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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

Hearing Officer Decision

Student

Birthdate: xx/xx/xx

File No: 6368/05-06 LS

Hearing Dates:

May 5, 2006

May 24, 2006

June 2, 2006

June 8, 2006

Final Closing Brief Received: June 22, 2006

Closed Hearing

Parties to the Hearing:

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Final Transcript Received: June 13, 2006

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Date of Decision : July 5, 2006

Hearing Officer : Joseph G. Rosenfeld, Ph.D.

I. Background

Student¹ is a xx year old kindergarten student, about to enter first grade, who resides within the boundaries of the New Hope-Solebury School District (SD). He is eligible for special education under as a child with autism. He was diagnosed with autism in 2002 and began receiving early intervention services through the County Intermediate Unit (IU) from December of 2002. He also attended a preschool program in [redacted] for the 2003-2004 and the 2004-2005 academic years. At the time of this hearing, student was attending a regular kindergarten class in the afternoon and the SD was providing for an applied behavior analyst to work with Student in the morning at home. SD (S-10)².

The parents have rejected the proposed IEP (S-47) because they believe that the level of applied behavior analysis should be 3 hours per day and he requires an hour a week of occupational therapy (OT). They are requesting reimbursement for the private occupational therapy examination and are dissatisfied with the proposed extended school year program (ESY).

II. Findings of Fact

1. Student's date of birth is xx/xx/xx. He lives with his parents within the boundaries of the School District (NT 12).
2. Student was diagnosed with autism in 2002 and started early intervention services at the County Intermediate Unit in December of 2002. He attended a regular preschool in [redacted]. During the 2004-2005 he attended the Preschool on Monday, Wednesday, and Friday from 9 am to 1 pm. with the services of an aid. He received a variety of services including behavioral, speech, and occupational therapy (NT 12, 216-217, S-10, p. 2).
3. For the 2005-2006 school year, Student attended a regular kindergarten class in the afternoon in the SD and received applied behavior analysis services (ABA) in the morning (NT 288, S-25). The kindergarten program for all students is a half-day in the SD. The services of speech therapy and OT were provided during the hours of the regular afternoon kindergarten program (NT 29).
4. Ms. D conducted an independent occupational therapy evaluation on Student on December 31, 2005. The parents paid \$300.00 for this service (S-44).
5. Thirty minutes of direct OT intervention and thirty minutes of observation and consultation with school staff would be appropriate for Student (NT 86-87, 92).

¹ Will be referred to as the student or Student for the balance of the report to assure greater confidentiality and to simplify later redaction of identifying information. The School District will be referred to as SD. The County Intermediate Unit will be referred to as IU.

² The following abbreviations will be used: S# = SD exhibit number, P# = Parent exhibit number, FF# = finding of fact number, NT# = note transcript page number(s) FAPE = free appropriate public education, IEP = individualized educational program, ESY = extended school year, ABA= applied behavior analysis, EI = early intervention program..

6. On the Beery Test of Visual Motor Integration given by Ms. D, Student scored a standard score of 85, one standard deviation below the mean for his age, which is considered a moderate deficiency (NT 97, S-44 p. 3).
7. Dr. S holds a Ph.D. degree in Applied Behavior Analysis and is a senior behavior analyst for the Verbal Center for Autism in Indianapolis. He evaluated Student using the Assessment of Basic Language and Learning Skills (ABLIS) (NT 104).
8. The ABLIS is an assessment and also a curriculum developed Drs. Mark Sundberg and James Partington. One section is all language development to aid the child with autism to make progress in language and communication skills (NT 409-410).
9. The ABLIS is a criterion-based qualitative instrument. It does not have age norms. (NT 146-147, 149). Based on the ABLIS assessment from Dr. S, Student has improved significantly with his academics, verbal behavior and social behavior over the past three years. (NT 112-113, 151, P-1, p.5, P-9).
10. Dr. S opines that the minimal amount of training that either an aide or a teacher would need to work with a student receiving ABA would be an intensive two-week training program before they start working with a student under supervision. (NT 107-108).
11. Applied behavior analysis utilizes techniques such as shaping, reinforcement, prompting, fading, extinction, chaining, discrimination, understanding and punishment when necessary and teaching in ways that promote generalization. The AB analyst looks for learning opportunities and then provides many behavior trials so that the student learns the appropriate skill (NT 105-107).
12. ABA can be effective when trained individuals teach it. At the facility directed by Dr. S, each aide or teacher would be given an intensive two-week training program before starting one to one work with a child. Dr. S or his associate would consult with them about twice a week until they became more proficient within a six-month period (NT 107-108).
13. In order to determine competency, behavior analysts have a certification board that was developed in Florida. To become a board certified associate behavior analyst, one needs to take three graduate classes through an accredited university in behavior analysis and you need nine months of mentoring from a board certified behavior analyst. An examination is also required. A board certified behavior analyst takes more credits (at least 5 courses) and has an experiential requirement of one year.³

