evaluation conducted at DuPont and felt it was comprehensive. (N.T. 182).

35. Dr. Rmade a referral to [redacted] Home, an adult and pediatric rehabilitation facility. A physician there did an assessment. Student was not admitted to Home because the home did not believe they had adequate coverage for medical conditions such as pulmonary difficulties. (N.T. 184-185, 219-220; P-15).

36. The [redacted] Home Physicians Group, specifically Dr. K, evaluated Student on April 12, 2007. The report was marked as Exhibit P-15 and admitted for limited purposes as a report relied upon by Dr. R. (*See* N.T. 381-383). This report made certain recommendations regarding physical therapy, occupational therapy, recreational therapy, including music therapy, and the need for a neuro-opthalmology evaluation. (*See* P-15, pg. 4).

37. Because this report was admitted for limited purposes, the Hearing Officer will make no findings based upon these recommendations, but the report supports a need for updated evaluations.

38. Dr. R expressed some concern about whether or not the school would be able to provide recommended therapies because she was unsure as to whether or not they had the expertise to provide them. (N.T. 186-187).

39. Dr. R is supportive of the recommendation of music therapy because it may be a good means of stimulating an adolescent's attention. (N.T. 188).

40. Student's visual acuity remains in question and this would decrease the effectiveness of eye gaze as a means of communication. (N.T. 190-191).

41. Dr. R cannot tell whether Student responds to the words spoken or simply to the sound of the human voice. (N.T. 199).

42. Dr. R is not certain of whether Student's movements are volitional or reflexive. She has prescribed electrical stimulation to strengthen his fingers. (N.T. 202-203).

43. Dr. R observed that Student had lost a level of alertness in response to his environment as well as having experienced tone changes from March through July 2006. This was primarily due to the frequency of hospital visits and intervening illnesses. (N.T. 206-207).

44. Dr. R does not know whether Student remembers her from one visit to the next. (N.T. 216).

45. Dr. R has seen a positive change in Student's demeanor which she describes as focusing on people for a longer period of time and shifting his gaze to a person who speaks. (N.T. 242-243).

Initial Provision of Educational Services

46. After his accident, the educational liaison who provides services to students at the hospital, Mr. B, provided services to Student through IU 15. (N.T. 1681-1682).

47. Mr. B later provided services to Student in the home, initially five hours per week. (N.T. 1692-1693).

48. An initial evaluation report (ER) was conducted May 31, 2006 at Student's home. It concluded that Student was a child with a disability and in need of specially designed instruction. At that time, he required care for all activities of daily living. (S-27).

49. In May 2006 it was anticipated that Student would start the following school year in school as opposed to home. (N.T. 1707; S-27.3).

50. By the middle of August, the doctors determined that Student would not return to school because of his vulnerability to illnesses. (N.T. 1710).

Observations of Father and LPNs Caring for Student

51. Father testified that Mr. B came to the home approximately ten times for about an hour between Student's release from the hospital and December 23, 2005. (N.T. 395-396).

52. Student can bear weight while in a standard, help his caregiver with positioning, and move his stomach muscles. (N.T. 403-404).

53. Ms. W, LPN, who worked with Student from October 2006 through July 2007 described Student's increased awareness and the ability to focus on a person or object. (N.T. 256, 261-262, 281).

54. Student is receptive to brushing his teeth and will bridge, that is, lift his legs up and put pressure on his feet in order to put on his pants. (N.T. 267-268).

55. Ms. W expressed her opinion that Student can communicate his likes, such as having the television or music on, by a hand squeeze confirmed by a second hand squeeze. (N.T. 286-287, 303-304).

56. Ms. S is an LPN who has worked with Student since July 2006, 48 hours a week some of which is while he is sleeping. (N.T. 307, 310, 329-330).

57. Ms. S initially described Student as being very lethargic but progressed to squeezing his hand and raising his thumb. (N.T. 311-312).

58. Ms. S has observed what she believes to be a sense of humor by watching his eyes. (N.T. 312-313).

59. Student has the ability to use a urinal on occasion, assist slightly in dressing, and roll his body for a bath. (N.T. 323-324).

60. When working with Student, Ms. S usually has her hand near his hand. If she is across the room she asks for a thumbs up. She assumes thumbs up is a "yes" and that no motion is a "no." (N.T. 338.339).

