

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.

D.V.

Child's Name

[redacted]

Date of Birth

6509/05-06 LS

ODR File Number

July 25, 2006, August 21, 2006, September 12, 2006, October 5, 2006

Dates of Hearing

Record Closed October 24, 2006

Closed Hearing

Parties to Hearing

Parents

Dates Transcripts Received:

August 2, 2006, August 30, 2006,
September 19, 2006, October 10,
2006

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Date of Decision:

October 31, 2006

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Background

The student is an [elementary school-aged] resident of the school district. [Student] is identified as having Autism and in need of Occupational Therapy (OT), Physical Therapy (PT) and Speech (S/L). [Student] transitioned from Early Intervention (EI) to the school district for kindergarten. [Student] started in the school district's regular education half-day kindergarten where [Student] received [Student's] related services after the kindergarten class, as well as Applied Behavioral Analysis (ABA) training at home. The parents paid for ABA training in space provided by the school district. Due to behavioral issues, [Student's] program was changed to part time Autistic Support (AS) kindergarten. [Student] continued in part time AS in first grade until October 2006 when [Student's] program was changed to full time AS. The student received Extended School Year (ESY) in the summer of 2005.

The parents claim a denial of FAPE for the 2004-2005 school year and the 2005-2006 school year. This includes ESY for 2005. Placement for the 2006-2007 school year has been resolved between the parties even though the January 31, 2006 proposed Individualized Education Program (IEP) is still at issue. Issues about an Independent Educational Evaluation (IEE) have been resolved between the parties.

Findings of Fact

1. The role of [Redacted] and Associates was to oversee the school district funded home based program and communicate what was happening in that program with the school. Additionally, they provided expertise to the school and observed in school on a monthly basis. They started working with the student in 2002 through the [local] County Intermediate Unit (IU) EI program.

[Redacted] and Associates is a private agency. [Redacted] is a board-certified behavioral analyst. (NT 658, 664, 665, 737)

EI

2. The student received EI services through [the] IU. (NT 33)

3. The AS teacher observed the student in [Student's] EI placement prior to developing the IEP. (NT 381)

4. The Evaluation Report (ER) of March 4, 2004 found the student's academic skills to be age appropriate. The student was identified as having Autism/PDD and Speech/Language Impairment. The parents agree with the identification. (NT 245, 246; S-2)

5. The student did not exhibit the negative behaviors shown in kindergarten when in EI. (NT 673, 674)

6. At the end of EI the behavior consultants ([Redacted] and Associates) saw no need for a behavior plan (BP). (NT 687)

Kindergarten

7. The IEP of April 6, 2004 reflected the ABA consultant's April report. (NT 437-440, 446, 460; S-4, S-C)

8. The goals and objectives in the April 6, 2006 IEP are measurable and state methods of evaluation. The IEP has a lengthy narrative describing present level of educational performance. The goals and objectives did not state baseline data, but relied on the ER, teacher and parent input. Baseline data for the April 6, 2004 IEP are in the present levels part of the IEP. These came from the March 4, 2004 ER and the ABA consultant's report. Behavior issues were handled through SDI's on the April 6, 2004 IEP.

The supports for the student in the regular education kindergarten class were ABA consultant, one-on-one aide and SDI's. (NT 144-152, 301, 302, 303, 365, 366, 372, 373, 378, 437-440, 602; S-4, S-C)

9. Ms. W, behavior consultant from [Redacted] and Associates, participated in the April 6, 2004 IEP meeting. (NT 115, 116, 343, 344, 666; S-4)

10. Over time behavior strategies were changed based on consultation with ABA consultants. (NT 447, 448, 456)

11. By way of a Notice of Recommended Educational Placement (NOREP) the parents approved the kindergarten placement of half day regular kindergarten, half day autistic support, OT, PT and S/L. The district provided twelve hours a week of ABA at home with eight hours of program supervision per month. The parents paid for two hours per day of ABA at school in a space provided by the school. Initially, the school district offered half day of regular kindergarten and a half day of AS. The parents rejected this because they wanted ABA. The parents did not want a placement in [the] IU. It was the parents' desire that the student be in a regular kindergarten class.

