

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

Student: BD
Date of Birth: xx/xx/xxxx
Hearing Dates: February 4, February 24, and March 18, 2010
ODR File No.: 00062-0910AS / 00561-0910AS
Consolidated

CLOSED HEARING

School District: Montgomery County Intermediate Unit

Parties:

Mr. & Mrs.

Representatives:

Parent Attorney: Caryl Oberman Esquire
The Law Offices of Caryl Andrea Oberman
Grove Summit Office Park
607A North Easton Road
Willow Grove, PA 19090

Montgomery County
Intermediate Unit

Intermediate Unit Attorney: Timothy E. Gilsbach
Fox Rothchild, LLP
10 Sentry Parkway, Suite 200
P.O.Box 3001
Blue Bell, PA 19422-3001

Date Record Closed: April 23, 2010

Decision Date: May 8, 2010

Hearing Officer: Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a Free Appropriate Public Education (hereinafter FAPE) for [Student] (hereinafter referred to as “Student”), an eligible 5 year old student, diagnosed with autism who resides with his parents in [Redacted city], Pennsylvania. The action challenges the actions of the Montgomery County Intermediate Unit (hereinafter referred to as “Intermediate Unit or IU”) in failing to timely or adequately evaluate the student and in failing to timely and adequately provide an appropriate placement and associated related services of a one on one aide; occupational therapy, speech/language therapy and ABA therapy in the home resulting in a denial of a FAPE and to an entitlement to reimbursement and compensatory education.

Due process concerning the current matter was filed with the Office for Dispute Resolution on July 16, 2009 and December 15, 2009 and on January 12, 2010 moved to consolidate the complaints. The matter was initially assigned to Hearing Officer Deborah DeLauro and was reassigned to the undersigned prior to convening the first hearing.

For the reasons that follow, I find in favor of the PARENTS IN PART and the INTERMEDIATE UNIT IN PART with a MODIFIED award for tuition reimbursement and reimbursement of related services and a MODIFIED award for Compensatory Education as outlined in the attached ORDER and a DENIAL of reimbursement for privately secured evaluations.

ISSUES

- (1) Whether compensatory education for services for the 2008-2009 school year is warranted,
- (2) whether the Parents are entitled to reimbursement for independent evaluations and therapeutic services for the 2008-2009 school year, and

(3) whether Parents are entitled to reimbursement for preschool tuition for the 2008-2009 and 2009-2010 school years.

FINDINGS OF FACT

1. The Student is a five year old eligible young child who resides within the boundaries of the geographical area for which the Montgomery County Intermediate Unit (“Intermediate Unit/IU”) provides services for early intervention and lives with his Parents in [Redacted City], Montgomery County, Pennsylvania. [Stipulation, NT 35-36].
2. The IU is responsible for providing under its auspices early intervention services to county residents between the ages of three and the age of beginners. [Stipulation, NT 35-36].
3. The Student is an eligible young child under Pennsylvania law and an eligible child under IDEA, Part B. [Stipulation, NT 36].
4. The Student’s conditions of disability include autism spectrum disorder and speech and language disability. [Stipulation, NT 36].
5. The Intermediate Unit conducted its initial psychological and occupational therapy evaluations of the Student in an untimely manner, outside of the relevant statutorily-required timeframes. [Stipulation, NT 38-39].
6. At age two, the Student was enrolled in a typical preschool at [Redacted Preschool]. [NT 132].
7. The Parent expressed concern to the pre-school regarding the student’s lack of eye contact, limited social interaction, and restricted range of interests. Teachers at the pre-school did not share the concerns of the parent. [NT 131-133]

8. The Parent removed the student from the [Redacted Preschool] in order to place him in a pre-school better equipped to address the concerns she had regarding the behavior and development of the student. [NT 133-136]

9. Within one week of the start of the Student's attendance at [Redacted Preschool] (hereinafter may be referred to as "[REDACTED PRESCHOOL]"), his teacher [Redacted Teacher] and the head of school [Redacted Administrator] reported to the Parents that they had observed things that suggested to them that the Student had at minimum, some sensory issues. They suggested that the Student be observed by professionals and directed the Student's parents to Federation Early Learning Services for an evaluation. [NT 135-136]

10. [Redacted Preschool] staff in mid-July of 2008 noted the Student's issues to include lack of eye contact, not responding to his name, having no sense of personal space, becoming fixated on items such as toys and food, having difficulties in social activities, taking toys from other children and destroying their buildings, and needing everything he sees. [P-1, p. 2]. The Parents received almost daily reports from [Redacted Preschool] of those issues at school. [NT 136-137].

11. In August and September of 2008, occupational therapist Susan Moses of Federation Early Learning Services conducted an evaluation of the Student which included background information from the Student's mother, two of his teachers and [Redacted Administrator] as well as observations totaling 6 hours over 2 opportunities. Ms. Moses issued a report of her findings showing developmental lags and issues, including lags in gross motor, fine motor and oral motor skills, talking randomly and out of turn, balance, auditory distractibility, frequent need for redirection and exaggerated need for positive reinforcement, sensory processing difficulties in several areas, constant need for boundaries and limit setting, need for help in using language with peers and possible anxiety. [P-2, pp. 1-8]. Recommendations included 26 interventions,

modifications, and supports, to wit: increased structure, the use of sensory strategies, direct occupational therapy and one to one assistance in class.[P-2, pp. 8-12] as well as a recommendation that the Parents contact the Intermediate Unit for “developmental evaluations in all areas of development and...ongoing consultation in the classroom.” [P-2, p. 12].