³ The board certified AB analyst is not required to be certified by a Dept. of Education or be licensed by a state.

14. Dr. S recommends 3 hours per day of 1 to 1 direct ABA teaching outside of the classroom (NT 214, P-1) and does not recommend breaks of more than two weeks in instruction because of the longer time to recoup if a break is much longer (NT p. 165).
15. Dr. S believes that ideally the Student should be receiving 40 hours per week of intense 1 to 1 services (NT p. 171).
16. Student needs a 1 to 1 instructional aide to be involved with the direct teaching and for the classroom instruction (p-1, p.5).
17. It is important for Student to have experiences with typical peers to practice what he has learned and to have an opportunity to use language and model typical peer behavior (NT 167-168, 279).
18. There are different methodologies for students who are autistic and ABA is one of those methodologies (NT p. 187).
19. Eating and chewing are problem areas for Student. At home he has chewed on wood, on the furniture, the deck, and his bed. This is usually dealt with by the occupational therapist (NT 265-266).
20. When Student's ABA program was reduced from 3 to 2 hours per day, the mother noticed that he seemed to become more easily upset at home and somewhat resistant to going to school (NT 296-301).
21. In the summer of 2005 when Student was in the EI program, when OT and other services were cut for 3 weeks Student's behavior regressed. There was a decrease in functional communication, hand flapping, running back and forth, hitting into walls and screaming behavior increased (NT 325-0315. P-5).
22. ABA, OT, and Speech were provided for more hours than were required in the IEP S-68, pp.1-6. The time sheets on S-68 were not completed contemporaneously but reflect service provided and the mother did not claim that additional services should have been provided (S-68, NT 335).
23. For the summer of 2006, the parents propose a summer camp program run by [redacted]. This would be an art camp program, providing a variety of art activities, acting and dance instruction. The program runs for 6 weeks and the director would allow for Student to receive up to 3 hours of ABA a day (NT 337-338). No further detailed information was presented about this camp program. No representative of the camp had contacted the SD regarding retention or recruitment issues (NT 697).
24. Dr. F rejected the placement because it was an art camp with no provision for social skills training, or for occupational and speech therapy.

25. Parents approved the interim IEP of October 19, 2005 (S-25) and signed the NOREP on November 8, 2005 (S-26, NT 348-350).
26. Parents would like OT for 60 minutes with greater cooperation between the “highly qualified” SD personnel, the home based therapists and the parents (NT 362-363, S-61).
27. Academically, Student has achieved at or above the level of his peers (NT p. 379).
28. A behavior plan, which also included a functional behavior assessment, was proposed by the SD but was rejected by the parents (S-43).
29. Ms. V is an experienced behavior analyst that has known and worked with Student since May of 2002 until the present time. She also supervised one to one staff that were working with Student in his home. She usually consults with the home team for two days every other week and she spends a half-day with him before he goes to school (NT 402, 469, S-74).
30. It is important that the home program that Student receives is consistent with what he is doing in school; therefore some communication between programs is necessary (NT 435).
31. In the 2005-06 academic year, before the afternoon included kindergarten program, Student initially received 3 hours of one on one ABA *Language for Thinking* program within the home (P-1, p.1, P-9, p. 31, NT 444-445, 489). The time was composed of two hours based on the interim IEP and one hour per day of compensatory education.
32. In Math and Reading, Student is functioning at or above the level of the typical student in his kindergarten class (NT 466-467).
33. Ms. V has no objection to the goals of the proposed IEP. She objects to the specificity as to where these goals will be implemented on a continuous daily basis (NT 480-481, S-47, pp. 12-15).
34. Student needs repeated trials to develop skill acquisition, which is what the one on one ABA attempts to accomplish (NT 488). The main focus of the home program is to address Student’s need to develop communication skills and to promote his understanding and use of language appropriately. While the home program may include some academics it does not focus on it (NT 494-495).
35. The transition occupational therapy report that was provided by the IU was based on clinical observation in both the home and school environments. The recommendations were for him to have direct services once a week and consultation services when necessary (NT 519-520, S-8).
36. The special education teacher, the regular education teacher and the OT are involved in data collection of occupational therapy goals (NT 526-527, S-73).