The student's schedule at the start of 2004-2005 school year was 9AM to 12:30 P.M. regular kindergarten; 12:30 to 1:30 PM was OT, PT and lunch; 1:30 to 3:30 PM was one-to-one ABA therapy at school at parents' expense. (In March ABA was moved to home.) The AS occurred at times therapies were not scheduled. The parents wanted the ABA at school rather than a half day AS class. (NT 250-254, 344, 427, 428; S-4)

12. In kindergarten the parents paid for some ABA by their provider during the school day until the March 10, 2005 IEP. This arrangement was made because the parents rejected the school district's offer of half day regular kindergarten and half day autistic support. The parents wanted ABA. The school district paid for ABA after school

(twelve hours of therapy and eight hours of supervision). (NT 37, 38, 46, 47, 80, 81, 181-184, 187, 668, 669, 772; S-7)

13. The school district paid for the late afternoon program by [Redacted] and Associates that was done in the home during the time the student was in regular kindergarten. (NT 666, 772)

14. In kindergarten, before March 10, 2005, the student received autistic support in [Student's] regular kindergarten class. (NT 188, 189)

15. Ms. B, ABA consultant, was hired by the school district to work between the home and school. She worked with the teachers. The ABA consults were communicated with about behaviors in regular education kindergarten class. (NT 192, 208, 510, 515)

16. The kindergarten teacher reviewed the ER prior to the student starting school. The teacher used the ER, present educational levels in the IEP and reports to determine starting points for the student. The regular education kindergarten teacher worked on the IEP goals. (NT 475, 476, 497-501, 503; S-2)

17. The student's behavior at the start of kindergarten was different than what the AS teacher observed in EI. Medications had been changed in October 2004. [Student] was lethargic and not focused. Later this changed to perseveration and disruptive behavior. Elopements occurred as well as self-stimulation. The student was easily distracted in the regular education kindergarten classroom.

In regular education kindergarten a reward system (Penny Board) was used.

In kindergarten the student's behavior started to deteriorate in November and December. (NT 314, 413-415, 513, 600, 601)

18. The student would sometimes have to be removed from the regular education classroom five or six times a day. At first into the hall and later to the AS classroom. (NT 606, 607)

19. The regular education kindergarten teacher and the AS teacher conferred daily about the student. (NT 480)

20. During the time in regular kindergarten when the student's behavior became more challenging, the school district and their behavior consultants were in communication. [Redacted] and Associates provided suggestions for handling the student's behavior during the regular kindergarten placement. (NT 691, 692, 792-794)

21. In regular education kindergarten, academic progress was charted on the kindergarten skills checklist. This was indicated on the report card. It was difficult to measure progress due to problem of keeping the student focused. The aide kept a log on the student. (NT 601, 611, 612)

22. In regular kindergarten the student had difficulty getting through the curriculum due to behavior issues. These included fixating on [Student's] socks, missing [Student's] mom, lashing out, removing shoes, trying to hit others, elopement, striking out with [Student's] arms, throwing things, ripping posters off the wall and calling out. The pace of instruction was too much for the student and this caused behavior outbursts. The student's behavior impeded relationships with classmates. (NT 398, 399, 507-510, 618-621, 623, 624, 632)

23. The kindergarten AS teacher and the ABA consultant met concerning the student's behavior. (NT 312-314)

24. The ABA consultant was in the regular education kindergarten classroom twice. (NT 603)

25. In regular education kindergarten class the aide was changed in December or January because it was felt the student's relationship with the aide was part of the problem. They went to rotating two aides. (NT 632, 641, 643, 644)

26. Academics were worked on in kindergarten in both the regular education and AS classes. (NT 635, 639; S-4)

27. The regular education kindergarten teacher provided information for quarterly progress reports. (NT 504, 505)

28. Ms. B took over for Ms. W during a maternity leave December 2003 to January 2004. (NT 674, 675)

29. The school tried many different things with the help of the ABA therapist before the decision to change kindergarten placement was made. (NT 191, 192)

30. Ms. B never expressed an objection to the student's change in placement. (NT 773)

31. Ms. B opines that the use of "extinction burst" techniques would have been successful if used over a period of several weeks in regular kindergarten. This technique requires that keeping a demand placed on a student be maintained, no matter how long or what behaviors occur, until a student complies. (NT 674, 675)