12. Ms. Moses provided direct occupational therapy services to the Student, for which the Parents paid privately, from October 2, 2008 through March 19, 2009. [P-3; NT 144, 146, 594-595]. She also provided consultative services to classroom staff at [Redacted Preschool] . [P-2; P-6; NT 473]. Services for occupational therapy during this time period, paid for by the Parents totaled Two Thousand and Fifteen Dollars (\$2,015.00). [P-3]
13. The program at [Redacted Preschool] was, at all times relevant hereto, an appropriate program to meet the needs of the student. [NT 345-372; 443-460]
14. On October 3, 2008, the Student’s mother contacted the Intermediate Unit to request services for the Student and to inquire how to start the evaluation process. [NT 139, 142-143; Exhibits P-4, P-5 and P-29]
15. The Student’s mother completed the paperwork to initiate the evaluation process prior to the end of October. The Intermediate Unit logged in the Child and Family Profile and Teacher/Caregiver Questionnaire as received November 13, 2008, nearly two weeks later. [NT 139-141; Exhibits P-4 and P-5].
16. The Teacher/Caregiver Questionnaire solicits information regarding a child’s focus, attention span for individual and group activities, interaction with both peers and adults, cooperation with classroom routines, asking and answering questions, following directions, speech intelligibility, fine and gross motor skills, and transitions. The Student’s mother indicated concerns in each of these areas. [P-4].

17. In the Child and Family Profile, the Parents list their reasons for seeking services from the Intermediate Unit as the Student's constant random talking, speaking off topic even in a one to one setting, perseveration on ideas, topics and toys, sensory processing, focus and non-responsiveness. [P-5, p. 2]. The Parents listed his needs as not being able to sit still, developmental lags in gross, oral and fine motor skills, anxiety, trouble focusing, distractibility, inability to understand boundaries and trouble keeping up with friends on the playground. [P-5, p. 7]. They also informed the Intermediate Unit of their concern about the Student's limited eye contact, aggression, difficulty with transitions, and atypical speech behaviors. [P-5, pp. 8-10].

18. The Student's mother followed up with the Intermediate Unit in December 2008 and January 2009 to inquire regarding the status of the previously submitted paperwork and to request an evaluation date. [NT 142-143]

19. In the fall of 2008 and the winter of 2008-2009, the Student continued to have problems in school, He was disruptive in class and had meltdowns, often triggered by transitions and by anxiety. [Redacted Preschool] assigned a one to one shadow to the Student several days a week beginning on November 17, 2008 and billed the Parents for that additional service. [Redacted Preschool] eventually sought reimbursement for these services from the Intermediate Unit in the amount of One Thousand Five Hundred and Seventy Five Dollars (\$1,575.00). [NT 144-145, 455-456; P-6, p. 1; P-7; P-12; P-39; P-47]

20. Having received no response from the Intermediate Unit about any scheduling of an evaluation, the Parents had the Student privately evaluated, at their own expense, by neurologist Dr. Joyce Sapin on January 12, 2009, and at her recommendation by a developmental pediatrician Dr. Anna Baumgaertel on January 27, 2009. [P-8; P-10; NT 146-147, 595-596]. Dr. Sapin diagnosed the Student with Aspergers/autistic spectrum disorder and characteristics of sensory integration dysfunction. [P-8, p. 3]

21. Both Dr. Sapin's report and Dr. Baumgaertel's report note that the Student had a personal aide/wraparound services in school. [P-8, p. 1; P-10, p. 2]
22. Dr Baumgaertel in her report reported the Parents' continuing concern with the Student's motor coordination, language development and socialization. She diagnosed the Student with disruptive behavior disorder, low motor tone, mild neurological dysfunction, motor planning disorder, visual motor delay, and sensory modulation dysfunction, and as at risk for anxiety disorder and ADHD with some atypical features. She recommended occupational and physical therapy, sensory integration including a sensory diet, social activities and social skills intervention in a small group setting, and pairing with children who are at least cognitively average. [P-10, pp 1, 4-5]
23. The Parents provided the Sapin and Baumgaertel reports to the Intermediate Unit in January, 2009. [NT 63, 142, 149]
24. Following receipt of the privately obtained evaluations, the Intermediate Unit scheduled an evaluation for February 2, 2009. [NT 143-144; P-11] At the time of the evaluation the Parents were provided a Permission to Evaluate form (hereinafter may be referred to as "PTE"), by the Intermediate Unit evaluators. [NT 143-144] Procedural Safeguards were not timely provided [P-12; NT152]
25. The Permission to Evaluate was issued and signed by the Parents on February 2, 2009. [P-11; NT 60]
26. The Permission to Evaluate noted that the evaluations to be used included "Occupational Therapy Evaluation and Educational Assessment (Battelle Developmental Inventory)". [P-11 at 1]
27. Ms. McCaughey has been employed with the IU for seven years as a case manager and was assigned as the Student's case manager. [NT 45]

28. Ms. McCaughey determined the types of evaluations to be performed based “on the information shared in terms of needs” and looked to the information provided by the Students’ parents and teachers. [NT61, P-4, P-5]
29. The Intermediate Unit’s evaluation comprised of a psychological evaluation by Dennis Kerr and an occupational therapy evaluation by Dr. Wong. [P-14; NT 152]. Neither evaluator observed the Student in a school or home settings or spoke to any of his teachers at school. [NT 154]
30. Mr. Kerr routinely reviews every document in a student’s file as part of his evaluation process. [NT 562]
31. The Evaluation Report states that the Student has a difficult time with reciprocal conversation, engages in constant random talking, speaks off topic during conversations, and has a difficult time initiating and sustaining contact with his same age peers. [P-14, pp. 6-7]
32. The Intermediate Unit’s Evaluation Report recommended, *inter alia*, the need for the Student to initiate and sustain social contact with same age peers and play with peers, to imitate peer’s play activity and to engage in interactive play. [P-14. p. 14] The Report further recommended the use of peer modeling and the use of role play for modeling language skills, the use of social stories to assist in learning conversational skills, use of peer modeling for social language cues, role playing with a peer or adult with social language issues or events that typically would present themselves in play, encouragement to participate in teacher-directed tasks, and opportunities to practice skills. [P-14, p. 15]
33. Mr. Kerr determined that [Student] was eligible for services under the category of autism. [P-14]
34. It is the Intermediate Unit’s protocol to perform a speech and language evaluation for any child diagnosed with autism. [NT 583-586] The Intermediate

Unit failed to observe that protocol in the Student's case and did not evaluate his speech as part of its Evaluation Report. [P- 14; NT 582-583]

