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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: C.M.

Date of Birth: [redacted]

Dates of Hearing:

October 3, 2011

November 15, 2011

November 30, 2011

CLOSED HEARING

ODR File No. 2128/1112KE

Parties to the Hearing:

Representative:

Parent

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Date Record Closed:

December 21, 2011

Date of Decision:

January 3, 2012

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

C.M. (hereafter Child)¹ is an eligible young child who resides within the geographic area served by the Montgomery County Intermediate Unit (IU) and is eligible for special education early intervention services pursuant to the Individuals with Disabilities Education Act (IDEA) on the basis of autism.² Child's Parent filed a due process complaint against the IU in July 2011, asserting that it denied Child a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504),³ and the federal and state regulations implementing both statutes, in its evaluation of Child and the proposed educational program as Child transitioned to the IU.

The case proceeded to a due process hearing convening over three sessions, at which the parties presented evidence in support of their respective positions. The Parent sought an independent educational evaluation, compensatory education, and development of an appropriate educational program. The IU disagreed that its evaluation and program were deficient, with the exception of certain services which it admitted were not provided and remain due and owing.

For the reasons set forth below, I find in favor of the Parent.

ISSUES

1. Whether the Parent and Child are entitled to an Independent Educational Evaluation at public expense;
2. Whether the Individualized Education Program developed by the IU was appropriate for Child pursuant to the IDEA;
3. Whether the IU has violated Section 504;
4. Whether Child is entitled to compensatory education and, if so, in what amount?

FINDINGS OF FACT

1. Child is an eligible young child who is eligible for special education services by reason of Autism. (Stipulation, Notes of Testimony (N.T.) 38-40; *see also* 20 U.S.C. § 1412(A)(1); 11 P.S. § 875-103; 22 Pa. Code §§ 14.101, 14.151-158)

¹ In the interest of confidentiality and privacy, Child's name and gender, as well as certain other potentially identifying information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400 *et seq.*

³ 29 U.S.C. § 794.

2. Child's Parent first became concerned with Child's developmental delay, particularly with language, when Child was approximately fifteen months old. Child was screened for early intervention services shortly thereafter. (N.T. 179-80; Parent Exhibit (P) 4 pp. 3-7)
3. An initial Individualized Family Service Plan (IFSP) was developed in September 2009 by the responsible agency and Child began receiving early intervention services at that time. Child was provided with occupational therapy, behavior support services, special instruction, and Applied Behavior Analysis (ABA) therapy. (N.T. 180-81, 185-86, 213-14; Intermediate Unit Exhibit (IU) 2, IU 3)
4. Child was first diagnosed with Autism by a developmental pediatrician in June 2010. Based upon parent report, this pediatrician noted Child's lack of communication, lack of interest in other children, limited eye contact, self-stimulatory behavior, limited food repertoire and sensitivity to food textures, sensory integration difficulties, and global developmental delays. (N.T. 240-43, 385; P 5)
5. The developmental pediatrician recommended that Child be provided with 25 hours per week of systematic educational instruction; in the alternative if those services were not available, she suggested that 3 hours of ABA therapy and 1 hour of occupational therapy per week, in addition to consultation with a Board Certified Behavior Analyst (BCBA), would be appropriate. She also recommended addressing Child's feeding challenges through its behavioral and sensory aspects and a sensory integration evaluation. (P 5)
6. Other recommendations in the June 2010 evaluation by the developmental pediatrician included wraparound services in the future for behavioral and emotional support; formal hearing testing; genetic testing; consultation with a pediatric allergist; and behaviorally-oriented feeding programs. (P 5)
7. The Parent has not yet been able to follow up on feeding program recommendations of the developmental pediatrician because of significant scheduling concerns. (N.T. 391-92)
8. The agency responsible for the initial provision of Child's early intervention services issued an annual re-evaluation report in September 2010. The report noted that Child did not have functional communication, was not babbling or pointing, and was a very picky eater. Child was at that time attending a preschool/daycare program full time. The report provided information on Child's development in the cognitive, communication, social & emotional, physical, and adaptive domains. Child's sensory seeking behaviors and difficulty with sensory processing were also noted. (IU 4)
9. The IU first became aware of Child in September 2010 when the Parent submitted a parent input form and the initial provider transferred its file to the IU. The IU is not responsible for providing early intervention services to children younger than three years of age, but takes over the responsibility when children turn age three. (N.T. 58, 98, 188-89, 397-98; P 4 pp. 18, 20-33, 41, P 10 p. 60; IU 7, IU 8; *see also* 11 P.S. §§ 875-101 - 875.503; 22 Pa. Code §§ 14.101 - 163; 55 Pa. Code §§ 4226.1 - 4226.103)