37. According to the school OT, the private OT report indicated deficits similar to what was indicated in the IU transition report, but also identified some other underlying skill deficits, but not functional deficits. Further she asserted that the standardized tests used were frequently inaccurate for autistic children because of attention issues. She further claimed that the examination needed to take place in the natural setting (NT 530).
38. The school OT believed that the private OT report was appropriate for a clinic but not for school based services because they were not related to the curriculum or the functional skills required for school (NT 531-532, S-60).
39. In the proposed IEP of February 21,2006 (S-47) OT is to be 30 minutes per week of direct therapy and 30 minutes per week of consultation with the classroom teacher and the special education teacher. The plan includes opportunity for self-regulation and a sensory diet (S-47 pp. 13-16). There are also goals involving cutting, copying, pencil grasp, using zippers, etc (NT 545-546).
40. For an ESY program the OT indicated that there was no evidence of regression during school breaks but OT was recommended in order to maintain skills (NT 542-543, 589-560, S-76 pp 16-17).
41. The OT sees Student for 30 minutes for once weekly direct therapy but has been seeing him twice a week since February and will continue until the end of the semester in order to make up for the time that he missed when he started school late (NT pp 550-551).
42. The framework for occupational therapy practice indicates that one should do a clinical observation first and only if the clinical observation is not sufficient, is there a need for a standardized test to confirm observations (NT 557).
43. Six weeks of a summer program is sufficient for him to retain his OT skills. (NT 591).
44. Basic OT goals were not changed as a result of Ms. D's evaluation, however the school OT did use sensory information gained to develop a sensory diet which is part of the specially designed instruction in Student's IEP (NT 589, 593-594, 853).
45. All compensatory education services that were to be provided by the IU for the SD were provided or settled by an agreement (NT 619-626, S-68, S-79).
46. When the IU provided its compensatory services, there was no written communication between the parties but Mr. C, the IU supervisor, believed that the communication was verbal (NT 654-656, 674, S-31).
47. Student is eligible for ESY services. Though there was not a measurable issue of retention and recoupment, the IEP team opined that he needed an ESY program to

- retain social skills and occupational and speech therapy goals. The proposed ESY goals were based on the pendent (interim) IEP (NT 690-691, 711, S-76).
48. The proposed ESY program would be 6 weeks in duration and would start at 9 a.m. until 2 p.m. [redacted] School District (NT 693). There would not be non-exceptional peers in this program mainly because the SD is not required to provide ESY programs for non-exceptional students. Instruction would be in both small groups and individual. The SD considered an integrated (included) setting but rejected it (NT 1149-1150).
 49. The SD proposed ESY program would allow Student to maintain his social reciprocity goals (NT 704).
 50. Whining, crying, and spitting are the behaviors that are a source of concern for his kindergarten teacher (NT 1064-1065).
 51. A behavior plan was developed for Student to deal with his “spitting behavior.” [Redacted]. The plan was developed by Dr. S, the IU behavior consultant and school psychologist (S-43).
 52. Dr. S visited the home and classroom and utilized data collected by the staff working with Student on a regular basis to develop the program. There were some disagreements between Ms. V, the consultant for the home program and Dr. S on the function of the behaviors and on the reinforcers to be selected. At home, a token system was being effectively utilized but Dr. S did not believe that system was right for a regular education classroom where you would not want to call attention to the differences that a student’s disability presents as a token system would. Dr. S preferred a scheduled based access to reinforcement (NT 778-779, 782 (S-43). The parents preferred the home based plan and rejected the school plan (NT 785, 1020).
 53. According to Dr. S ABA is a series of activities that are tied to skill development. A number of the activities can be carried out in the classroom and by consultation with staff. (NT 815). Student’s IEP goals can be accomplished with one and a half to two hours a day of one to one ABA (NT 817-819, 830).
 54. Dr. S asserts that many activities could be done without the student being pulled out for one to one activities, such as choral responding, and outdoor activities (NT 822). The more that can be taught in context, the more likely it is that the student will learn those activities versus out of context learning (NT 824-825).
 55. Skills that may be mastered in the one to one setting may not be generalized to the inclusive classroom setting. The skills need to be relearned in the more general regular education setting, according to Ms. B, IU curriculum consultant (NT 847-848).

