

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

HEARING OFFICER DECISION/ORDER
CHILD'S NAME: M.C.
ALLEGHENY INTERMEDIATE UNIT-EARLY INTERVENTION PROGRAM
(ODR FILE NO. 6985/06-07 LS)

Date of Birth: xx/xx/xx
Type of Hearing: Open
Dates of Hearing:
November 9, 2006; November 16, 2006;
December 12, 2006; December 14, 2006

I. PARTIES TO THE HEARING

PARENTS:

DATE TRANSCRIPT RECEIVED:
December 18, 2006

PARENTS' REPRESENTATIVE:

Jeffrey Ruder, Esquire
1717 Murray Avenue
Suite 101
Pittsburgh, PA 15217

HEARING OFFICER:

Dorothy J. O'Shea, Ph.D.

Signature: Hearing Officer

DISTRICT CONTACT:

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Allegheny IU/EI Program
475 East Waterford Drive
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December 22, 2006
Date of Decision/Order

DISTRICT REPRESENTATIVE:

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HEARING OFFICER DECISION/ORDER
CHILD'S NAME: Student
ALLEGHENY INTERMEDIATE UNIT-EARLY INTERVENTION PROGRAM
(ODR FILE NO. 6985/06-07 LS)

II. BACKGROUND INFORMATION

During the 2006-2007 school year, Student was a three year old, eligible student, diagnosed with cerebral palsy. Student's Parents made a due process hearing request, alleging that the Allegheny Intermediate Unit's services proposed in Student's November 1, 2006 Individualized Education Program (IEP) were insufficient and inappropriate to implement Student's IEP goals. Through his April 28, 2006 Individualized Family Service Plan (IFSP), Student had received Conductive Education. His Parents contended that because Student's November 1, 2006 proposed IEP did not include Conductive Education as a related service, Student has been denied a free and appropriate public education. Student's Parents requested that the Allegheny Intermediate Unit amend Student's IEP to include Conductive Education at the same level provided through his previous IFSP.

III. FINDINGS OF FACT

1. Student was born xx/xx/xx (Hearing Officer's Exhibit 6, page 2: HO 6, page 2).
2. Student received the medical diagnosis of "*spastic quadriparetic cerebral palsy secondary to static encephalopathy*" (Parents' Exhibit 6, page 1: P6, page 1).
3. Student received Infant/Toddler early intervention services from the *Office of Child Development* for delays in the adaptive, fine motor, and gross motor domains until his transition to preschool programming through the *Allegheny Intermediate Unit* (AIU) (P6, page 1; School District Exhibit 4, page 1: SD 4, page 1).
4. On November 1, 2005, Student received a Multidisciplinary Evaluation (MDE) and Individualized Family Service Plan (IFSP) (P1, pages 1).
5. Student's MDE and IFSP added an addendum February 17, 2006 (P1, page 1).
6. On April 28, 2006, Student's MDE and IFSP were reviewed (P1, page 1).
7. Throughout his birth-to-three program, Student had received Physical Therapy, Occupational Therapy, and Conductive Education,

along with private therapies such as Aquatic Therapy, and additional Physical Therapy and Occupational Therapy through the [redacted] Institute (P-5, pages 1-3).