10. The Parent listed concerns including that Child was a picky eater with new foods and textures. She also noted concerns related to gazing and spinning; understanding commands; sitting still; short attention span; absence of speech and any form of communication; potty training; sensitivity to loud noises and touch; repetitive behavior; and mouthing objects. The Parent provided the report of the developmental pediatrician from June 2010 to the IU around this time. (N.T. 190-94, 196-211, 244, 386, 440-41; P 4 pp. 27-33, 44; IU 7, IU 8)
11. Input from Child's then-current teacher noted concerns with almost all areas of development (cognitive, social/emotional, communication, fine motor, and self-help), with gross motor skills the only exception. (P 4 pp. 38-39; IU 9)
12. A conference call was first held in October 2010 to discuss Child's transition to the IU early intervention program. Child's Parent thereafter called the IU as instructed to make arrangements for an evaluation prior to Child's transition. (N.T. 214-15, 217-19, 396-97; P 4 pp. 8, 36-37; IU 5)
13. Prior to Child's transition to the IU program, the case manager reviewed Child's IFSP and the evaluation report from the initial provider. (N.T. 56-57)
14. The IU attempted to schedule an evaluation of Child in January and February 2011, but the Parent was not able to attend on the dates scheduled. (N.T. 96-97, 99-100, 111-12, 152-53, 218-19, 392-93; IU 11)
15. A second transition meeting with the IU and the initial provider of Child's early intervention services was held by conference call in February 2011. (N.T. 50-52, 59, 219)
16. The IU became responsible for Child's early intervention services upon Child's third birthday in March 2011. The March 31, 2011 Individual Family Service Plan (IFSP) was the program implemented by the IU at that time. After Child's third birthday, very limited early intervention services were provided for approximately two months. (N.T. 91-92, 94-95, 221, 237, 333-34, 378-79, 471-72, 546-47; P 3 p. 2, P 4 pp. 40-45, P 10 pp. 40-61, P 11; IU 13, IU 14)
17. The March 31, 2011 IFSP addressed outcomes/goals related to using gestures to indicate food choices; attending to play and eating activities; and using 5 sign language signs to communicate needs. Early intervention services set forth in this IFSP as of that date related to occupational therapy (2 hours/week), behavior support (1.5 hours/week), and a personal care assistant (7.5 hours/week). (P 10 pp. 40-61; IU 14)
18. Child was evaluated by the IU on April 5, 2011. (N.T. 122-23, 152, 221-22, 393; P 8; IU 15)
19. The IU did not issue a Permission to Evaluate form prior to the April 5, 2011 evaluation, as it routinely gives them to parents at the time an evaluation is conducted. The Parent

agreed to the assessments proposed. The entire evaluation took approximately one hour. (N.T. 96, 111-12, 221-24, 399-401, 435-36; P 8; IU 15)