61. In her observation, Student is intelligent and has a mind of his own. She believes he expresses his wants using the hand squeeze. (N.T. 376, 378).

Initial IEP and 2006 ESY

62. The first IEP, dated May 22, 2006, described Student's traumatic brain injury and noted that he "inconstantly responds to visual, tactile and auditory stimuli." Under "strengths" are listed the ability to focus on a speaker, squeeze another's hand with his left hand, and some purposeful up and down eye motion. These are described as a defined yes/no response and improvement in the squeeze response. Services were to be provided in school. (S-23; N.T. 1536, 1707-1709).

63. The May 2006 IEP provided for 30 hours of ESY during the summer of 2006. (S-23.14).

64. As a result of Student' hospitalization and teacher's vacation, Student received only 11 hours of ESY in the summer of 2006. (N.T. 1709).

65. The School District later added the 20 hours of ESY missed in 2006 to the summer 2007 program. (N.T. 1709).

2006 IEP's

66. The May 2006 IEP contained five annual goals: three in communication and two in functional/developmental skills. The communication skills concentrated on eye opening or movement, left hand squeeze, and response to verbal prompts. The functional/ developmental skills related to use of switches and assisting in daily care activities. (S-23.9 – S-23.12).

67. The May 2006 IEP listed Student as eligible for Extended School Year [hereinafter ESY] services based on severe disability. Services were to be home based for five hours per week for six weeks. (S-23.13-S-23.14).

68. Placement described in the November 2006 IEP was a full-time special education classroom in the neighborhood school with a modified curriculum. (S-23.15).

69. A November 8, 2006 IEP repeated the inconsistent responses to visual, tactile, and auditory stimuli and the five annual goals, but changed the educational placement to the home. It listed Student as having a visual impairment. It continued: "[Student] will receive a curriculum modified for pace & content, focusing on developing an augmented method of communication." (S-34.16, S-34.3).

January 10, 2007 IEP and Reevaluation

70. The IEP resulting from the January 10, 2007 team meeting significantly changed the descriptions of Student's present levels of academic achievement. It noted that Student had

been receiving instruction in the home since November 9, 2006 for an hour per day for five days per week supported by related services. Student's ability to receive academic instruction is described as "severely limited, as of 1/10/2007." He has "inconsistent periods of wakefulness (open eyes) up to an hour during instruction" and only "occasionally and inconsistently" responds to some verbal command. It concludes: "until consistency & reliability of response is established, [Student's] ability to give back information, to demonstrate retention & learning of academic instruction is severely limited." (S-38.5).

71. Student "needs total assistance for all his personal care, has a tracheostomy, uses assisted ventilation at night, needs suctioned periodically, receives nutrition via a gastrostomy tube, is on medication, and uses supportive positioning equipment (e.g. reclinable wheelchair, leg & splints)." It noted that temporarily he is unable to receive instruction on occasion because of illness. (S-38.5).

72. The January 2007 IEP contained the following annual goals: 1.) "Increase his level of arousal & alertness through presentation of visual stimulation by maintaining his eyes opened for five minutes, four out of five times over three consecutive sessions." 2.) "Will increase his level of arousal & alertness through presentation of olfactory stimulation by maintaining his eyes opened for five minutes, four out of five times over three consecutive sessions." 3.) "Will increase his level of arousal & alertness through presentation of auditory stimulation by maintaining his eyes opened for five minutes, four out of five times over three consecutive sessions." 4.) "Will increase his level of arousal & alertness through presentation of oral stimulation by maintaining his eyes opened for five minutes, four out of five times over three consecutive sessions." (N. T. 833; S-38.10-S-38.16).

73. The January 2007 IEP provided for one hour per day (on weekdays) of instruction. ESY services were to continue in the home five hours per week for six weeks beginning July 5, 2007 and ending August 10, 2007. Speech and language pathology/therapy; physical therapy, occupational therapy and vision support are each listed at 30 minutes per week. (S-38).

74. The January 2007 IEP built in an IEP team meeting every two months to reassess. (S-38.18; N.T. 850).

75. A reevaluation report was completed January 10, 2007. The IEP team determined that no additional data was required. This evaluation repeated the prior physical therapy evaluation. The occupational therapy evaluation recommended a home based educational program that would allow for sensory stimulation, ongoing and careful assessment of active motor responses, and assessment of consistency of movement. The speech and language portion of the reevaluation simply repeated observations from September 2006. (P-6).