56. The kindergarten class utilizes a balanced Literacy Program using the Harcourt Trophy Series. The class uses Everyday Math for their instruction and they have several science and social studies units (NT 1044-1047).
57. Student functions very well academically and in some areas above his regular education peers. He still has social and behavioral needs. Social goals are written into his interim IEP as well as the proposed IEP (NT 849-850, 989-990, 1044, S-25, S-47).
58. In the proposed program (S-47) Student would have attended the afternoon kindergarten and would have come to school at 10 a.m. and would have received the *Language for Thinking* SRA program which was developed using ABA principles, gym class with various exercises and practices, and would have lunch and recess at the elementary school. There would also be a one to one special education teacher assigned to him who would stay with him in the regular kindergarten afternoon program (NT 856-860).
59. In the full day, first grade program, all of the current school support would be present. The *Language for Thinking* program would still be on a one to one basis. A lot of the one to one skills that he has received can be reinforced in the regular classroom while he is with his typical peers such as the Pledge of Allegiance and the various calendar activities that are part of the normal K-2 classroom. Reinforcement can also take place at recess and lunch (NT 860, 870-873, 895).
60. In the speech and language area, Student has the ability to request, name, and talk about items but continued development in the area of expressive language was necessary. He does not readily initiate interactions with others (NT 914-915).
61. Student receives speech and language therapy once per week in a pull-out session for 30 minutes, and once per week in the classroom setting (NT 924).
62. Student is making progress in all of his short-term speech and language objectives (NT 910, 935-940, S-25, pp. 15-16, S-47, pp. 7, 12, S-72).
63. In the classroom setting, the immediate direct instruction comes from the classroom teacher (Ms. G) and the special education teacher (Ms. D) serves as his one to one monitor, redirects his behavior when necessary, and supplements academic instruction throughout the day. She helps Student to generalize the skills he learns in the one to one therapy in speech and occupational therapy since she also observes these sessions (NT 980-982).
64. The proposed IEP (S-47) supports Student in the way that he needs to be successful in first grade. It supplies an appropriate level of interaction with typical peers (NT 1007, 1111).
65. The SD encourages training for its entire staff not only by bringing people to address the faculty and by encouraging them to go out for training (1107-1108, 1140-1142).

66. There have been controversies between the SD personnel, the mother and Ms. V on the frequency and purpose of the classroom visitations (NT 1132-1133, 1143)

III. Issues:

1. Is the proposed IEP appropriate because of the failure to provide an appropriate level of ABA services, occupational therapy services and adequate training of the staff members who administer the program?
2. Should the cost of the independent occupational therapy examination be reimbursed to the parents?
3. Is the SD required to compensate the parents for the [redacted] Camp because they believe that it a more appropriate setting for Student's ESY program?
4. What is the appropriate duration of the ESY program?
5. What related services should be offered in the ESY program?
6. Is there an award of compensatory education due to the parents?
7. What should be the contact between the staff that works with Student at home and the staff that works with him at school and the parents?

IV. Discussion and Conclusions of Law:

In a recent decision in *Schaffer v. Weast*, 126 S. Ct., 528 (2005) the Supreme Court held that the party seeking relief has the burden of persuasion in administrative proceedings in cases under the Individuals with Disabilities Education Act (IDEA). In this case, this decision effectively puts the burden on the parents to prove that the SD's proffered individual education program was inappropriate and that the SD did not comply with the mainstreaming requirement of IDEA. 20 U.S.C. § 1412(5)A. This is a reversal of previous procedures that required the school district to have the burden of proof that its programs were appropriate and that the mainstreaming requirements were met.⁴

1. **IEP**

In judging the appropriateness of an IEP, the standard of being reasonably calculated to enable the child to receive educational benefits must be applied, *Board of Education of the Hendrick Hudson Central School District vs. Rowley*, 458 U.S. 176, 206-207 (1982). That benefit must be more than minimal *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3d Cir. 1988).