20. Child did not sit still or attend during the evaluation for any period of time, and instead sought stimulation from the environment. The Parent explained that Child's behavior during the evaluation was not typical, but there was no suggestion by the IU that an additional observation or evaluation be conducted in the home or other setting. (N.T. 145-49, 245-48)
21. A hearing test was attempted by the IU but could not be completed because Child could not tolerate this assessment. Additional audiological evaluation was recommended. (N.T. 224-25; P 8 p. 4)
22. On May 19, 2011, the Parent sent an email message from a friend's email account to the IU, stating that Child was not receiving early intervention services, and requesting the IU ER and a draft Individualized Education Program (IEP). The IU case manager responded by telephoning the Parent and leaving a voicemail message, because she did not know the person whose email account was being used. The Parent did not have internet access or an email account at the time. (N.T. 60-62, 104-05, 115, 234-38, 405, 423-24; P 3 pp. 1-2; IU 18)
23. The IU sent its Evaluation Report (ER) to the Parent on May 19, 2011. The Family Information appears to be based solely on a form the Parent completed on October 17, 2010, noting the family's routines, Child's difficulty with food that is new or of different textures, and the Parent's main concerns. Hearing was not noted as a concern based upon a 2008 screening/assessment; and vision was not noted as a concern during the April 5, 2011 evaluation. (P 9 (and *compared with* P 4 pp. 20-33); IU 17)
24. In its evaluation of Child's developmental domains, the ER reported the results of the Battelle Developmental Inventory, Second Edition (BDI-2), which is a "play-based, developmental inventory that assesses several skill sets [including] [a]daptive behavior, social-personal skills, communication skills, motor skills, and cognitive skills." (P 9 p. 8)⁴ Results of the BDI-2 reported in the ER reflected scores in the mild developmental delayed range, although the ER also suggested that Child's score was not a true reflection of Child's cognitive potential. (P 9)
25. In the report on the BDI-2 in the area of communication development, the ER noted that Child did not sign independently or use any other form of communication. In social and emotional development, Child's score was in the average range although needs in these areas were noted. (P 9)
26. The IU psychologist also administered the Childhood Autism Rating Scale – Second Edition (CARS-2) utilizing Parent reports, and she concurred with the diagnosis on the autism spectrum (Pervasive Developmental Delay, or PDD). (P 9)

⁴ See also Jerome M. Sattler, *Assessment of Children, Cognitive Foundations* 317-19 (5th ed. 2008).

27. The occupational therapist assessed Child's sensory processing abilities through a Sensory Processing Measure – Preschool (SPM-P), which is a questionnaire given to a parent and teacher. She also assessed Child's fine motor development using the Peabody Developmental Motor Scales-Second Edition (PDMS-2), as well as Student's adaptive and self-care skills using the Developmental Assessment of Young Children (DAYC). The occupational therapist did not observe Child outside of the evaluation setting. (N.T. 127-35, 146-49, 154-55, 225-26, 403; P 8 pp. 6-8; P 9)
28. Results of the SPM-P reflected difficulties in all areas in the parent questionnaire and in most areas in the teacher questionnaire (scores more than 1.5 standard deviations below the mean) in sensory processing. (P 9)
29. On the PDMS-2, Child demonstrated needs in fine motor skills including visual-motor integration. (P 9)
30. The results of the DAYC reflected weaknesses (scores more than 1.5 standard deviations below the mean) in the area of self-care and adaptive skills. (P 9)
31. The occupational therapist recognized that Child has a very limited food repertoire, but because Child eats a variety of foods with different textures, she did not believe that to be related to tactile sensitivity. Based on the Parent's experience and her discussions with the pediatrician, she does believe this concern is related to Child's sensory sensitivity. (N.T. 136-41, 149-50, 156-57, 160, 277-79, 288-91, 425-27)
32. In adaptive development, the IU included an informal functional behavioral assessment (FBA) which targeted "yelling, falling to the floor and kicking [] feet in the air." (P 9 pp. 12-15) This behavior was described as occurring when Child did not have a snack or take a nap at school, and then was asked to perform a non-preferred task or was denied a preferred item or activity. The ER recommended a full FBA if Child did not respond to interventions to address this behavior. (P 9)
33. Recommendations in the ER included addressing language skills, pre-academic skills, and socialization; exploration of total communication; development of fine-motor and visual-motor integration skills, as well as attention and organization skills; and sensory integration. The ER also made suggestions on community and home activities, referral to a social worker, wrap-around behavioral support services, and medical services to address Child's food repertoire.⁵ (P 9).