35. The Intermediate Unit did not assess the Student in all areas of his suspected disability and did not use multiple instruments to evaluate him even in the limited areas that it did assess. [NT 152, 154, P-4, P-5]
36. No other evaluations were performed. [NT 159, 165-166] The Evaluation Report was dated April 2, 2009 and was received by the Parents on April 13, 2009
37. Prior to issuing the Evaluation Report to the Parents, Ms. McCaughey contacted the Students Mother to set up the Student's initial IEP meeting for April 24, 2009. [NT158]
38. Private occupational therapy services ceased in March 2009 due to a lack of funds by the Parents. [NT 156-157, 171]
39. At the IEP meeting on April 24, 2009, the only person present from the Intermediate Unit was Ms. McCaughey, functioning as both the LEA representative and as the special education teacher. [NT 168, 70-71]. The Student's classroom teacher at [Redacted Preschool] was present for a part of the meeting [NT 168-169]. The Student's mother and [Redacted Administrator] of [Redacted Preschool], were present. The two Intermediate Unit evaluators, Mr. Kerr and Dr. Wong, were listed as having been excused. [P-16, p. 6; NT 169-170]
40. An IEP was issued on April 30, 2009, which included a total of sixty (60) minutes per week of itinerant teacher services and sixty (60) minutes of occupational therapy per week. [P-16 at 20; NT 72]
41. The IEP provided that services would not be provided during breaks. [P-16 at 21]

42. Parents signed a NOREP agreeing to this IEP on May 5, 2009. [P-16 at 3]
43. The IEP included three goals in occupational therapy and three goals in social skills. [P-16 at 13-19]
44. The social goals were expected to be met through itinerant teacher hours pushed into the students existing private preschool setting. [NT 75]
45. The Intermediate Unit relied upon an OCDEL policy stating that “[i]f an IEP team determines that without a typical preschool experience at public expense a child cannot make meaningful educational progress on the IEP and be provided FAPE, IU EI program is responsible for making the placement in a typical community setting. However, without the issue of FAPE, IU is not necessarily responsible for honoring parental requests for purchasing slots or reimbursement for typical preschool” in making its decision not to offer any “placement” in which to deliver services to support its failure to offer a pre-school setting or to fund the setting the student currently attended. [NT 425 - 437; P-60 at 4]
46. [REDACTED PRESCHOOL] is a religious school in which twenty-five percent of the year is spent on religious activities. [NT 309]
47. An FBA was conducted by Dr. Feige with observations of the Student at [REDACTED PRESCHOOL]. [NT 507-508]
48. During the observations, Dr. Feige saw minimal issues in terms of behaviors on a day when the Student did not have a one to one aide. [NT 507, 552]
49. Dr. Kupersmith explained that during the course of this observation, the Student did not exhibit his “usual frequent behaviors.” [P-31]
50. Student was seen by Dr. Baumgaertel on July 3, 2009, for a follow-up visit. [P-24]

51. Dr. Baumgaertel recommended that Student continue at [REDACTED PRESCHOOL] with an ABA trained shadow, ABA management support at home for two hours per day, occupational therapy, language interventions, and play therapy. [P-24 at 1]
52. This evaluation report was provided to the I.U. on July 8, 2009 [P-25 at 4]
53. Parents requested a speech and language evaluation on June 24, 2009. (P-22 at 29]
54. A Re-Evaluation Report was issued on July 6, 2009, that included a speech and language evaluation. [P-25].
55. Parents filed a Due Process Complaint on July 16, 2009. [P-29]
56. A Resolution Session was held between the parties on August 6, 2009. [NT 41; P-34]
57. Parents requested an FBA on June 12, 2009. [P-21 at 4]
58. A revised IEP and NOREP was issued to the Parents on September 1, 2009. [P-40]
59. The IEP included the following services: (1) one sixty minute group session and one thirty minute individual session of speech and language therapy per week, (2) Two sixty minute sessions of itinerant teacher support per month; (3) Twenty Four hours per week of personal care assistant support to follow [REDACTED PRESCHOOL]'s schedule, (4) Twelve hours per month of behavior supervision; (5) Two forty-five minute sessions of occupational therapy per week and thirty minute consult per week; (6) Ten hours per week of home behavior programming; (7) and ninety minutes per month for behavior team meetings. [P-40 at 3, 44-45]

60. Parents agreed to this IEP by NOREP signed on September 11, 2009. [P-40 at 3]
61. The results of the FBA were included in this IEP. [P-40 at 16].
62. A subsequent Re-Evaluation Report was issued by the I.U. on September 23, 2009, that included a FBA. [P-42]
63. An IEP meeting was held on October 6, 2009, at which time a new IEP was offered and presented to the Parents. [P- 44]
64. Parents signed NOREP agreeing to this IEP on October 10, 2009. [P-44 at 3]
65. A second Due Process Complaint was filed on December 15, 2009, seeking reimbursement for [REDACTED PRESCHOOL] for the 2009-2010 school year. [P-45]
66. Parents filed an Amended Due Process Complaint on or about January 12, 2010, requesting consolidation of these two matters. [P-54]
67. A total of Six-Thousand Two-Hundred and One Dollars (\$6,201.00) for services over the course of the 2008-2009 school year and summer of 2009 have been paid [P-39 at 3]
68. Four-Thousand Nine Hundred and Fifteen Dollars (\$4,915.00) in tuition for the 2008-2009 school year has been paid by the parents. [*Id.*]
69. One-Thousand One Hundred and Twenty-Five Dollars (\$1,125.00) for summer programming has been paid by the parents. [*Id.*]
70. The additional costs paid by Parents include payments for an enrichment program, lunch bunch, and other fees. [*Id.*]