32. Ms. W, behavior consultant, participated in the March 17, 2005 IEP meeting. (NT 673; S-7)

33. Discussions about reconvening the IEP team started in November 2004. On December 10, 2004, the school wrote the parents to start arranging for an IEP meeting because of the student's disruptive behaviors. It was not until February that a date

convenient to all IEP team members could be set. Then weather forced a postponement until March. It was held on March 10, 2005. (NT 256, 615, 617, 618; S-5, S-6)

34. On March 3, 2005, the parents requested that the student be changed from regular kindergarten to an autistic support class. An IEP meeting took place on March 17, 2005 to consider this. By way of a NOREP, the parents approved the change. An IEP was developed. (NT 118, 432, 433, 624, 625; S-6, S-7)

35. The kindergarten teacher is not certain when between December 2004 and March 2005 the student transferred to the part time AS class. The move was made due to behavioral problems. These were discussed at parent conferences. (NT 477, 482, 483, 601, 617, 618, 619)

36. Some progress was made on goals in April 6, 2004 IEP. (NT 373, 448, 449, 452)

37. Goals and objectives in the April 6, 2004 and March 17, 2005 IEP's are the same with exception of PT goals and a flash card goal for sounds and symbols. Even when goals are the same, things within the goal such as vocabulary words and strategies can change. The goals in the March 17, 2005 IEP have some minor differences from the previous IEP to reflect progress made.

The school district gathered data during the kindergarten year and put it in the present levels of the March 17, 2006 IEP. This was used in developing the IEP.

The March 17, 2005 IEP placed the student in AS kindergarten from 9:00 AM to 11:30 AM. The student had lunch, recess, therapies and specials with non-handicapped to 1:30 PM. (NT 161, 162, 163, 165, 166, 386, 387, 388, 389, 519, 578; S-4, S-7)

38. The regular education kindergarten teacher shared all of her information with the IEP team at the March 17, 2005 IEP meeting. (NT 482, 483)

39. The change of placement in kindergarten was due to behavioral socialization concerns, not academics. The school district felt it had done all it could to maintain the student in the regular education kindergarten. (NT 258-260, 482-487)

40. By way of a NOREP the parents approved placement in a part time AS class with twelve hours per week of ABA at home with ten hours per month of home/school consultations.

In the part time AS placement, there are inclusion opportunities at lunch, assemblies and recess. Older students are brought into the classroom. (NT 194, 256, 289, 290, 434; S-7)

41. After the student was moved to part time AS the parents' paid ABA services were moved from school to home. (NT 683, 684; S-7)

42. Starting with the March 10, 2005 IEP, ABA consultation services were to be increased to ten hours per month. The contract with [Redacted] and Associates was not changed from eight hours a month. (NT 757, 758, 787; S-2, S-4, S-7)

43. The kindergarten AS teacher had training and experience in ABA. Additionally, the school district contracted with ABA consultants to work with teachers. (NT 279, 280, 423-425)

44. The kindergarten AS teacher used an eclectic approach based on the needs of each student. This includes ABA techniques suggested by the ABA consultants and TEEACH. (NT 306, 307, 407, 408, 411)

45. The kindergarten AS teacher communicated regularly with the ABA consultants. (NT 428, 429; S-D)

46. In kindergarten behavioral issues were dealt with through SDI's. (NT 314, 315; S-4, S-7)

47. In the AS class there are three other students. One has oral communication skills. (NT 228)

48. Opportunities for interaction with nondisabled peers were limited after the change to full time AS. (NT 556, 557)

49. The AS kindergarten class followed the kindergarten curriculum. Written expression is part of the kindergarten curriculum. (NT 356, 455, 456)

50. Some of the student's sensory behaviors (self-stimulating behaviors) as of December 2005 are licking hands, hand rubbing, raising [Student's] hands, making physical contact, touching women's chests and repeating the word "fuck". Elopement became a problem. (NT 723-725, 744)

Grade 1

51. At the start of first grade, the student was part time AS. [Student] had special subjects and lunch with regular education students. The class was made up of K to third graders. (NT 522-524, 532, 533; S-7)

52. The first grade AS teacher has experience in ABA and has been an ABA home therapist. (NT 81, 82, 333)

53. The first grade teacher was trained in “Verbal Behavior” (VB) approach. She used it in the classroom. She worked with autistic children in an in home setting for five years using ABA. (NT 203, 204, 542, 543, 564, 565)