⁴ *Obert v. Bd. Of Educ of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3d Cir. 1993), which placed the burden of proving the mainstreaming requirement upon the school district regardless of who brought the action. That requirement is effectively overturned by *Schaffer v. Weast*. See *Angela Greenwood, A Minor, By Her Parent, Susan Greenwood v. Wissahickon School District, et al* Civil Action No. 04-3880 in the U.S. District Ct ED Penna. (February 3, 2006).

From September 2005 until the interim IEP was approved on October 2005 the Student continued on his EI IEP. The October IEP, was the pendant IEP and while it was discussed, was not the focus of this hearing. The proffered IEP is the one of February 27, 2006 that was rejected by the parents.⁵ This IEP included a statement of child's present levels of educational performance, a statement of measurable annual goals, including short term objectives, a statement of the special education and related services a statement of the supplementary aids and services, to be provided to the student and school personnel and an explanation of the extent, if any that the will not participate with non-disabled children in regular class 34 CFR.300.347 (a)(1)-(4). Apparently there was no objection to the short-term and long-term goals in this IEP (FF-33) but the problem was where these goals would be implemented on a daily basis. Both the pendant IEP and the proposed IEP called for one to one ABA services but for one and a half hours per day. This was a change from the 3 hours per day that was in the EI IEP.

Applied behavior analysis utilizes techniques such as shaping, reinforcement, prompting, fading, extinction, chaining, discrimination, understanding and punishment when necessary and teaching in ways that promote generalization. The AB analyst looks for learning opportunities and then provides many behavior trials so that the student learns the appropriate skill (FF-11). Dr. S, the parents' expert, states that one to one teaching utilizing ABA methodology is highly effective. He believes that ideally a student should be receiving intense one to one services for 40 hours per week (FF-15) but in situations that involve classrooms, he recommends 3 hours per day of 1 to 1 direct teaching outside of the classroom and does not recommend breaks in instruction of more than 2 weeks (FF-14). To the contrary, Dr. S, the IU consultant states that many activities that are utilized in the one to one ABA can be carried out in the classroom and by consultation with the staff. He asserts that the student's IEP goals can be accomplished with one and a half to two hours per day of ABA (FF-54). Ms. B, the IU curriculum consultant also claims that skills that may be mastered in the one to one setting may not be generalized to the inclusive classroom setting. They may need to be relearned in the more general regular education setting (FF-56). Further, if the parents wish Student to be in an inclusive setting, pulling him out of his first grade class for three hours per day, besides speech and language therapy and occupational therapy could impede his regular class progress. The proposed program retains a special education teacher, knowledgeable about ABA and autistic support, working one to one with the student (NT 978-979). Since many of the skills will be supported by class activity, the plan is for one and half hours of ABA per day, the one to one teacher would be available for more hours if it were deemed necessary. I thus find that the SD's one to one ABA plan to be appropriate.⁶ See FF-59, FF-64.

⁵ Note that the parents did not attend this meeting, though invited (S-48).

⁶ A number of the SD and IU employees are familiar with ABA. Ms. B, in addition to certification in special education, and experience with students with autism, has a certificate in ABA from Penn State University (NT 841), Ms. D, is certified in regular and special education and has had college coursework in ABA and has interned treating autistic children (NT 978-979). Dr. S, the IU consultant, had coursework at Rutgers Univ. and experience in ABA having interned in an ABA program and worked in hospitals and schools. He is certified in school psychology. Both Dr. S and Ms. V (S-74) are expert in ABA but neither have a state license or certification in an educational field. Thus while recognizing their expertise, I have given weight in this instance to the SD legally certified personnel's testimony because of their greater involvement of providing services in a public school setting.

As to the occupational therapy, the proposed IEP (S-47), OT is to be 30 minutes a week of direct therapy and 30 minutes a week of consultation with the classroom teacher and the special education teacher (FF-39). The parent's OT witness, Ms. D essentially agreed with that recommendation (NT 92). I therefore find that 30 minutes of direct OT and 30 minutes of consultative OT are appropriate.