71. Six-Thousand and Nineteen Dollars for tuition at [REDACTED PRESCHOOL] for the 2009-2010 school has been paid by the parents. [P-39 at 1]
72. The parties attended a resolution meeting on August 6, 2009. A due process hearing on the consolidated matters was conducted in this matter on February 4, 2010, February 24, 2010, and March 18, 2010
- a. Exhibits were submitted and admitted into evidence on behalf of the Hearing Officer as follows:
 - i. HO-1
 - b. Exhibits were submitted and admitted into evidence on behalf of the Parent and accepted as joint submissions by the Intermediate Unit as follows:
 - i. P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-12, P-13, P-14, P-15, P-16, P-17, P-18, P-19, P-20, P-21, P-23, P-25, P-26, P-27, P-28, P-29, P-30, P-31, P-32, P-33, P-34, P-35, P-36, P-37, P-38, P-39, P-40, P-42, P-44, P-45, P-46, P-47, P-55
 - c. Exhibits were submitted and admitted into evidence on behalf of the Intermediate Unit as follows:
 - i. SD-40
 - d. The following exhibits were submitted objection sustained:
 - i. P-35, P-46
 - e. The following exhibits were withdrawn:
 - i. P-18, P-27, P-36

DISCUSSION AND CONCLUSION OF LAW

The Right to a Free and Appropriate Public Education and Burden of Proof

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “Free Appropriate Public Education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the

Commonwealth has delegated the responsibility for the provision of a FAPE to its local school districts. School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational [Student]efits’ in light of the student’s ‘intellectual potential.’ ” Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir.2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)). In assessing whether an individualized program of instruction is “reasonably calculated” to enable the student to receive meaningful [Student]efit, the progress noted must be more than a trivial or *de minimis*. Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (182); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999).

These federal regulatory requirements apply no less to children between the ages of three and five than to any other eligible child suspected of having a disability. Indeed, Pennsylvania has explicitly adopted into its Early Intervention regulations the federal IDEA provisions on evaluations, IEPs and early intervening services. 22 Pa. Code Section 14.102(a)(2); 34 CFR Section 300.226.

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school district for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the student bears the burden of proof in this proceeding. The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast U.S., 126 S. Ct.528, 163L. Ed.2d 387 (2005). In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006). Because a student’s parents seek relief in this administrative hearing, they bear the burden of proof in this matter. i.e., they must ensure that the evidence in the record proves each of the elements of their case. The U.S. Supreme Court has also indicated that, if

the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., student's parents) must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast U.S. , 126 S. Ct.528, 163L. Ed.2d 387 (2005); L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006). Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

Evaluation

Pursuant to 34 CFR §300.502(b)(i), a parent is entitled to reimbursement of an Independent Educational Evaluation (hereinafter referred to "IEE") at public expense if they disagree with the District evaluation report and the District evaluation report is in some way inappropriate. Holmes v. Millcreek Tp. School Dist., 205 F.3d 583 (3rd Circ. 2000). See also P.P. ex rel. Michael P. v. West Chester Area School Dist., 585 F.3d 727, 740 (3rd Circ. 2009) (Third Circuit agreed with holdings of Hearing Officer, Appeals Panel, and District Court that, because the parents were not challenging the District's evaluation, the District was not responsible for reimbursement for privately-obtained IEE); In Re: The Educational Assignment of D.S., (rejects IEE reimbursement on legal grounds because no evidence that parents disagreed with District's evaluation).

The applicable regulations provide that a parent may obtain an independent educational evaluation ("IEE") at public expense when "the parent *disagrees with an evaluation obtained by the public agency.*" 34 C.F.R. §300.502(b)(1)(emphasis added). The central test in determining if a parent is entitled to reimbursement for an IEE is whether "a school district's evaluation was appropriate and whether the parent disagreed with it." In re: J.P., Pa. SEA No. 1573 at 12 (2005). "The threshold requirement, then, is *that parents disagreed with the District's evaluation.*" Id. at 13 (emphasis added) see also Rebecca H. Holmes v. Millcreek Township Sch. Dist., 205 F.3d 583, 590 (3d Cir. 2000). "Where, as here, the parents set the IEE in motion well before the completion of the District's [or I.U's] evaluation and, obviously, prior

to a point when they could have knowledge whether they agreed with it or not, this initial requirement is not met.” *Id.* In addition, “the IEE must answer questions not previously raised, provide *essential* new information, or add something to the prevailing understanding of the student’s disability. A mere showing of differences between the district and independent evaluations is not, though, sufficient.” *In re: J.P., Pa. SEA No. 1573 at 13 (2005)*(emphasis added). For the reasons detailed below, the Parents in the present matter have failed to meet these requirements and, accordingly, are not entitled to the reimbursement for the evaluations. In addition, as noted below, the I.U. had seventy (70) days from the date that the Parents requested an evaluation or the I.U. knew or should have known that the Student needed to be evaluated to complete the evaluation. 22 Pa. Code § 14.123; 33 C.F.R. §300.301(c)(1)(i).

In the present case, the Parents arranged for the evaluations for which they now seek reimbursement prior to receiving the I.U.’s evaluation and prior before the time by which the I.U. would be required to complete any evaluation of the Student. The Parents provided some information with respect to the Student’s needs to the I.U. on November 13, 2008. [P. Ex. 4 at 1; P. Ex. 5 at 1; P. Ex. 29 at 6]. Based upon the information provided, to the extent that it showed the need for the I.U. to complete an evaluation, the I.U. had ten (10) days to provide a PTE and then sixty (60) days from the execution of the same to conduct and issue an evaluation report, or until January 12, 2009. *See 22 Pa. Code § 14.123; 33 C.F.R. §300.301(c)(1)(i).* Parents obtained an evaluation from Dr. Sapin on January 12, 2009, before the I.U. had completed its evaluation and on the date the evaluation from the I.U. would be due. [P. Ex. 8 at 3; N.T. Vol. III p. 595] Finally, the Parents took the Student to Dr. Baumgaertel to be evaluated on January 27, 2009, prior to the I.U. completing its evaluation and prior to the Parents knowing whether they would agree or disagree with the I.U.’s evaluation. [P. Ex. 10 at 1; N.T. Vol. III p. 596] In the present case, there is simply no evidence to show that the Parents obtained the private evaluations as a result of a disagreement with the I.U.’s evaluations, but, to the contrary, the Parents put these evaluations in motion prior to the I.U. completing its evaluations and prior to when the Parents could have even known they would disagree with the IU’s evaluation. In addition, it appears these evaluations were set

in motion prior to the timeframe in which the IU was even obligated to complete its own evaluation.