76. Parents approved the NOREP dated January 15, 2007 but with the following notation: "in good faith reliance that all services will be supplied promptly and consistently as of [January 17, 2007] per the IEP." (S-39.2).

March 5, 2007 IEP

77. The March 5, 2007 revised IEP added goals 5 and 6 as well as revising SDI, ESY, and supports for school personnel. Added goal number 5 was: "will alert to a human voice with active movement of his right thumb within 30 seconds four out of five opportunities." Goal number 6: "will activate various environmental interface devises (EID) by activating a switch using his right thumb within 30 seconds in 5 out of 10 opportunities." It included a protocol and procedure for using a string switch as well as a prompt hierarchy for the use of any switch. These additions were as a result of administering "Every Move Counts, Sensory Based Communication Techniques." Short term objectives in furthering these goals provided for presentation of sour tastes, cold stimuli, and various prompts in utilizing the switches. (S-41).

78. Student responds to auditory input from the human voice better than an object making a noise. Consequently, goals were added in the March 2007 IEP to include this information. (N.T. 855-857; S-41.19-S41.21)

May 14, 2007 IEP

79. The May 14, 2007 IEP essentially repeated the information contained in the prior IEP but made slight changes to all six goals and objectives. For example, the annual goal of increasing levels of arousal and alertness through the presentation of visual stimulation deleted the phrase "over three consecutive sessions." The IEP continued to focus on switch use and responses to various stimuli. (S-46).

80. The transition plan simply states that Student will "age out" at 21. (S-46.9).

School District Special Education Consultant

81. Ms. F holds a certificate in elementary education, special education of the physically handicapped, special education of the mentally retarded, and elementary principal. She is employed at the Lancaster-Lebanon Intermediate Unit 13 as a special education consultant. By trade, she is a speech/language therapist who provided consultation to the School District with regard to Student beginning in September 2006. (S-53; N.T. 813-820).

82. In her role as consultant, Ms. F met with Student and discussed the use of technology with the teacher. At that time, the School District anticipated Student's return to a classroom in the School District's high school. (N.T. 820, 823).

83. Based on the doctor's recommendations, instructional placement was later listed as the home. (N.T. 827; S-34.14-S-34.15).

84. Prior to the January 2007 IEP, primary focus was on trying different ways to elicit a yes or no response from Student. (N.T. 836).

85. In January 2007, the professional members of the IEP Team were looking at using vision in a different way. They were focusing on indicators of readiness for a functional literacy program. (S-38.4; N.T. 837).

86. According to Ms. F, the goals and objectives were designed to build consistency in being awake and alert in order to determine if Student was "moving along" in his recovery. (N.T. 842).

87. The Hearing Officer accepts the opinion of Ms. F that it was appropriate to focus on arousal and alertness at that time. If there is no student response, it is difficult to determine whether any learning is occurring. The Hearing Officer accepts as credible the opinion that in order to instruct, one needs a student who is awake. (N.T. 843-844).

88. According to Ms. F, the School District is attempting to use smell and taste as a way of building neural pathways. In addition, the School District attempts to use age appropriate information and information from the family about what was motivating and important to Student prior to his injury. (N.T. 844-845).

89. The School District was looking for more consistent responses so that they could confirm what Student knows in order to move on. The School District also felt that they wanted to build a sequential model while attempting to avoid frustration and fatigue. (N.T. 846-847).

90. The Hearing Officer accepts the opinion that the specially designed instruction contained in the IEPs was not simply the taking of measurements but was instructional in nature. Part of learning is being able to react to one's environment. (N.T. 850).

91. In January 2007 the team introduced "Moodle," a way for the team members to communicate with one another on the internet. Each therapist or teacher could make immediate entries on Moodle so that the other individuals working with Student would have the latest information. (N.T. 852-853).

92. The protocols for the use of switches and prompt hierarchy was designed to make sure that everyone was consistent in the way in which services were being delivered to Student. These were "instructional" according to Ms. F. (N.T. 858-859).