As to the training of staff, the SD has the responsibility of training its staff. However the standards of training are based on state certification and continuing education requirements. Board Certification as a Behavior Analyst is not a legal license and is not the requirement to be a special education teacher, supervisor, or psychologist in this Commonwealth. While I understand the parents' desire to have trained staff work with their child, most of the staff from the IU and school district that testified did indeed have a background and training in ABA. Thus I concur that staff should have training to work with students, I dismiss the notion that they have to have board certification in behavior analysis or associate status to work with or supervise ABA or similar techniques. Further it is within the legislative authority of the school district to select its employees not the individual parent. Behavior analysts may themselves differ on the exact method they use to control a particular behavior. No convincing evidence was presented to indicate that any slight variation in technique would have a major negative impact on the student. The SD encourages training for its entire staff (FF-65). The SD shall offer appropriate training to any new staff that it hires to work with Student.

Reimbursement of the Private OT Evaluation

While parents may obtain private second opinion evaluations, and a school district must consider the examination, and may choose to provide the outside examination, it is not required to do so if its examination was appropriate. Parent counsel claimed in his closing brief that the IU OT did the entire evaluation by observation and did not give any standardized assessments and did not fully assess his visual motor functioning, sensory integration, or motor planning. The IU OT testified that that the private report indicated many of the same things that the school report did. She asserted that it was appropriate to use observation, and only if something was unexplained might a test be necessary (FF-42). She admitted that the private report identified some skill deficits but not functional deficits. She felt that the standardized tests were not accurate with students with autism and the examination was appropriate for a clinic rather than a school (FF-37, FF-38). In his closing brief, school counsel indicated that the private OT never saw the student in school nor reviewed any of his educational records and did not speak with any of the Student's teachers or therapists regarding his functioning in the classroom. However, the school OT did use the sensory information from the private OT to develop a sensory diet that is part of the specially designed instruction in Student's IEP (FF-44).

It seems that there are flaws in each of the reports. It is true that the school OT could have used standardized tests that might have revealed additional data, although the use of standardized test is not a necessary component for an appropriate OT report. It is also true that the private OT could have evaluated the student in school or at least spoke with someone from the school if she were going to send the report to the school. However, the

private OT report was used for part of the specially designed instruction. Taken together, both reports contributed to the IEP. I will therefore award the \$300 the parents requested to reimburse them for their expenses for the private OT examination since some of her findings were used in preparing the IEP.

ESY

Utilizing data from the 2005-2006 school year, no evidence was presented that showed that Student regresses significantly during school breaks and that he needs a long time to recoup his knowledge. Nevertheless the SD proposed an ESY program to help maintain the student's current skill level and to ensure his progress (FF-47). The SD's proposed ESY program would be 6 weeks in duration. The class hours would be 9 a.m. until 2 p.m. The proposed location was in the [redacted] Elementary School in the [redacted] School District (NT 693). There would not be non-exceptional peers in this program mainly because the SD is not required to provide ESY programs for non-exceptional students. Instruction would be in both small groups and individual. (FF-48) The program would be designed around his IEP goals and the one to one special education teacher would also be working with him.

The SD considered an integrated (included) setting but rejected it (NT 1149-1150, FF-24)⁷.

The parents rejected the program because the class did not have typical students present. Since the school offers no ESY programs for regular education students, it cannot mainstream Student. The SD contends that it would be able to meet the student's IEP goals since he would have group and individual experiences with other eligible students. He would receive both speech and language therapy and occupational therapy in the school and would have the services of a one to one special education teacher. All the teachers at the ESY program would be experienced in dealing with students with disabilities including autism and would be duly certified in their specialties.

For the summer of 2006, the parents proposed a summer camp program called [redacted]. This would be an art camp program, providing a variety of art activities, acting and dance instruction. The program runs for 6 weeks and the director would allow for Student to receive up to 3 hours of ABA a day (NT 337-338). No further detailed information was presented about this camp program. No representative of the camp had contacted the SD regarding retention or recruitment issues (NT 697, FF-23). There was no testimony from representatives of the camp or information on the training of staff to deal with students with autism or information on how they would implement an IEP. In this case, the parents had rejected the SD ESY program; they would have the burden of persuasion to convince the hearing officer that their program was appropriate. While a school district may have programs in a variety of settings, it need not support recreational programs as ESY programs. The fact that a program is not inclusive does not make it automatically inappropriate. The parents have failed to meet their burden of proving that the SD

⁷ The SD needed to consider the least restrictive environment issues even for ESY programs *Reusch v. Fountain*, 872 F. Supp. 1422 (D. Md 1994). However, the SD is not required to create such a program solely for ESY unless it offers those services to students without disabilities.

program is inappropriate and the program they present is appropriate.⁸ While not ideal, the SD ESY program is an appropriate program to meet Student's IEP goals for the summer.