Pre-School Placement and Reimbursement for Private Pre-School Tuition and Related One on One Support

The early intervention statute defines, at 11 P.S. Section 875-103, early intervention services as, *inter alia*, developmental services provided under public supervision; designed to meet the developmental needs of a eligible young child in physical, cognitive, sensory, language and speech, psychosocial or self-help skill development; are provided to eligible young children in compliance with the provisions of this act and Part B of the IDEA, including procedural safeguards and *free* appropriate public education, related services and IEPs; and are *provided in the least restrictive environment appropriate to the child's needs* (hereinafter referred to as "LRE"). Eligible young children who will be served in a non-home-based setting *must, to the maximum extent consistent with the child's abilities, receive early intervention services in a setting with non-handicapped children.* (emphasis supplied).

Early intervention agencies must adhere to the LRE requirement and must provide a range of services, which they are explicitly empowered to do either *directly or through contracts with community agencies, including preschools.* 22 Pa. Code Section 14.155(a). Early intervention IEP teams must recommend that early intervention services be provided in the least restrictive environment with appropriate and necessary supplemental aids and services, and may elect to provide them in a typical preschool program with non-eligible young children. 22 PA. Code Section 14.155 (b)(1). Adherence to the principals of LRE is not at issue in this case as the parties agree that the student requires a typical preschool.

It is uncontroverted, however that the Intermediate Unit offered no setting in which the student could receive the other services offered restricted or least restrictive (e.g occupational therapy, intenerate teaching)¹. The Intermediate Unit argues that it was not required to provide a pre-school setting in that:

¹ There are alternative methods to placement in a regular private preschool to met LRE. These methods include providing opportunities for the participation (even part time) of pre-school children with disabilities

- a. The Intermediate Unit relied upon an OCDEL policy stating that “[i]f an IEP team determines that without a typical preschool experience at public expense a child cannot make meaningful educational progress on the IEP and be provided FAPE, IU EI program is responsible for making the placement in a typical community setting. However, without the issue of FAPE, IU is not necessarily responsible for honoring parental requests for purchasing slots or reimbursement for typical preschool” in making its decision not to offer any “placement” in which to deliver services to support its failure to offer a pre-school setting or to fund the setting the student currently attended. (NT 425 – 437; P. Ex. 60 at 4).

And;

- b. The student was already enrolled in a pre-school setting at the time the team decided that a typical preschool environment² was necessary in order to meet identified goals [NT 439].

Analysis of the Intermediate Units first position is swift and easy. The expert reports, IEP and NOREP all support the need for the student to be immersed within an early childhood environment which provides a framework and structure for supports and interventions to facilitate, integrate and generalize appropriate social reciprocity, social navigation, and social participation. [NT 345-372, 386-388, 443-460 464-474; P-10 Report of Baumgartel stating exposure to typically developing peers [Student]eficial; P16 NOREP indicating recommended educational placement

in other pre-school programs operated by public agencies (such as Head Start); (2) Placing children with disabilities in private school programs for non-disabled pre-school children or private school pre-school programs that integrate children with disabilities in regular elementary schools. 34 C.F.R. 300.552

² As the Intermediate Unit agreed to provide services within a pre-school placement in that the student was already enrolled and proceeded to use that setting to push in additional services, they, de facto, agreed to the appropriateness of the setting for the purposes of service provision. The objection to the pre-school lodged by the IU was not that the environment was inappropriate, but that they did not want to pay for it. In fact the record is devoid of any objection lodged to the pre-school setting prior to the institution of due process.

is an Early Childhood environment; P-16 IEP indicating student to participate in typical preschool program). A FAPE required a pre-school placement in this case.

The Intermediate Unit violated its own policy of providing a pre-school setting where “[i]f an IEP determines that without a typical preschool experience at public expense a child cannot make meaningful educational progress on an IEP and be provided a FAPE, the Intermediate Unit Early Intervention Program is responsible for making the placement in a typical community setting [P-60 at 4 NT 424-425]³.

The behavioral, social and communication needs of the student as identified by the evaluations and the team and the interventions and supports engineered to address them are inextricably interwoven with and dependent upon the stimulus, naturally occurring cues and naturalistic teaching opportunities occurring within the environment where services are delivered. Particularly with respect to the pervasive nature of the core deficits common to the diagnosis of autism, and most importantly with respect to the social skills interventions necessary to the future success of young children with this diagnosis, it is not possible to parse the “service” from the framework in which they are provided. The provision of supportive services should not be viewed in a vacuum⁴.

The fundamental core of each IEP goal promulgated by the team requires as a necessary component the availability of peers and activities promoting interaction with those peers. The need for adult supervision and facilitation (teachers) and a “place” to conduct these activities (classroom) is obvious. Taken together, these components equal a pre-school setting. Failure to provide the pre-school setting is a failure of FAPE.

When an educational agency fails to offer FAPE, it may be required to pay for services in a proper setting chosen by the parents and require the educational agency to preemptively remedy its’ clearly inappropriate offer or, in this case, lack thereof, by funding the eligible young child’s placement in his typical pre-school. In

³ An OCDEL Policy against funding private pre-school settings without built in exceptions for the provision of FAPE would be in contravention to IDEA. The Intermediate Unit’s policy of “not being in the business of funding pre-school placements” [NT 78, 81, 494] flies in the face of IDEA protections.