8. On June 28th, 2006, during Student's team meeting to discuss his evaluation and Individualized Education Program (IEP), Student's Parents requested a pre-hearing conference (Narrative Transcript, page 202: NT 202).
9. His Parents requested Student's independent educational evaluation (IEE) because the AIU's initial evaluation did not include Conductive Education as a related service (NT 202).
10. The AIU filed for due process, refusing to complete the requested IEE and informing Student's Parents of the appropriateness of the AIU's evaluation report (NT 202).
11. In July 2006, based on the AIU's request for due process, the parties held a resolution pre-hearing meeting to discuss due process and to address the Parents' requests (NT 202-203).
12. In July 2006, the AIU had agreed to reevaluate Student again for Occupational Therapy and Physical Therapy services; agreed to include additional parental input, and also agreed to include information from the conductor of Student's Conductive Education in an expedited reevaluation (NT 202-204).
13. The AIU's request for the first due process was continued per Parent request to obtain counsel (NT 202-204).
14. On September 12, 2006, the AIU held another IEP meeting, offering Student's IEP and presenting a *Notice of Recommended Educational Placement* (NOREP) to Student's family (HO 2, pages 2-3).
15. On September 25, 2006, Student's mother signed the NOREP, checked she did not approve the recommendation, noted that the proposed Early Intervention services were insufficient, and then marked a due process hearing request (HO 2, pages 2-3).
16. On September 25, 2006, Student's mother attached a letter when returning the September 12, 2006 NOREP, explaining that she was away, clarifying her delay in returning the NOREP (HO 2; NT 14).
17. On October 5, 2006, Student's reevaluation team reviewed his existing data, including existing evaluation data, evaluations and information provided by Student's Parents, current observation and assessment from Student's program, and observations by teachers and related service providers (SD4, pages 1-2).

18. On October 9, 2006, the AIU and Parents participated in a due process hearing regarding Student's IEE, coming to a settlement agreement to reevaluate Student for a third evaluation (i.e., independent occupational and physical therapists were to conduct the reevaluations) (NT 202).
19. On October 9, 2006, the Parents completed a *Due Process Complaint Notice*, stating, "Student's IEP fails to provide him with a free and appropriate public education by not including Conductive Education among the necessary related services that enable him to benefit from his early intervention program" (HO 5, pages 2-3).
20. On October 9, 2006, Student's Parents asked the AIU to amend Student's proposed IEP to include Conductive Education implementation at the same level provided through his existing IFSP (HO 5, pages 2-3).
21. On October 9, 2006, the Parents contended that Student's Conductive Education must be included as a related service in order for Student to benefit from his AIU preschool program (HO 2; HO 5, HO 6; HO 7).
22. On October 9, 2006, the AIU sent by fax to a prior assigned hearing officer a letter challenging the sufficiency of the Parents' request for due process and requested that the hearing date of November 9, 2006 be continued (HO 3, page 1; NT 14-15).
23. On October 10, 2006, the current Hearing Officer determined that the Parents' *Due Process Hearing Request* was insufficient (HO 4, page 1).
24. On October 10, 2006, the current Hearing Officer directed the Parents to submit in writing by October 17, 2006 to the AIU and to the Hearing Officer a detailed explanation of their due process hearing request (HO 4, page 1).
25. On October 10, 2006, the Hearing Officer denied the AIU's request for continuance (HO 4, page 1).
26. On October 23, 2006, the Parents responded to the Hearing Officer's email communication of October 23, 2006, which stated that the Parents failed to comply with her October 10, 2006 directive (HO 6, pages 1-2).
27. On October 24, 2006, the AIU answered the Parents' complaint and accepted the Parents' October 23, 2006 letter as the "*Complaint for Due Process*," waiving any issue as to the timeliness of the Hearing Officer's October 10, 2006 directive (HO 7, pages 1-2).

28. Student's October 2006 reevaluation report was completed as a result of the parental request for an IEE at public expense (SD 4, page 1; NT 202).
29. On October 27, 2006, Student's Parents received his October 2006 reevaluation report (i.e., Student's most current evaluation) (SD 4, page 1).
30. Student's October 27, 2006 reevaluation report was the evaluation that resolved the due process hearing initiated by the AIU(NT 205).
31. Student's October 27, 2006 reevaluation report described Student's IFSP service coordination by the [redacted] and Early Intervention services in Student's home, including "Speech and Language Services (1 hour per month); Specialized Instruction (utilizing the method of Conductive Education) (12 hours per month); Occupational Therapy (12 hours per month); Specialized Instruction (1 hour per month); and Physical Therapy (10 hours per month)" (SD 4, page 2).
32. Student demonstrated a qualifying delay (i.e., greater than or equal to 25% delay) in adaptive (e.g., self-help tasks) (SD 4, pages 7-9); fine-motor (e.g., visual motor tasks) (SD 4, pages 8-9); and gross motor (e.g., maximal assistance to access transportation, transition, and ambulation) domains (SD 4, pages 8-9; NT 207).
33. Student was within the age appropriate range in a number of domains, including personal/social, expressive communication, receptive language, and cognitive development (SD 4, pages 3-4; NT 207).
34. Student qualified for special education services as a child with "Developmental Delay," and "in need of specially designed instruction" due to delays in adaptive, fine motor, and gross motor domains (SD 4, pages 1,10; NT 208).
35. Student's Parents did not have objections to any of the AIU's three evaluation reports except for where the evaluation reports listed recommendations for services (NT 207).
36. Student continued to receive the educational services listed in his April 28, 2006 IFSP, which included Conductive Education as "specialized instruction" (P1, pages 19-20).
37. On November 1, 2006, the Parties participated in a Resolution Session that did not materialize into a settlement (HO 7, page 2; NT 17-18).
38. On November 1, 2006, the AIU proposed Student's IEP (P4).