54. The first grade AS teacher implemented the kindergarten curriculum because the student could not do first grade work. (NT 597)

55. At the start of first grade, the school tried to include the student in a special subject, but they had difficulty physically getting [Student] to the class. (NT 330, 331)

56. At the beginning of the 2005-2006 school year the student’s behavior was “really rough.” (NT 268, 270)

57. Early in the 2005-2006 school year a Motivation Assessment Scale (MAS) was done due to the student’s inappropriate behavior. (NT 579, 580; S-12)

58. In the first grade, the student had self-stimulating behavior. [Student] rubs [Student’s] face on [Student’s] shoulder, [Student] touches rough surfaces, [Student] makes noises, [Student] smacks self, [Student] shrieks, [Student] rocks and licks surfaces. Some of these developed recently. The parent communicated her concern about self-stimulating behavior to the school district. The student developed biting behavior during the 2005-2006 school year. (NT 88, 89, 90, 91, 92, 555, 556, 558)

59. In first grade the student’s aggressive or disruptive behavior impeded other students’ learning. (NT 581)

60. In first grade, older regular education students visited with students in the autistic support class. (NT 84)

61. The IEP team reconvened on October 17, 2005 due to behavior concerns. (NT 177; S-12)

62. On October 17, 2005 the student’s IEP was revised to add a behavior plan. The present educational levels were amended as were related services (OT). The behavior support plan (BSP) addresses pinching, swatting, running, kicking, scratching, throwing objects, pulling hair, pushing, elopement and biting. The classroom teacher helped develop the plan.

There was little change in goals and SDI’s.

The BSP was developed by the ABA consultants paid for by both the parents and school district. Placement was full time AS. (NT 197, 200, 203, 267, 544; S-12)

63. Present levels in the October 17, 2005 IEP reflect information from the first part of first grade. (NT 538, 539; S-12)

64. Mr. K (IU behavior specialist) worked with the school district for part of the 2005-2006 school year. He used differential reinforcement of other behaviors (DRO) techniques to work on the behavior plan and escape-maintained behaviors. He assisted in implementing the student's behavior plan from October 2005 to January 2006. (NT 93, 212-214, 735)

65. There are minor changes from the March 10, 2005 IEP to the October 17, 2005 IEP. Goals were carried over from the March 10, 2005 IEP to the October 17, 2005 IEP because they were not reached. (NT 527, 536; S-4, S-7, S-12,)

66. The NOREP of October 17, 2005 calls for a full time AS placement. (S-12)

67. In first grade, supports for the student included one-on-one aide and ABA consultants. (NT 579)

68. The first grade teacher consulted with the ABA consultants. Ms. W visited the class monthly. There were more frequent visits during escalating behavior. There were phone and e-mail communications. (NT 566, 567)

69. On January 31, 2006 an IEP meeting was held to revise the IEP and review ESY for 2006. The parents rejected the proposed IEP and placement in full time AS. Goals were added to the January 31, 2006 IEP at the request of the parents. (NT 73, 74, 276; S-14)

70. At the January 31, 2006 IEP meeting the ABA consultants presented a progress report. The report complained of problems with record keeping and inconsistent implementation of the behavior plan. It was shared with the district prior to the meeting. It recognized challenging behavior. The first grade teacher claims she kept records as called for in the plan and implemented the plan. There was a change in aides at this time. There were no previous complaints or further complaints on data collection or implementation. (NT 112, 113, 274, 275, 560, 561, 568, 569, 570, 577, 590, 592, 705, 706; S-13)

71. Comparing goals between the April 6, 2004 IEP and the January 31, 2006 IEP shows substantial carryover of goals, but with some changes in objectives. The present levels were updated. The first nine goals on the January 31, 2006 IEP are almost identical to the April 6, 2004 IEP because they had not been met. The January 31, 2006 IEP has math and vocabulary goals.