93. Ms. F testified that in response to a lively team discussion regarding use of "eyes open" as a measure of wakefulness, the goals and objectives were tweaked to emphasize any movement. The mention of "three consecutive sessions" was deleted to allow for the showing of progress but not necessarily in consecutive sessions. (N.T. 865-869).

94. In direct response to Parents' concerns that many of the activities in the IEP were too basic, the School District added the use of a variety of interactive social participatory activities. (N.T. 868-869).

95. The School District intended to train Student's nurses in the same protocols described in the March 2007 IEP. (N.T. 870-871).

96. There is no transition plan in the IEP dated November 8, 2006. (S-34.8).

Special Education Teacher

97. Ms. W2 is a special education teacher employed by the Intermediate Unit with a Level 1 certificate in special education. She teaches five high school age students in a self-contained multiple disability support classroom and also provided at-home services to Student. Initially she saw Student in the home one hour every school day. During the 2007-2008 school year she is in the Student's home Tuesdays and Thursdays for one hour. Another teacher comes Monday, Wednesday, and Friday for an hour each day. (N.T. 1528-1531).

98. Although Parents report Student responds positively to this teacher, Ms. W2 is not certain whether he remembers her from one visit to the next. (N.T. 1533-1534).

99. Beginning in November 2006, the teacher participated in recording responses by Student and trying different types of switches. (N.T. 1543, 1547).

100. Leading up to the January 10, 2007 IEP, the special education teacher was trying to become more objective in taking data and making observations. Her teaching did not change significantly. She continued to present a variety of approaches and styles of language, honoring the idea that Student may have a very high cognition or a very low cognition. (N.T. 1553-1555).

101. The teacher would select materials Student's Parents had told her that he may be interested in, such as hunting, cars, the school newspaper, fantasy novels, or a literature textbook. (N.T. 1557-1558, 1572, 1661-1662).

102. When asked if she would change her methods of teaching if it were determined that Student was "locked in" the teacher said that she would not because the need to establish a basic communication system would continue. (N.T. 1561-1562).

103. Because of the difficulty in determining whether a hand squeeze was intentional or merely reflexive, efforts were made to find another way of communicating that could be more reliable. (N.T. 1607-1609).

104. All of the efforts and experimenting with devices were to elicit a definite cause and effect response so that a more effective communication method could be determined. (N.T. 1637).

105. The special education teacher kept statistics for the period November 9 through November 21, 2006 as to the percentage of response to certain stimuli or questions. Student responded to teacher's voice 76% of the time but responded to visual stimuli (pictures placed in front of him) only 20% of the time. Using the left hand squeeze as a response, Student responded appropriately to "Is your name [Student]?" 82% of the time. (P-20, pp. 1-2; N.T. 1596-1603).

106. In the December 6, 2006 ER, under Observations by Teachers and Related Service Providers, Student was reported to have kept his eyes open during the one hour per day homebound instruction 78% of the time. He appeared to follow a family member or nurse with his eyes on several occasions, and when asked ten simple questions about his day on one occasion he was able to answer 8 out of 10 questions correctly. (P-5, pg. 1; N.T. 1623-1624).

107. Based on the entirety of the special education teacher's testimony, the Hearing Officer finds that Student does not currently have a reliable method of communication but he is improving.

Director of Special Education

108. According to Ms. S2, the School District director of special education, the goals in the January 10, 2007 IEP were expressed in terms of arousal and alertness. (N.T. 1722; S-38).

109. Student's cognitive level is largely unknown because of no consistent, reliable way for Student to communicate his responses. (N.T. 1723-1724).

110. Parents wanted music therapy for Student. (N.T. 1748).

111. Although music was used to stimulate Student to be awake, the School District did not feel music therapy was necessary. The School District did not have a music therapist evaluate Student. (N.T. 1748, 1750-1751).

112. Father requested training on how to discern when a movement is reflexive as opposed to voluntary but he did not receive this training. (N.T. 1866).

113. Father requested a complete vision evaluation as well as vision therapy for Student. This was denied. (N.T. 1892-1893).

Speech/Language Therapy, Physical Therapy, and Occupational Therapy

114. The School District last conducted a physical therapy evaluation in September 2006. Student was not feeling well on the day of the evaluation and was not easily aroused. He did not have any physical therapy services at the time of the evaluation but the evaluator thought he would benefit from physical therapy, occupational therapy, and speech. (P-4; N.T. 410-412).