⁵ The psychologist who conducted the evaluation of Child was apparently no longer an employee of the IU by the time of, and did not testify at, the due process hearing. In order to glean some understanding of the psychologist's recommendation in that ER to address Child's feeding concerns "medically" (P 9 p. 22), this hearing officer noted the psychologist's citation to a presentation at a recent Penn State National Autism Conference in 2010, "Eating problems in autism spectrum disorders: What they are and what to do." (Retrieved from <http://www.outreach.psu.edu/programs/autism/files/session37-46.pdf>, last visited December 29, 2011) While the content of this presentation and website were not directly referenced during the hearing, it merits mention that the information provided therein appeared to this hearing officer to be a relevant and helpful resource, although it did not necessarily support the conclusion that Child's

34. Beginning in April 2011, Child was provided with approximately six hours per month of behavioral consultative services, and a personal care assistant worked with Child for 7.5 hours per week. The Board Certified Behavior Analyst (BCBA) who provided consultation and oversaw the personal care assistants conducted informal evaluations of Child through observation and direct interaction, but did not use any formal assessment tools or instruments. (N.T. 332-42, 348-49, 365-66, 372-73, 377-78, 412-15, 467, 476-78, 480-81, 514-15; P 11; IU 14)
35. The behavioral services provided beginning in April 2011 included beginning communication strategies, as well as early learning skills such as imitation and attending. The behavioral therapists working with Child acknowledged the March 2011 IFSP but concluded that the goals in that document were no longer appropriate for Child in the classroom setting. (N.T. 479-97, 499-501, 554-55; P 11 pp. 57-63, P 14)
36. There was no formal progress monitoring or reporting on the behavioral services provided beginning in April 2011 because Child did not have an IEP. However, the BCBA's took data on Child's acquisition of early PECS and imitation skills. The IU reported progress to the Parent through informal communication. (N.T. 462, 472-97, 504-05, 508-09, 552-53; P 11, P 14)
37. In May 2011, the BCBA's who were working with Child sent proposed IEP goals to the IU, which were included in the IU's proposed IEP. (Stipulation, N.T. 591-92; P 10 pp. 18-24)
38. Occupational therapy services resumed on or about May 20, 2011, for one hour two times per week, and ended again on June 30, 2011. The IU arranged for another occupational therapist, but the Parent did not agree to the chosen provider because Child has difficulty interacting with people of that gender, and this person also was, in the Parent's estimation, difficult to understand. (N.T. 227-30, 419-22, 433; P 3 p. 6; P 13)
39. At the time the IU case manager sent the ER to the Parent in May 2011, she also sent a letter asking for the Parent's availability for an IEP meeting on three dates in June 2011. The Parent did not receive this letter until very close to the first suggested date, and her work schedule could not accommodate any of the three dates. (N.T. 69-70, 255, 404-05; P 9 p. 1; IU 17)
40. In an email message on May 24, 2011, again sent from the friend's email account, the Parent expressed disagreement with portions of the IU's ER, and requested an independent educational evaluation (IEE). The IU case manager responded by telephoning the Parent several days later and leaving a voicemail message. (N.T. 65-68, 238-39, 281-83, 401-02, 405-06; P 3 pp. 6-10, 13; IU 20)

food sensitivity is a medical issue. (P 9) In any event, this hearing officer did not place evidentiary weight on the content of this cited reference in evaluating the ER, but merely notes this brief review of it in writing this decision.