⁴ Although it is certainly reasonable and, in fact, quite common for services for a child to be clinic based only and deemed appropriate (e.g. Physical Therapy) this is not the situation at bar.

re: the Educational Assignment of Jonathan .S., Special Education Opinion No.1181 (2001), rev'd on other ground sub nom. Delaware County Intermediate Unit v. Jonathan S., 809 A. 2d 1051 (Pa. Commonw. Ct 2002). a school district can be required to fund a private pre-school program if necessary to meet a child's needs as defined in the IEP. Notes to 34C.F.R.300.522 (1992); Bd. of Education of LaGrange Sch. Dist. V Illinois State Bd. of Educ., 29 IDELR 369 (N.D. Ill. 1998) (a private pre-school is the LRE where no *10 aspects of the disability of a four old with Downs Syndrome required the "at-risk" program offered by the district which prescreened children for academic or language difficulties); See, e.g., *Office of Special Education Programs* ruling 22 IDELR 630, 663 (1995) (if placement team determines, based on child's IEP, that pre-schooler needs interaction with non-disabled peers, public agency is responsible for making available appropriate program in the least restrict environment at no cost to parents); and *Office of Special Education Programs* ruling 16 EHLR 739 (to meet LRE requirement, each pre-schooler's placement must be consistent with determination of the child's ability to be educated in regular education programs. In the instant case the student's ability to be educated in a typical pre-school program was specific finding of the team).

The Intermediate Unit's second argument that it was not required to fund a preschool placement because the student was currently enrolled in pre-school is equally unpersuasive. The Intermediate Unit argues that even if it can be determined that a pre-school setting is necessary to provide a FAPE, they are not required to provide one since the student was already enrolled and attending a pre-school program prior to any contact with the Intermediate Unit or determination of eligibility. The federally mandated provision of a FAPE does not provide for an analysis of "where the educational agency finds the child" taking into account all resources currently in place and then seek to "fill the gaps" as this argument seems to imply. A FAPE consists of "educational instruction specially designed to meet the unique needs of the handicapped child" supported by services necessary to permit the child to [Student]efit. In Bd. of Educ. V Rowley, 458 U.S. 176,181,203 (1982) at 188-89.

The Intermediate Unit's difficulty in reconciling these policies is likely derived from the fact that publically funded pre-school is not widely embraced⁵ in the Commonwealth of Pennsylvania (provision of publically funded pre-school services available in connection with Head Start services only.) as well as a perceived confusion regarding placement vs. services (social skills is not a service [NT 74]). In fact, the Pennsylvania Department of Education has explicitly stated "that there is currently no universal preschool in the Commonwealth of Pennsylvania." BEC Early Intervention and Private Schools 11 P.S. 875-304 (Jul. 1, 2003) also see Allyson B. v. Montgomery County Intermediate Unit, U.S. Dist. LEXIS 32159, *41-*42 (E.D. Pa 2010).

It is expected that with the advent of and concentration on early intervention services and the continued development of these programs and the wealth of positive outcome research now available regarding the indicia of success preschool experiences have for young children, the debate regarding pre-school as a part of public responsibility vs. parent responsibility to elect should diminish and publically available options for pre-school services will increase.

Finally, the traditional analysis regarding reimbursement for unilateral private placements is not warranted here in that the traditional analysis whether public funds may be used to fund private education is based upon the premise that the student cannot be adequately provided for in the district. See Burlington School Committee vs. Dept of Educ. 471 U.S. 359 (1985); Florence County School District vs. Carter 510 U.S. 7 (1983).

This is not a case in which an LEA has offered a placement, and the parents have nevertheless placed their child in a placement they prefer triggering an analysis of the appropriateness of each. This is a case in which IU has offered no placement at all, and Student's parents have filled the gap, thereby allowing the Student's IEP to be delivered as written⁶.

⁵ The fact that "pre-school" is currently offered in many forms rather than a uniform adhere to the usually envisioned structure of what constitutes public education complicates this issue – particularly as it may relate to an analysis of appropriateness.

⁶ The program at [Redacted Preschool] is appropriate. See footnote 2 regarding the imputed stipulation by the Intermediate Unit regarding the appropriateness of the pre-school program.

The non-secular nature of [REDACTED PRESCHOOL] does not render it improper, nor is it a bar in any way to a reimbursement remedy. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Christen G. v. Lower Merion School District*, 919 F. Supp. 793 (E.D. Pa. 1996); *In re the Educational Assignment of B.C., Special Education Opinion No. 1821 (2007)*. However, the Non-secular nature is to be considered when seeking public funds to support the private placement. Teachers testified that approximately 25% of the day is devoted to religious activities including assemblies of prayer. Although it certainly can be agreed that a given activity, while carrying a religious “theme” can be geared to satisfy curricular requirements or state standards and result in education [Student]’s benefit⁷, a religious focus is a preference asserted by the parent. Even in light of the failure of the Intermediate Unit’s failure to provide any options for placement, the ultimate and unilateral choice by the parent should not be asserted at public expense to the extent the environment includes components that are not directly linked to the needs established by the IEP team (e.g. enrichment activities or secular activities)⁸.

In addition to reimbursement for the Student’s tuition at [Redacted Preschool] since February 15 of 2009, the Parents are also entitled to reimbursement for the costs they have incurred in providing a one to one shadow for the Student at [Redacted Preschool] from February 15, 2009. The evidence is uncontradicted that the Student required and requires one on one assistance to enable him to participate appropriately in a typical school year preschool program. [NT 600, 145-146; P-39; P-47]

Finally in light of the inordinate and unjustified delay in this matter coupled with the numerous procedural violations⁹ and failure of this agency to operate

⁷ In fact following the teachers testimony regarding the average amount of time spent in a day on religious activities, the director of the program, who was present for all of the teachers testimony sought to “rehabilitate the teacher’s testimony in linking religious activities to PA Standards. It is notable that the teacher did not offered testimony regarding how she links religious activity to curricular requirements.

⁸ It is noted that the Intermediate Unit offered no evidence regarding the reasonableness of the cost of the pre-school chosen by the parent.

⁹ The long string of procedural violations by the Intermediate Unit (e.g. failure to provide notices; failure to comply with statutory deadlines) in addition to a denial of a FAPE amounting to a deprivation, constitutes an independent and coextensive basis for the provision of a remedy. *See In re the Educational Assignment*

within its own protocol for evaluation of children suspected to fall within the autism spectrum, the equities in this matter are entirely on the Parents' side.