115. Ms. S3 is the supervisor of speech and related services for IU 13. She supervises speech, physical, and occupational therapists. (N.T. 693-694).

116. Ms. S3 provided the September 2006 initial speech and language evaluation. (N.T. 696).

117. The School District has been both measuring whether there is a consistent motor response as well as instructing toward increasing consistency of motor response. (N.T. 708-709).

118. Student currently receives 30 minutes of speech and language therapy, 30 minutes of occupational therapy, and 30 minutes of physical therapy per week. (N.T. 769).

119. Parents have asked for more therapy time. (N.T. 771).

120. Ms. C is employed by the Intermediate Unit as an occupational therapist who became involved with Student in November 2006. The goal of occupational therapy in the school is to improve "the student's performance of tasks and activities that are relevant and important for successful school functioning." (N.T. 992-996).

121. Ms. C performed an occupational therapy evaluation in November 2006 which is contained in the January 2007 ER. (P-6; N.T. 997).

122. After January 2007, Ms. C came to the home every week for 30 minutes. She worked on sensory stimulation and the use of various switches. (N.T. 1011-1012).

123. Ms. B sees Student for speech therapy and is a member of the feeding team. (N.T. 1335-1337).

124. When she first became involved with Student in November 2006, he was not vocalizing, he was not eye gazing, and his motor movements were extremely limited. (N.T. 1351-1352).

125. Ms. B has been working primarily on sensory goals and the prompt hierarchy. (N.T. 1358-1359).

126. She and a colleague concluded a feeding assessment before the December 20, 2006 IEP meeting. (N.T. 1436).

127. Ms. M is the school physical therapist employed by the Intermediate Unit. (N.T. 1194-1195).

128. Ms. M became involved with Student in October 2006 when she did an initial evaluation by observing him in the home to determine his tone, range of motion, and movement in response to command. (N.T. 1198-1199).

129. Because alertness has apparently improved—Student's eye opening has increased (N.T. 1879-1882)—reevaluation of the need for related services is required.

130. The Hearing Officer finds that a current evaluation is needed to determine Student's physical and occupational therapy needs. These evaluations would focus on improving Student's strength and the use of his muscles so that he could engage in more self care activities. This evaluation should consider the need for music therapy.

131. The Hearing Officer finds that a current evaluation is needed to determine Student's speech/language needs.

CONCLUSIONS OF LAW

1. Student was not denied FAPE from January through June, 2006.

2. Student was not denied ESY during the summer of 2006 because the School District voluntarily made up the missed hours of instruction which resulted from a combination of Student's illness and teacher's vacation.

3. Student's November 2006 IEP satisfied the IDEIA statute and regulations. Specifically, this IEP was designed to provide meaningful educational benefit.

4. Student's IEPs for the balance of the 2007 school year satisfied the legal requirements of the IDEA statute and regulations. Specifically, these IEPs were designed to provide meaningful educational benefit.

5. Student's current IEP fails to satisfy the legal requirements of the IDEIA statute and regulations because it is not based upon a current evaluation of needed therapies. Specifically, the IEP is not individualized nor designed to provide meaningful educational benefits in the needed areas of physical therapy, occupational therapy, and speech/language therapy.

6. Student's current IEP fails to satisfy the legal requirements of the IDEIA statute and regulations because it does not contain any useful transition planning.

7. Parents are not entitled to compensatory education services.

DISCUSSION OF ISSUES

1. **Was Student denied FAPE from 1/16/06 to 6/7/06?**

A devastating August 2005 automobile accident changed Student's life forever. This accident transformed Student from a well adjusted, gifted student to an individual who has no reliable means of communicating with his surroundings. The Hearing Officer is struck by the earnest nature of everyone involved in this case to solve the complex problems affecting this one student and his family. Just as the Parents and the School District representatives have no clear vision of what can be done to help this Student, this Hearing Officer must wrestle with the application of the law to these tragic facts.