The proposed IEP of January 31, 2006 has a BSP. It has a ESY Assessment Profile. (NT 169-176, 285, 546, 547, 554, 570, 571; S-4, S-14)

72. Ms. W (ABA Behavior Consultant) in her October 17, 2005 report did not complain about lack of data collection. (NT 107; S-B)

73. The school district opines that regular progress reports show lack of progress in a goal area that can justify repeating a goal from IEP to IEP. (NT 156, 157, 162)

74. Ms. B did not object to the goals in the January 31, 2006 IEP at the meeting. (NT 771)

75. The behavior plan in the January 31, 2006 IEP is identical to the BP in the October 17, 2005 IEP. (NT 799; S-7, S-12)

76. The parents raised their objections to the goals and lack of baseline data at the January 31, 2006 IEP meeting. There was no discussion on how to change challenged goals because the parents felt they were at an "impasse." (NT 126, 127, 130, 134)

77. Because the January 31, 2006 IEP was rejected by the parents, the October 17, 2005 IEP remained in effect. (NT 597)

78. The parents were not required to accompany the student on field trips in first grade. (NT 590, 591)

79. Throughout first grade extensive records were kept through a parent/teacher log and charting of the student's behavior. Quarterly progress reports were maintained and sent to parents in first grade. In first grade a communication log between school and home was maintained; this chronicled progress and behavior. It took several forms including charges and graphs. (NT 296-299, 574, 586-591; S-22, S-23, S-27)

80. The student's inappropriate behavior caused [Student's] lack of educational progress in first grade. (NT 571)

Transportation

81. Transportation was offered for the student for both school year and ESY. (NT 289, 454, 461, 462)

82. The parents chose to transport the student. (NT 326, 327, 328)

83. The parents have not requested reimbursement for transportation or the ABA in the afternoon of [Student's] kindergarten year. (NT 117)

84. The behavior consultant opines the student is capable of riding a school bus with someone making sure [Student] was OK. (NT 696)

ESY

85. The March 10, 2005 IEP is an IEP revision and ESY IEP. (NT 385, 386; S-7)

86. ESY for 2004 was provided by [the] IU as part of EI. It consisted of twenty-five hours of one to one ABA and sixteen hours of supervision per month. (NT 48, 49)

87. Data was kept for determining need for ESY in 2005. (NT 453, 454; S-10)

88. The school district identified areas of the IEP to be covered by ESY and offered ESY for the summer of 2005. This included an offer of transportation. The parents were given ESY progress reports. (NT 261-267; S-8, S-9, S-10, S-11)

89. The student received ESY in the summer of 2005 in the autistic support program at [Student's] school from July 5, 2005 to August 5, 2005 for five hours daily. Additionally, ABA was provided twelve hours a week in the home one on one with eight hours of supervision.

The parents chose to provide transportation in ESY. They worried about how the student would react to school district transportation. (NT 49-51, 55, 56, 288, 345; S-9)

90. The parents do not contend the student needed twenty-five hours of ABA therapy and sixteen hours of supervision for 2005 ESY. (NT 124, 125)

Other

91. The ABA team dealing with the student has been with [Student] since EI. The school worked cooperatively with the ABA consultants from the start of kindergarten to have a unified system of dealing with the student. (NT 117, 435, 436)

92. Some of the student's behaviors are sensory related; some are avoidance/escape behaviors. (NT 451, 452)

93. The IEP goals are measurable in all IEP's. (S-4, S-7, S-12, S-14)

94. The school district uses the TEEACH program in its autistic support program. (NT 186)

95. The parents received regular quarterly progress reports on the IEP goals in kindergarten and first grade. (NT 135, 287; S-18, S-19, S-20, S-21, S-22, S-23, S-24, S-25)

96. The student is not on grade level in reading, math and written expression. (NT 550)

97. In both kindergarten and first grade the student was exposed to the regular education curriculum in [Student's] AS class. (NT 225, 226)

98. There is no published program or curriculum for ABA or VB. (NT 709, 712, 746)

99. ABA and VB does not require consistency, but rather generality. That is, people working with the student should not accept [Student's] challenging behavior. They do not all have to respond the same way. (NT 713, 714)

100. The behavior consultant sees no problem with ABA being used at home, but not at school. Generalization is not a problem for the student. (NT 721-723)

101. Ms. B was personally in the school in October 2004, December 2004, and January 2006. (NT 743)

102. The parents are not consistent in handling the student's behavior at home. (NT 746)

103. Ms. W is not a certified ABA or VB specialist. (NT 748)

104. [Redacted] and Associates did not send regular monthly progress reports to the school district. They were sent only when the consultants saw a need to do so. They did not provide baseline data about the student to the school district. Iterations were provided. (NT 764, 775, 777)

105. Ms. B opines that the programs, as implemented for the student, are inappropriate. These views were not communicated in writing to the school district. Concerns were expressed about implementation of their suggestions. (NT 781-786)

106. Placement for 2006-2007 school year was resolved at a resolution meeting. (NT 11)

Issues

1. Did the school district provide FAPE from 2004-2005 school year to date including ESY for 2005 as stated in the complaint notice of April 20, 2006?