41. The Parent's concerns with the IU ER included information regarding Child's health history and developmental skills; communication needs; the occupational therapy evaluation; the functional behavioral assessment; and the overall comprehensive nature of the ER. (P 3 pp. 6-10)
42. By another email message from the friend's account on June 1, 2011, the Parent acknowledged the IU case manager's voicemail message inquiring about scheduling an IEP meeting, and asked that she be provided with three proposed dates. She also asked for a response from the IU on her IEE request. (P 3 p. 13)
43. Aside from mentioning the Parent's request for an IEE in a voicemail message, the IU did not advise her of its decision, or otherwise address her concerns with the ER. (N.T. 83, 118, 175-77, 575-76; P 3 p. 13)
44. The IU scheduled the IEP meeting for June 17, 2011 after receiving no response from the Parent on her availability. (N.T. 102-03; P 10 pp. 67-68; IU 21)
45. An IEP meeting was held on June 17, 2011, attended only by the IU case manager and a regular education teacher. The Parent did not attend either in person or by telephone, and was not provided with an invitation to attend a meeting on that date. (N.T. 71-74, 78-79, 83-84, 255-57, 279-80)
46. The IEP developed at the June 17, 2011 meeting reiterated most of the information from the ER. Outcomes/Goals addressed requesting items or events using icons/picture exchange; matching labels with items; imitation of one-step movements; responding to one-step directions; completing tabletop tasks; attending to group-based instruction; participation in parallel play with a peer; and occupational therapy goals relating to grasping and using marking and eating utensils, improving visual-motor skills, and sensory input to support Child's involvement in all environments. Early intervention services specified in this IEP were behavior support (12 hours/month), speech therapy (1 hour/month), occupational therapy (1.5 hours/week), specialized instruction (1 hour/month), and a personal care assistant (4.5 hours/day) who would implement the ABA services through a Verbal Behavior program overseen by a BCBA. (P 10 pp. 5-39; *see also* N.T. 107-09, 116-17, 558-59)
47. The IU's proposed IEP increased the amount of behavior services from 1.5 to 3 hours/week for a behavior support consultant, and from 7.5 hours to 22.5 hours/week for the personal care assistant. (P 10 p. 33 *compared with* IU 14)
48. The IU issued a Notice of Recommended Educational Placement (NOREP) on June 29, 2011, proposing that services be provided in accordance with an enclosed IEP. The IU also recommended that a speech/language evaluation be conducted over the summer of 2011. (N.T. 107; P 10 pp. 1-4)
49. The Parent received the proposed NOREP and IEP sometime after July 8, 2011. Included in the documents sent to her was a request for a signature on the attendance page of the

IEP, which is consistent with the IU policy if a parent does not attend an IEP meeting. (N.T. 75-79; P 10 pp. 67-71)

50. The Parent did not approve the NOREP, rejecting it on July 18, 2011 because she did not believe the proposal was based upon an appropriate and comprehensive evaluation including speech/language needs, and because she was not involved in its development. (N.T. 257-61, 410-11; P 10 pp. 63-66)
51. In May or June 2011, Child was introduced to a basic picture communication system similar to and using principles of the beginning stages of the Picture Exchange Communication System (PECS). (N.T. 231-34, 309-11, 353-59, 368-69, 373-75, 377-78, 479; P 11, P 13 pp. 14-15)
52. The Parent has not been trained with PECS but would like to be, which would help Child generalize those skills across environments. (N.T. 233-34, 286, 308-09, 494-95)
53. The Parent filed a Due Process Complaint on July 20, 2011. (IU 1)
54. The parties did meet during the course of the due process hearing and agreed upon a pendent IEP on or about November 15, 2011. (N.T. 515; Parent's closing pp. 8, 18-19)
55. The following exhibits were admitted into evidence:

P 1, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18

IU 1, 2, 4, 5, 7, 8, 9, 11, 13, 14, 15, 17, 18, 20, 21

Hearing Officer Exhibit (HO) 1

(N.T. 590-95)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁶ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which

⁶ The burden of production, “i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent on matters important to the issues presented.

IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all children who qualify for special education services. 20 U.S.C. §1412. With limited exception not applicable here, the IDEA requires that children with disabilities between the ages of 3 and 21, inclusive, be provided with FAPE. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. §§ 300.101(1)(a) and (b). In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies meet the obligation of providing FAPE to eligible children and students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). Most critically, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. IEPs for eligible children in Pennsylvania expressly include this requirement. 22 Pa. Code § 14.154(a). Nevertheless, it has long been recognized that “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The Parent contends that the IU denied FAPE to Child because (1) its evaluation of Child was not timely or appropriate; and (2) its IEP was not appropriate since it did not address self-help skills, speech/language needs, and services in the home. She seeks an IEE at public expense, compensatory education, and declaration that the IU has discriminated against Child under Section 504. The IU, for its part, denies all of the Parent’s claims except for any services which should have been but were not provided under the pendent IFSP.

The IU Evaluation

In conducting an evaluation, a local education agency must ensure that it uses procedures to determine whether the child has a disability and to determine the child's educational needs. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c)(2). The IDEA regulations provide further guidance for conducting the evaluation or re-evaluation.

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the Parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. § 304(b); *see also* 20 U.S.C. § 1414(b)(2). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Assessments must be administered in a manner which is nondiscriminatory, in a form designed to yield accurate information, and for the purpose for which the assessments were designed, by a trained professional, and in accordance with the test maker's instructions. 20 U.S.C. § 1414(b)(3); 34 C.F.R. § 300.304(c)(1). Additionally, 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,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Further, the team must ensure that it considers existing information about the child through the following.

(a) *Review of existing evaluation data.*

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—

- (1) Review existing evaluation data on the child, including—
 - (i) Evaluations and information provided by the Parents of the child;
 - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child’s Parents, identify what additional data, if any, are needed to determine—
 - (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
 - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
 - (ii) The present levels of academic achievement and related developmental needs of the child;
 - (iii)(A) Whether the child needs special education and related services; or
 - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

34 C.F.R. § 305(a); *see also* 20 U.S.C. § 1414(c)(1).

Pennsylvania regulations also require that evaluations of eligible young children be sufficient in scope and depth to investigate information relevant to the young child’s suspected disability, including physical development, cognitive and sensory development, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family’s perceived strengths and needs which will enhance the child’s development.

22 Pa. Code § 14.153(2).

When parents disagree with a school district’s educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); *see also* 20 U.S.C. § 1415(b)(1). When a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). The local education agency must respond “without unnecessary delay.” *Id.*

For several reasons, this hearing officer finds preponderant evidence that the IU evaluation was not sufficiently comprehensive and that the Parent and Child are entitled to an

IEE at public expense.⁷ The first reason is that the family's input was apparently limited to information from October 2010, some six months prior to the date of its evaluation (Finding of Fact (FF) 28), which is a significant amount of time lapse for a child at this age. Moreover, the records which the IU had in its possession suggested that Child's limited food repertoire was sensory in nature, and further included information demonstrating that this characteristic did impact Child during the educational portion of the day. (FF 4, 5, 10; P 8 p. 7) Indeed, the informal FBA conducted as part of the IU evaluation specifically targeted Child's problematic behavior when Child did not have a snack (and a nap) in the preschool environment. (FF 32) Yet, this aspect of Child's development was not explored beyond summarily concluding that this concern was medical rather than educational and, thus, need not be addressed. (N.T. 159, 566-69) The fact that a particular educational service may be "medical" in nature, however, is not determinative, since related services do include "medical services for diagnostic or evaluation purposes." 34 C.F.R. § 300.34(a); *see also* 20 U.S.C. § 1401(26)(a). Even the IU Supervisor of Special Education for the preschool program acknowledged that the determination of whether Child's feeding concerns could be addressed behaviorally should be a team decision made with parental input. (N.T. 568-69) It is also noteworthy that there was no observation of Child outside of the evaluation to make an informed decision on the impact this concern had on Child's need for early intervention services. (FF 20)

Additionally, while the IU did appropriately suggest that a speech and language evaluation was necessary and that speech/language therapy should be provided, it is unclear why this possibility was not considered until the date that the Parent and Child appeared for the IU initial evaluation, thereby delaying this assessment until sometime after the IU ER issued. Not only was Child's lack of communication clearly a main concern of the Parent as well as the initial provider of services, Child's transition plan specifically recommended a speech/language evaluation. (FF 8, 10, 11, 17; P 4 p. 37) The failure to include this assessment in the initial ER reflects an evaluation which did not explore all areas of suspected disability, including Child's communication needs. 34 C.F.R. § 304(c)(4).