Every child with a documented disability is entitled to FAPE from entrance into school until age 21, or perhaps longer if compensatory education is awarded. It is true that there is no child so medically fragile or profoundly handicapped that the child falls below the gateway to eligibility. *Irving Independent School District v. Tatro*, 468 US 883 (1984). Training in basic life skills such as toileting, dressing, feeding, and communication are an essential part of the education required by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq*. [hereinafter IDEIA]. *See*, *Polk v. Central Susquehanna IU 16*, 747 F.2d 149, 153 (3d Cir. 1984); *Kruelle v. New Castle County School District*, F.2d 687, 695 (3d Cir. 1981)(interpreting an earlier version of this statute).

Having set forth the floor, the IDEIA does not require states to develop IEPs that "maximize the potential of handicapped children" but merely requires the provision of "some" educational benefit. *See, Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). The Third Circuit has defined that standard to mean that more than "trivial" or "de minimus"

benefit is required. *See, Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179, 184 (3d Cir. 1988), *cert. denied,* 488 U.S. 1030 (1989). However, the Third Circuit has determined that a student's demonstrated progress in an educational program is sufficient to show that a school district's IEP provides meaningful benefit necessary to satisfy the IDEIA's FAPE standard. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). One of the issues, then, is whether or not the School District has shown that it provided a "meaningful benefit" to this Student, progress which is gauged in terms of improvement within the educational program.

The crux of the problem in this case is that without a reliable means of communication, it is difficult--if not impossible--to determine whether or not any activity provides a meaningful benefit to Student. The Parents and some of Parents' witnesses believe that the Student already has a method of communication and that his communication indicates a much higher level of comprehension than recognized by the School District. On the other hand, the School District has made concerted efforts to measure Student's interaction with his surroundings and has reasonably concluded that no reliable means of communication yet exists.

It is undisputed that Student has been assigned Level III in the Rancho Los Amigos Levels of Cognitive Functioning. (N.T. 141-143). The Hearing Officer accepts and adopts this classification which is generally described as "localized response: total assistance." (S-50.1). Descriptors for an individual at Level III include: turns toward or away from auditory stimuli, follows moving objects past in a visual field, responds inconsistently to simple commands, and may respond to some persons such as family or friends but not to others. (S-50.1). While it may be unfair and somewhat pessimistic to brand this Student with the Rancho

descriptors, the School District is required to deal with this Student at his current level and as it finds him. The School District has structured all of the IEPs around the development of a method of reliable communication. Initially, this was an entirely appropriate response and the Hearing Officer is persuaded that the special education teacher conveys information while concentrating on the communication trials.

Parents contend that the entire process is ridiculous because inconsistency is the hallmark of a Rancho Level III. Part and parcel of the Parents' argument is that Student may indeed be "locked in," that is, understanding much of what occurs but simply unable to respond because of his devastating physical limitations.

The only significant movements exhibited are eye blinks, a left hand squeeze, and the slight movement of the right thumb. Initial IEP goals were written exclusively in terms of stimulus and response. (*See* S-23, IEP of May 22, 2006).

The Hearing Officer must reject Parents' argument that there was a denial of FAPE from January 2006 to June 2006. It may be that efforts to devise a first IEP were somewhat slow, but this is excusable considering the Student's fragile medical condition, his need for repeated hospitalizations, and the initial uncertainty as to the permanence of Student's physical limitations. According to Dr. R, between December 2005 and March 2006, Student was frequently in and out of the hospital because of breathing problems. He was not very alert at this time. (N.T. 152). Further, she stated that he had lost a level of alertness through July, 2006 due to hospital visits and intervening illnesses. (N.T. 206-207). His level of functional performance was inconsistent and he did appear at that time to need a defined yes/no response in order to gauge some academic level and/or achievement.

The IEP of May 2006 provided for appropriate emphasis on communication and functional skills with daily speech, physical, and occupational therapy at least one time per week for thirty minutes. It took time to evaluate Student and to determine exactly what this Student could even physically tolerate in terms of therapy or teaching. There was no denial for FAPE during the second half of the 2006 School Year.

2. Was Student denied ESY during the summer of 2006?

Parents request compensatory education for the School District's failure to provide 30 hours of instruction that the School District had planned to deliver during the summer of 2006. The School District concedes that only 11 of these 30 hours were provided. (N.T. 1706-1710). The teacher testified that while she was available at the beginning of the summer, Student's illness and periods of hospitalization prevented the instruction as anticipated. The teacher was then on vacation later in the summer. (N.T. 1706-1710; S-23.4, S-23.13).