Stipulations

1. The student's date of birth is [redacted].
2. The student is a resident of the school district.

Discussion and Conclusions of Law

The IDEA requires that FAPE be provided to all students qualifying for special education services. The Supreme Court, in Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), held FAPE is met by complying

with IDEA's procedural requirements and by providing individualized instruction and support services to permit a child to benefit educationally from the instruction. While the law does not require school districts to offer optimal educational programs to maximize the child's potential, this standard is met only when the child's program provides more than a de minimus educational benefit.

The April 6, 2004 IEP is based on reports from EI and an ER developed by the school district to transition the student to school age programming. (FF 4, 8) This ER is complete and properly conducted under U.S.C. §1414(a) (b). Requirements for developing an IEP are stated in 20 U.S.C. §1414(d). The team was properly constituted. The content of the IEP is complete. (FF 8) There are present levels of performance that lay a basis for measuring progress on the goals. (FF 8) Goals are measurable. Related services of OT, PT and S/L are stated. Placement was in the LRE regular education kindergarten with nondisabled peers, with the support of a one-to-one assistant. (FF 11)

The student's IEP contains numerous goals relating to the behavior of the student as well as over twenty SDI's. (FF 8) The educational program was the kindergarten curriculum. (FF 11) The IEP calls for the school district to provide ABA home services provided by the school district for twelve hours per week with 8 hours per month of consultation. (FF 11) The parents were permitted to have the ABA services they were paying for provided at the school after the end of class and therapies. (FF 11) The parents approved the program and placement by way of a NOREP approved by the parent. (FF 11)

The appropriateness of an IEP is based on information known at the time it is drafted, *Furman v. East Hanover Board of Education*, 993 F. 2d 103, (3rd Cir. 1993). The IEP of April 6, 2004 was appropriate as drafted.

At the start of kindergarten, the student displayed behaviors not present in EI. (FF 17) [Redacted] and Associates provided consultations to the school to help with these behaviors. (FF 10, 15, 20, 91) There were inconsistencies in applying recommendations, but consistency is not essential in ABA. (FF 99) Some suggestions such as "extinction burst" were proved not usable in a classroom. (FF 31) As the school year progressed it became clear that the program placement was not working. As early as November discussions on changing placement took place. These intensified in December. No one can identify with certainty when the student's placement changed. Attempts at setting IEP meetings were underway. (FF 33, 34, 35) The student was still in the regular kindergarten class on February 3, 2005 and the parents' request for a change was made on March 3, 2005.

On March 17, 2005 an IEP was developed. Present levels of performance were updated. The goals were maintained with little change due to lack of progress on the goals. (FF 37) The major change was a change of placement to a part time AS kindergarten class. (FF 37) It is important to note that ABA consultation time with [Redacted] and Associates was increased to ten hours a month. (FF 40)

The parents and ABA consultant participated in the March 17, 2005 IEP meeting. The parents approved the program and placement by way of a NOREP.

By October of first grade the student's behavior resulted in a meeting to revise the IEP. At this time the student was showing little academic progress. (FF 54, 96) An IEP was developed on October 17, 2005. It maintained the goals of the previous IEP's with little change. (FF 62) There were no academic goals despite lack of academic progress. A BP developed by [Redacted] and Associates was added to the IEP. ABA consultation remained at ten hours a month. The placement was changed to full time AS with continued related services. (FF 66)

The student's challenging behaviors continued. These included self-stimulating behavior. [Student] rubs [Student's] face on [Student's] shoulder, [Student] touches rough surfaces, [Student] makes noises, [Student] smacks himself, [Student] shrieks, [Student] rocks and licks surfaces, [Student] bites, [Student] licks hands, hand rubbing, [Student] raises [Student's] hands, [Student] makes physical contact, [Student] touches women's chests and [Student] repeats the word "fuck" and [Student] elopes.