In the summer of 2005 when Student was in the EI program, when OT and other services were cut for 3 weeks Student's behavior regressed. There was a decrease in functional communication, hand flapping, running back and forth, hitting into walls and screaming behavior increased (NT 325-0315. P-5).

According to Dr. S, breaks of more than two weeks may make recoupment of skills more difficult (NT. P.165). Thus the ESY services to be received shall be started within two weeks after the school year ends and should last until two weeks before the new semester begins.

The related services of speech and language therapy and occupational therapy should be continued during the summer program. The ABA program would be continued at the 1.5-hour daily schedule. If ESY classroom instruction has ended before the two-week period before classes begin again, the 1.5 hours of ABA shall be increased to 3 hours during that brief interim.

Compensatory Education

As to compensatory services, Mr. C, supervisor from the IU, testified to the significant amount of services provided to the student to cover any of the time missed (NT 610-641). Service logs and time sheets presented at the hearing (S-68) indicate that more services were supplied than required to make up for any missed services. For example as it relates to behavioral consultation, S-68 p. 80, the student's program called for 37 hours of consultation and 93 hours were provided during the 2005-2006 school year. Based on Mr. C's testimony and the time sheets presented in all the areas of service, I do not find there to be any cause for compensatory education.

It is true that there was no written communication between Mr. C and the parents on the services being made up. Mr. C testified that there was verbal communication between the parties (FF-46). If compensatory education is ordered following a hearing or other legal procedures, there is a parent choice in the receipt of the compensatory education. However, there is no regulation that prohibits a school district or IU from making up any missed services before there is a legal order to do so. They are providing services that have been approved in the IEP. A school district or IU should have the ability to make up for lost services. The legal procedures occur when the parties do not make up for the lost services.

⁸ *Florence County School District 4 v. Carter*, 114 S. Ct 361, 20 IDELR 532(1993).

Parent Visitation

An issue raised by the parents concerns them and their consultant visits to the public school classroom. It would be helpful for school districts to have policies on parent visitations and those of outside experts who visit classes. There are federal regulations that protect the privacy of students (FERPA)⁹ and regulations involving state police clearance on individuals working around school students that might affect school policies on frequent visitors. IDEA does encourage parent interaction with school staff. However, in a regular education public school, parents of eligible students under IDEA have the same privileges of visitation and receiving reports as do any regular education parents. Parents and their consultants can participate in all IEP meetings and keep in contact by email at other times. The visitation schedule for parents is determined by the school district unless the IEP team determines that a parent's presence is necessary for a certain period of time. I would encourage positive communication between the parties.

V.. Accordingly the following is made:

ORDER

1. The IEP of February 27 is appropriate and shall be implemented.
2. The parents shall be compensated for the cost their independent occupational therapy examination of \$300.00.
3. ESY services shall not have a break longer than two weeks after school stops and two weeks before the regular semester begins again. The ESY program, in accordance with the ESY IEP (S-76), shall include occupational therapy 30 minutes direct and 30 minutes consultation, speech and language therapy, 30 minutes direct and 30 minutes consultation and 1.5 hours of ABA. A special education teacher with ABA and autistic support experiences shall be provided for the ESY classroom. If ESY classroom experiences have ended before the two week period before school resumes, then the ABA time shall be extended to 3 hours for that brief interim.
- 4, Compensatory Education is denied
5. Attending [redacted] Camp as an ESY program at public expense is denied.
6. At minimum, Student's parents shall have the same visitation rights to the classroom as other parents.

⁹ *Federal Educational Rights and Privacy Act*. 20 U.S.C. § 1232g . The implementing regulations appear at 34 C.F.R. Part 99.

7. Parents shall be permitted to be accompanied by their consultants to IEP meetings.

July 5, 2006

Joseph G. Rosenfeld
Joseph G. Rosenfeld, Ph.D.
Hearing Officer.