The School District argues that it has no requirement to make up the time lost because a student is unavailable and in the hospital. The Hearing Officer need not resolve this legal issue because the School District voluntarily made up the missed hours of instruction. (N.T. 1709-1710). Because these hours were later provided, the Hearing Officer agrees that there is no cause to award compensatory education in the amount requested by Parents.

3. **Was Student's November 2006 IEP appropriate?**

The November 2006 IEP contained five annual goals: three in communication and two in functional/developmental skills. The communication skills concentrated on eye opening or movement, left hand squeeze, and response to verbal prompts. The functional developmental

skills related to use of switches and assisting in daily care activities. (S-23.9 – S-23.12).

Parents are most critical of the November 2006 IEP which, in their opinion, abandoned all cognitive therapy for their brain injured child. According to Parents, this IEP is "a mere exercise in passive response to stimuli and obedience training, intended to achieve consistency, a goal which is not realizable as long as [Student] remains in his current stage of disability." (Plaintiff's written closing statement, pg. 16). The Parents emphasize that this IEP should have contained self-help goals to address academic and functional skills, 34 CFR §300.320, and was deficient in failing to include a mandatory transition plan after Student reaches age 21.

The Hearing Officer regrets Parents did not provide more expert testimony to support their position with respect to the need for therapy in relation to self-help skills. The one piece of potentially helpful evidence was the Home initial physiatric consultation of April 2007 performed by Dr. K. (P-15). It is unfortunate that the Hearing Officer did not have the benefit of Dr. K's testimony in support of her evaluation and recommendations. Because of the admission of this report only for limited purposes, the Hearing Officer is reluctant to rely upon clearly hearsay evidence, especially where it was admitted over objection. (*See* N.T. 381-383). This report, however, is sufficient to trigger the need for a current evaluation, particularly to determine whether the amounts of these therapies being received by Student are adequate.

The November 2006 IEP did include goals of assisting in daily care activities by moving Student's body in positioning and dressing 25% of the time as well as including 60 minutes of speech and language pathology/therapy twice per month, physical therapy of 30 minutes per week, and vision support services for 30 minutes per month. (S-34.12; 34.14).

These seem appropriate to this Hearing Officer.

Admittedly, the goals were still "focusing on developing an augmented method of communication" (S-34.16), but the various therapies were certainly included in this IEP. Unfortunately for the Parents, there is simply no compelling testimony on this record that the kinds and amount of therapy provided in the November 2006 IEP are inadequate or insufficient. This was Parents' burden of presenting evidence in support of their contentions and I must find that they did not carry this burden.

The legal standard is not based on hindsight, but rather whether the School District's actions were reasonable at the time. The School District is given reasonable time in which to respond to newly discovered needs. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). Based upon hindsight, the therapies could have been more extensive, but this is simply not the standard. The School District needed time after the start of the school year to conduct evaluations and devise some reasonable approach to this Student's multiple disabilities and lack of communication. The School District's efforts were reasonable at the time.

4. Were Student's three 2007 IEP's appropriate?

In January 2007, the team issued a reevaluation report which included physical therapy and occupational therapy components, a feeding assessment, and a vision assessment. Based upon the September 19, 2006 speech and language evaluation, the recommendation was to reassess Student's need for an oral stimulation program and to develop an integrated and functional form of communication. (S-37). The IEP resulting from that evaluation continued

to describe Student's ability to receive academic instruction as "severely limited." (S-38.5). In-home instruction remained at one hour per day on weekdays plus 30 minutes per week of speech and language pathology/therapy together with 30 minutes per week each of physical therapy, vision support services, and occupational therapy. Because of continued medical concerns, all services were to occur in the home. This IEP resulted in an approved NOREP (S-39) on which Father noted his expectation that all services would be supplied promptly and consistently as described in the IEP. (S-39.2).

The January 2007 IEP is still aimed at developing Student's expressive communication and functional literacy. (N.T. 837-840). The March 2007 (S-41) and May 2007 (S-46) IEP's contained some revisions but continued to focus on the communication skills. The Hearing Officer does not fault either the January or March 2007 IEPs. Communication remains a paramount and reasonable goal. These IEPs were obviously designed to experiment with responses to stimuli and focus on the use of a switch to allow for reliable communication.