On January 31, 2006 an IEP was developed. Goals from previous IEP's were continued with small changes. (FF 71) A reading and a math goal were added. Ten hours of consultation with ABA consultants was maintained.

Following the progression of the development and implementation of programs for the student, a preponderance of the evidence shows:

1. The initial IEP of April 26, 2004 was calculated to provide meaningful benefit.
2. The March 17, 2005 IEP revision was a valid attempt to correct programming by a reasonable change in placement.
3. By the October 17, 2005 IEP, it is clear the student was not making meaningful academic or social/behavioral progress. Solid academic goals needed to be developed along with a revision of the social/behavioral goals and supporting SDI's.
4. These deficiencies are carried into the January 31, 2006 IEP. Although there are some academic goals, they are insufficient.

Turning now to ESY, the March 17, 2005 IEP meeting was also an ESY meeting. (FF 85) The ESY program had academic instruction, OT, PT, S/L and twelve hours a week of individual ABA services and ten hours of consultation. (FF 86, 89) ESY should not be compared to EI stretch calendar programming. They are different services. The 2005 ESY meets the requirements of 34 CFR §300.309(a) and PA Code §14.132.

In *Oberti v. Board of Education*, 995 F. 2d 1204 (3rd Cir. 1993), the Third Circuit Court of Appeals provided guidance for determining whether a proposed placement

conforms to LRE requirements. The court considered (1) steps taken by the district to include the child in the regular classroom; (2) comparison of the educational benefits the student would receive in the regular classroom; and (3) the negative effects that inclusion may have on the other children in the regular classroom. If it is necessary to place a child with a disability outside the regular classroom for all or part of the day, the proposed alternative must be evaluated to determine whether it provides for contact with nondisabled peers to the greatest extent possible.

At parents' request and in conformity with 20 U.S.C. §1414(d) (1) (A) (V), the student was placed in a regular kindergarten class with non-handicapped peers. (FF 11) Following Oberti, supports were provided. (FF 8) The changes in placement were incremental to part time, then full time to meet the social/behavioral needs of the student.

There is no evidence that the related service of transportation was denied the parents. The parents chose to transport the student. (FF 81, 82)

A preponderance of the evidence shows a denial of FAPE from October 17, 2006 to the present. Further, the portion of the IEP's calling for ten hours a month of ABA consultation was not provided. Only eight hours were provided by the school district. (FF 42)

Appropriate ESY services were provided in 2004.

Compensatory education is an in-kind remedy. A child is entitled to compensatory educational services if the child is exceptional and in need of special education and related services (i.e., eligible for FAPE) and if through some action or inaction of the district, the child was denied FAPE. See *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), *In Re the Educational Placement of J. A.* and Hearing Panel Opinion Number 1238. Compensatory education's specific purpose is to remedy a period lacking such benefit computed from when the district knew or should have known of the programmatic deficiency. See *M.C. v. Central Regional School District* 81 F. 3rd 389 (3rd Cir. 1996). Thus, services must be over and above what is required for FAPE now and in the future.

Having found a denial of FAPE from October 17, 2006, the student is entitled to compensatory education equal to the number of school hours between the start of denial of FAPE and the development of an appropriate IEP. Additionally, compensatory education is awarded for the two hours a month of consultation time from October, 2005 to the time consultation time of ten hours a month is instituted or it is changed in an IEP.

The LEA is ordered to take the following action

1. Immediately develop an appropriate IEP that includes academic areas included in the first grade curriculum as well as revised social/behavioral goals.

2. Provide compensatory education equal to the time when school was in session from October 17, 2005 to the development of an appropriate IEP.

3. Provide two hours of compensatory education for each month school was in session from October 2004 to the institution of ten hours a month of ABA consultation stated in the IEP's or the amount of time is changed in a revised IEP.

4. The use of the compensatory education time will be decided by the IEP team with the parents having final approval. The compensatory education must be used to meet stated IEP goals and objectives. The compensatory education will be delivered outside of the regular school day and ESY. The time period for utilizing the compensatory education will extend until the student's twenty-first birthday.

Date _____

Kenneth Rose
Hearing Officer