Reimbursement will be awarded as calculated in the Order for reimbursement of tuition as well as the cost of one on one supports.

Compensatory Education as a Remedy

Compensatory education is an appropriate remedy where a school district knows or should know that a child's educational program is not appropriate or that the student is receiving only trivial educational [Student]efit, and the district fails to remedy the problem. The period of compensatory education granted should be equal to the period of deprivation, excluding the period of time reasonably required for the district to act accordingly. *Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Regional School District, 81 F. 3d 389 (3rd Cir. 1996).*

However a technical violations, of which there were many in this case, alone do not entitle a student to compensatory education. A mere procedural glitch or technical violation of the IEP is insufficient. A violation must amount to a substantive effect on the child's ability to receive FAPE in order to hold the district responsible for any procedural glitches, such as the instant issue of difficulty with delivering related services.

20 U.S.C. 1415(f)(3)(E)(ii), 34 C.F.R. 300.513(2) provides:

(2) In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive FAPE only if the procedural inadequacies —

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational [Student]efit.

of J.W., Special Education Opinion No. 1723 (2006). (Procedural violations yield entitlement to compensatory education).

Having been found eligible for special education, the student is entitled by federal law, the Individuals with Disabilities Education Act (IDEA) as reauthorized by Congress December 2004, 20 U.S.C. Section 600 et seq. and Pennsylvania Special Education Regulations at 22 PA Code § 14 et seq. to receive a Free Appropriate Public Education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

As previously noted, a student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. 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). Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) 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 IEP must afford the child with special needs an education that would confer meaningful [Student] benefit. The court in Polk held that educational benefit "must be gauged in relation to the child's potential." Districts need not provide the optimal level of service, maximize a child's opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman, supra. In creating a legally appropriate IEP, a school district is not required to provide an optimal program, nor is it required to "close the gap," either between the child's performance and his untapped potential, or between his performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004); See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)

If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a

“Free Appropriate Public Education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993). (See also Board of Education v. Murphyshoro v. Illinois Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994)) (Under the IDEA a District must follow the procedures set forth in the act, and develop an IEP through procedures reasonably calculated to enable the child to receive educational [Student]efits. More recently, the Eastern District Court of Pennsylvania ruled, “Districts need not provide the optimal level of services, or even a level that would confer additional [Student]efits, since the IEP required by the IDEA represents only a basic floor of opportunity.” S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing Carlisle, 62 F.3d at 534, citations omitted. . See also, Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008).

The starting point for the determination of the appropriateness of an offer of a FAPE is the initial evaluation from which the needs of a student are identified. In order for an evaluation to be determined to be appropriate, it must meet the requirements of 34 CFR § 300.532. More specifically, the Evaluation Report (ER) should: 1) utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the student, including information provided by the parents; 2) assess the student in all areas related to the suspected disability; 3) be sufficiently comprehensive to identify all of the student’s special education and related services needs; and 4) utilize technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors. See In Re the Educational Assignment of L.-M. B., Special Educ. Op. No. 1795 (2007).

The pertinent sections of the federal special education regulations, 34 C.F.R. §§300.304 through 300.311 require:

- that initial evaluations be conducted within sixty (60) calendar days; 34 C.F.R. §300.301(1)(i); See also 22 Pa. Code §14.153(4)(i);
- that a child must be assessed in all areas related to the suspected disability, and the evaluation must be sufficiently comprehensive to identify all of the

child's special education and related services needs; 34 CFR §300.304(c)(4); 22 Pa. Code Section 14.153(2).

- that the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; 34 C.F.R. §300.304(c)(6); see also 22 Pa. Code Section 14.153(2).
- that the assessment tools and strategies provide relevant information that directly assists persons in determining the educational needs of the child; 34 CFR §300.304(c)(7); 22 Pa. Code Section 14,153(3).
- that the evaluation use "a variety of tools and strategies" to gather relevant functional information, including information provided by the parent, that may assist in developing a program for a preschool child enabling the child "to participate in appropriate activities"; 34 C.F.R. §300.304 (b)(1) and (b)(1)(ii); and
- that evaluations must be administered "in the form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally..."; 34 C.F.R. §300.304(c)(1)(ii).

The Intermediate Unit evaluated the Student inadequately and late. It failed to assess him for nearly a year in critical areas in which it was aware that he likely had special education needs. The evaluations conducted by the IU failed to include any observations in the students natural environments of home or school and failed to even compile interview information from teachers. Even though the student was suspected of an autism spectrum disorder, diagnostic instruments specifically geared to this disability were not used. In fact, topography of the evaluations failed each of the criteria enumerated above. (NT 152, 154; P-4; P-5) The IU failed to follow its own procedures and protocols in assigning him a case manager, conducting a screening and conducting a speech evaluation as part of his evaluation

as a student with autism. It delayed a behavioral evaluation/ FBA until the time of the school year precluded its proper provision. *See In re the Educational Assignment of L.B., Special Education Opinion No. 1145, p.5.*

The Intermediate Unit failed to provide legally required prior written notice on a timely basis or sometimes at all, including but not limited to Requests for Permission to Evaluate, procedural safeguards notices, invitations to IEP meetings, evaluation and reevaluation reports.

The Intermediate Unit failed timely to provide IEP-required services and failed to ensure that those services were delivered consistently. It failed to offer the Student a free placement capable of meeting his needs. It failed to have available a continuum of services that includes opportunities to integrate with typical peers.

Nothing in the record points to the Parent seeking services beyond those required to meet the minimum threshold of a FAPE. The record establishes the opposite result. Even the bare minimal services took an unacceptable amount of time to put in place. Once in place, services were not assured or occurred at a time where no meaningful benefit could have possibly been derived. (NT 503-510)

An LEA's failure to provide a child with FAPE entitles that child to a remedy, which may be compensatory education. The determination of an appropriate equitable remedy for violations of FAPE is left to the sound discretion of the Hearing Officer and may, in an appropriate case, include both reimbursement and compensatory education, so long as those remedies are not overlapping. *See In Re the Educational Assignment of C.H., Special Education Opinion No. 1179 (2001)*, (awarding compensatory education and tuition reimbursement for inappropriate evaluation, procedural violations and defective IEP).