The Hearing Officer also believes that the slight change in the May 2007 IEP toward more interactive activities for developing and practicing skills related to the two added goals (S-46.17, S-46.19) were an improvement. Some additional data collection efforts were added together with some additional training of the nursing staff.

However, the frequency of speech and language pathology/therapy, physical therapy, occupational therapy, and vision support services remained at 30 minutes per week. These do not seem to be enough once it was determined that reliable communication was slow in coming. Activities of daily living should have been given more consideration.

The Hearing Officer does accept the Parents' recommendation that increased therapy is

likely needed. Student can bear weight while in a standard, help his caregiver with positioning, and move his stomach muscles. (N.T. 403-404). It appears that the current IEP contains no goals to assist Student to increase his endurance, range of motion, and strength. These would be supportive services to assist Student to benefit from special education. 34 CFR § 300.34. If one assumes that the School District planned in May 2006 to provide in-school services, one must believe that more than 10 hours per week would have been provided to Student in the school setting. Student receives less than 10 hours of total services per week at the current time.

Physical therapy itself may form the "core of a severely disabled child's special education." The Third Circuit has recognized that "the educational program of a handicapped child, particularly a severely and profoundly handicapped child . . . is very different from that of a non-handicapped child. The program may consist largely of 'related services' such as physical, occupational, or speech therapy." *DeLeon v. Susquehanna Community School Dist., 747 F.2d 149, 153 (3d Cir. 1984).*

The developing and strengthening of fine motor skills should certainly be the goal of the occupational and physical therapy, as well as the speech and language therapy. Having actual goals will be critical. The Hearing Officer sees all three of these therapies as directly related to helping Student to learn basic self help and social skills. This is where formal education for a severely disabled student must begin. *Polk v. Central Susquehanna IU 16*, 747 F.2d 149, 153 (3d Cir. 1984). In addition, Dr. R has prescribed electrical stimulation to strengthen Student's fingers. (N.T. 202-203). Surely additional occupational and physical therapy should assist with this effort.

Parents have requested five hours of instructional time per week plus three hours each of occupational therapy, physical therapy, and language therapy per week. These service hours appear reasonable based on all of the testimony of record and would be designed to assist with Student's range of motion, weight bearing, strengthening, and endurance needed for basic activities of daily living. However, this Hearing Officer is not in the position to make the determination on the amount and type of these services without the benefit of a recent evaluation or the presentation of expert testimony on this issue.

When Student was evaluated on June 1, 2006 for occupational therapy needs, improved strengths and improved independence with self care activities were identified. (P-3). The Hearing Officer finds that these needs continue. Improving self care activities should be added to the occupational and physical therapy services currently directed almost exclusively toward switches and the development of a communication system. Similarly, the September 19, 2006 physical therapy evaluation recommended more therapy time but questioned whether the therapy could be provided by an educationally based therapist. (P-4). This is why a current evaluation is required and why the Hearing Officer does not believe that she can simply order an increase in these services.

The Hearing Officer does believe that a lack of transition planning is a deficiency which also should be remedied. Exactly what can be done for this Student to prepare of life after age 21 must at least be considered.

The Hearing Officer has carefully pondered the request for music therapy. This certainly has some appealing attributes. Again, on this record, there is insufficient evidence to support the ordering of music therapy. An evaluation to determine if this kind of therapy is

needed should be conducted. This Hearing Officer will decline to order more than an evaluation.

Similarly, "counseling" to help Student deal with his handicapping conditions is requested but no evidence of record supports this request. The request for counseling must also be denied.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. Within thirty (30) calendar days of the receipt of this Order, the School District must complete, at School District expense, a comprehensive and in-depth reevaluation report considering Student's need for physical, occupational, and speech/language therapy. This evaluation should also consider the need for music therapy. Other evaluations are not precluded, but the need for these therapies must be included.

2. Within fifteen (15) calendar days of the receipt of the reevaluation report, Student's IEP team must convene for the purpose of developing the Student's specific program and services based, in part, upon Student's needs in these identified areas. Transition planning should be considered and incorporated into any new IEP.

3. No compensatory education is awarded.

Date: February 8, 2008

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