This hearing officer also concludes that the IU did not respond to the Parent's request for an IEE within a reasonable time. Although it is clear that the IU and Parent experienced difficulties in communicating, the failure to respond in any meaningful way to her request, or to otherwise address her comments about its ER, for a period in excess of 60 days, cannot be overlooked. (FF 43) The Parent here was undoubtedly left with uncertainty over whether and how to arrange for an independent evaluation or what other steps might be available. For all of these reasons, the Parent and Child will be awarded an IEE at public expense which shall comprehensively assess Child in all areas of suspected disability and shall include speech/language and occupational therapy evaluations.⁸

⁷ In considering this claim, it should be noted that this hearing officer recognizes that the IU's delay in evaluating Child until a short time after the obligation to provide services fell upon it may not be attributed to the IU.

⁸ The IEP team, including the Parent, is also directed to consider on an individual basis rather than according to policy (N.T. 542-43, 561-63, 569) whether it would be appropriate to address Child's self-care needs, including toileting, as well as any other "services to enable the family to enhance the young child's development," 22 Pa. Code § 14.154(a), once the IEE has been completed.

The Proposed IEP

For many of the same reasons discussed above, the proposed IEP was not appropriate for Child because it was not based upon and responsive to all of Child's identified needs as determined through a comprehensive evaluation, particularly with respect to Child's communication and occupational therapy needs. Just as critically, the team which developed the proposed IEP did not include many of the members required, including the Parent. 20 U.S.C. § 1414(d)(1)(b); 34 C.F.R. § 300.321; 22 Pa. Code § 14.154(b). While an agency is permitted to hold IEP meetings without a parent who it cannot "convince" to attend, 34 C.F.R. § 300.322(d), the communication difficulties between the parties does not establish this circumstance. Simply put, the Parent here was not afforded an opportunity to participate in the development of Child's IEP upon Child's transition to the IU program. This procedural violation, standing alone, is sufficient to find a denial of FAPE. 34 C.F.R. § 300.513(a)(2)(ii) (noting that a denial of FAPE may be found where the agency "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child."); *see also* 20 U.S.C. § 1415(f)(3)(e).

The IDEA also requires that states "ensure a smooth transition for toddlers receiving early intervention services" to a preschool program by, among other things, establishing a transition plan that includes the family. 20 U.S.C. § 1437(a)(9); 34 C.F.R. § 300.124. Here, the fact that Child was provided no services at all upon reaching the age where services transitioned to the IU (FF 16, 34, 38) demonstrates that no smooth transition to the IU program was accomplished, resulting in a clear substantive denial of FAPE.

The next question is what remedy should be awarded to compensate Child for the deprivation. Compensatory education is an appropriate remedy where an agency knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the agency fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for the deficiency to be corrected. *Id.* In contrast to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

In this case, there is little if any evidence which would support an award under the *B.C.* approach, and it is impossible to speculate on what position Child would be in had appropriate services been provided and maintained during this critical year in Child's development. Accordingly, this hearing officer concludes that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Child. Because the IU should have

begun to implement the IFSP immediately upon Child's transition from the prior provider, there will be no deduction for a reasonable rectification period.

As of the date of Child's third birthday, Child was entitled to 11 hours/week of services as specified in the IFSP. (FF 17) As of approximately June 4, 2011 (following completion of a report of a comprehensive evaluation within 60 days of April 5, 2011 (FF 18; 22 Pa. Code §14.123(b)), Child was entitled to approximately 30 hours/week of early intervention services (P 10 p. 33)⁹ which includes approximately 25 hours/week of behavioral support, a service that it appears everyone agrees is appropriate for Child. (N.T. 244, 529-31; P 5) Thus, 30 hours per week shall be the award of compensatory education beginning with the week after June 4, 2011.