Following a determination that there was a deprivation of FAPE, calculation of the claim for compensatory education to remediate that deprivation depends upon a determination of the time the IU was required to begin services and the date upon which, if ever, appropriate services begin. Compensatory education is an appropriate remedy for the gap period or entire period of failure to provide appropriate services. *Alex K v. Wissahickon Sch. Dist.*, 2004 U.S. Dist. LEXIS 1994, *25 n. 6 (E.D.Pa. 2004) *citing M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d. Cir. 1996)

The regulations require, if the Parents request an evaluation orally, the Intermediate Unit has ten (10) days to issue a PTE and sixty (60) days after receipt of the PTE to complete the Evaluation Report and provide it to the Parents. 22 Pa. Code § 14.123(c); 33 C.F.R. §300.301(c)(1)(i); 22 Pa. Code § 14.153(4)(i). The Intermediate Unit then, unless the requirement is waived, must wait at least ten (10) days to hold an IEP meeting to offer an IEP based upon the results of the evaluation. 22 Pa. Code § 14.131(a)(1). The Intermediate Unit then has fourteen (14) days from the completion of the IEP to implement the IEP. 22 Pa. Code § 14.154(d)(1). Thus, ninety four (94) days after the initial evaluation request, the IU's duty to provide services begins. Ninety-four (94) days from November 13, 2009, the date the Permission to Evaluate was returned, is February 15, 2009.

Therefore, the appropriate measure of the compensatory education due to the student is the hours of service required under his October 6, 2009 IEP for every week that he attended school from February 15, 2009 through the date upon which the services proposed in the September 1, 2009 actually began to be consistently implemented, less the number of hours actually received or paid for by the Intermediate Unit for each of the services enumerated in the September 1, 2009 IEP. Compensatory Education is so awarded.

CREDIBILITY OF WITNESSES

Hearing Officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing. Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996). Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience.

Hearing Officers have the plenary responsibility to make "express qualitative determinations regarding the relative credibility and persuasiveness of the witness".

*Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIZ 21639 at *28 (2003).* This is a particularly important function, as in many cases the Hearing Officer level is the only forum in which the witness will be appearing in person.

CONCLUSION

The Parent has met the burden of proof establishing a denial of a FAPE on substantive and procedural grounds. FAPE was denied as a matter of law in the Intermediate Unit's failure to comply with statutory guidelines governing timely evaluation and the provision of a FAPE and therefore the Parent is entitled to reimbursement for privately placed services as well as compensatory education.

Parent is also entitled to reimbursement for tuition for the private pre-school. While the issue of typical pre-school as "service" or placement is challenging, the nexus between the opportunity to participate on some level in some sort of pre-school setting which includes typical peers and a FAPE, on the facts of this particular case is clear.

Finally although the equities would appear to weigh in favor of the parent and the significant delay in evaluating and providing services to this child egregious – particularly in light of the well settled common known research in favor of swift and intensive early intervention for young children with autism the law is well settled that there is no obligation to reimburse for a private evaluation, absent preexisting a disagreement with a district issued evaluation.

Witnesses presented on behalf of the parent's claim offered credible testimony demonstrating firsthand knowledge of the facts. Witnesses presented on behalf of the Intermediate Unit appeared to have difficulty reconciling disparate facts or were at a loss to explain inconsistencies, delays, omissions.

ORDER

The student was denied a FAPE by the Intermediate Unit's:

- Failure to timely and adequately evaluate.

- Failure to comprehensively identify need and promulgate and implement appropriate services
- Failure to provide options for a setting within which adequate services and support could integrate and facilitate meaningful progress with typical peers in the LRE.

Therefore, based on the foregoing denial of a FAPE:

1. Parents' request for tuition reimbursement for the 2008-2009 school year from January 2009 through August 2009 and the 2009-2010 school years for the Parents' placement of Student at [Redacted Preschool] is **GRANTED** in an amount equal to the total amount of tuition paid less twenty-five-percent (25%) and further reduced by the amount paid for enrichment activities excluding the amount paid for lunch bunch.
2. Parents' request for reimbursement for the evaluations conducted by Susan Cangialosi Moses, OTR/L, Joyce Sapin, M.D. and Anna Baumgaerte, M.D., FAAP is **DENIED**.
3. Parents' request for reimbursement for the occupational therapy services provided is **GRANTED**. Reimbursement shall be for all costs incurred in obtaining occupational therapy services from February 15, 2009 through the date on which the Intermediate Unit began consistently providing two hours per week of occupational therapy services.
4. Parents' request for reimbursement for the costs incurred by [Redacted Preschool] in providing Student for PCA services for the 2008-2009 school year is **GRANTED** in the amount of One Thousand Five Hundred and

Seventy Two Dollars (\$1,572.00). The award shall be paid directly to [Redacted Preschool].

5. Parents' request for compensatory education is **GRANTED** and Student is awarded the following compensatory education to be provided by the Intermediate Unit or by a provider of the Parents' choosing at a rate not to exceed the actual cost that would be incurred by the Intermediate Unit to provide the services directly, in the following amounts, less any hours actually provided or paid, for the period beginning February 15, 2009 through the time the services provided for in the September 1, 2009 IEP were actually consistently provided:
 - a. One sixty minute group session and one thirty minute individual session of speech and language therapy per week,
 - b. Two sixty minute sessions of itinerant teacher support per month
 - c. Twenty Four hours per week of personal care assistant support to follow [REDACTED PRESCHOOL]'s schedule,
 - d. Twelve hours per month of behavior supervision;
 - e. Two forty-five minute sessions of occupational therapy per week and thirty minute consult per week;
 - f. Ten hours per week of home behavior programming;
 - g. Ninety minutes per month for behavior team meetings.

Dated: May 8, 2010

Gloria M. Satriale

Gloria M. Satriale, Esq.,
Special Education Hearing Officer