It is also clear that some behavioral services were provided to Child beginning in April 2011 pursuant to the then-pendent IFSP. (FF 34, 35, 36) The difficulty, however, is making the determination, with any specificity and certainty, what appropriate services were and were not provided until the parties agreed to the services in the proposed IEP on November 15, 2011. The behavioral services between April and November 2011 did begin to address communication and early learning skills, which are areas of need that do not appear to be in dispute. (*Id.*) Nevertheless, these services were not delivered pursuant to an IEP and were not based on formal assessments, and there was also no systematic approach to monitoring Child's progress in those areas. (*Id.*) Accordingly, without some logical basis to calculate the hours which Child was provided with appropriate behavioral services, no credit will be given for the services which were provided with the exception of the approximately 12 hours of occupational therapy hours Child received in May and June 2011. (FF 38) *See Keystone Central School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a child was denied FAPE in calculating an award of compensatory education).

The award of compensatory education, therefore, is 11 hours per week from the date of Child's third birthday through the week that includes June 4, 2011, and 30 hours per week from the week of June 6, 2011 through November 15, 2011 or such date that the agreed-upon services pursuant to the pendent IEP were implemented, less 12 hours credit for the occupational therapy services provided.

Because all of Child's needs are yet to be determined and the specific services which should have been but were not provided are impossible to ascertain, the hours of compensatory education are subject to the following conditions and limitations. Child's Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Child's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the IU through Child's IEP to assure meaningful educational progress. There are financial limits on the Parent's discretion in selecting the

⁹ This hearing officer concludes that it is equitable to round up to 30 hours/week in order to provide for compensatory education for services which may and should have been identified through an appropriate evaluation but are not yet known.

compensatory education. The costs to the IU of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the IU or outside provider professionals who provided services to the student during the period of the denial of FAPE.

Section 504 Claims

The Parent also contends that the actions of the IU amount to discrimination against Child under Section 504. This hearing officer cannot agree.

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

Ridgewood, supra, at 253. In many cases, “a party may use the same conduct as the basis for claims under both the IDEA and [Section 504].” *Andrew M. v. Delaware County Office of Mental Health and Retardation*, 490 F.3d 337, 349 (3d Cir. 2007). However, where a child is not a school-age child who would be entitled to a public education if he or she did not have a disability, a violation of the IDEA is not also a violation of Section 504 because there was no discrimination on the basis of disability. *Id.* at 350; 24 P.S. § 13-1301; *see also Allyson B. ex rel. Susan B. v. Montgomery County Intermediate Unit*, 2010 WL 1255925 * 15, 2010 U.S. Dist. LEXIS 32159 *41 (E.D. Pa. 2010). Accordingly, this hearing officer finds no basis for a violation of Section 504 in this case.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the Parent and Child are entitled to an IEE at public expense, after which the IEP team will need to reconvene to develop an appropriate IEP; that the IU did deny FAPE to Child upon Child’s transition to its program at the end of March 2011; and that Child is entitled to compensatory education.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Parent and Child are entitled to an IEE at public expense.
2. The IEP team shall convene as soon as possible upon completion of the IEE to develop an appropriate program of early intervention services for Child which is responsive to all of Child’s identified needs.

3. The IU failed to provide appropriate early intervention services and to propose an appropriate IEP to Child upon Child's transition to the IU in March 2011. Child is accordingly entitled to, and the IU is ordered to provide, 11 hours per week from the date of Child's third birthday through the week ending June 4, 2011, as well as 30 hours per week from June 6, 2011 through November 15, 2011 or such date as the agreed-upon pendent IEP services actually were implemented, less 12 hours credit for occupational therapy services provided, of appropriate parentally-selected compensatory education, subject to the conditions and limitations set forth above.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: January 3, 2012