39. Student's proposed November 1, 2006 IEP offered by the AIU did not include Conductive Education (P4).
40. AIU personnel stated, Student's November 1, 2006 IEP "*is reasonably calculated to enable Student to achieve progress in a preschool environment*" (P4; NT 215-217).
41. The AIU, via *wordsmithing*, worked with Student's Parents to determine appropriate goals, so that all IEP team members would be able to understand the goals (P4; NT 217-220, 227-228).
42. The AIU recognized the Parents' preferences regarding the use of certain therapeutic aides, the ladder and slatted bench, and incorporated these items, along with other supportive devices into its proposed November 1, 2006 IEP (NT 228-229).
43. The parties stipulated that the proposed IEP is appropriate in the identification of Student's needs in terms of goals and in the provision of Physical Therapy and Occupational Therapy (P4, NT 10).
44. [Dr. S] M.D. saw Student on November 2, 2006 for a physical examination and to consult on the question of Conductive Education in his programming (P6; NT 152, 159).
45. Dr. S, employed at the [redacted] Institute, is a pediatric physiatrist, who specializes in physical medicine and rehabilitation (P5; NT 152).
46. Dr. S stated she had seen Student informally as an infant several years before but when she was scheduled to see him on November 2, 2006, at that point, did not recall ever having met him until she saw him again (NT 159, 176).
47. Dr. S reviewed submitted records from Student's mother and then spoke with Student's mother, receiving information about what Student's programming entailed, prior to examining him (NT 160, 177-180).
48. In conducting her November 2006 evaluation, at no time did Dr. S visit the AIU pre-school classroom that Student was either in or was being proposed to be placed in (NT 181).
49. Dr. S had never observed Student at the AIU and had never contacted anyone from the AIU concerning her own November 2006 evaluation or Student's proposed IEP (NT 181-182).
50. Dr S was not familiar with Student's proposed November 1, 2006 IEP, although she agreed with the goals (NT 179).
51. Dr. S was unaware of educational or related service opportunities available through the AIU (NT 180-182).

52. Except for Student's Parent, Dr. S evaluated Student without any input from the individuals who participated in Student's proposed IEP development and/or evaluation meetings, and without any personal knowledge of the AIU (NT 181-182).
53. On November 9, 2006 and continuing to November 16, 2006, Ms. W, employed by [agency redacted], testified concerning her implementation of Conductive Education as per Student's April 28, 2006 IFSP (P1; NT 25-147).
54. Ms. W is the only conductor available in the AIU area (NT 26-27).
55. Ms. W is not a certified or licensed therapist or instructor in Pennsylvania. She is not a certified or licensed occupational therapist or physical therapist (NT 214).
56. Ms. W reported her personal opinion to support the use of Conductive Education over the traditional therapies of Physical Therapy and Occupational Therapy (NT 91-183).
57. Ms. W did not administer standardized tests to evaluate Student's needs and did not use objective measurements in evaluating progress (NT 125-126, 137; 186-187).
58. Ms. W submitted charts in support of Student's progress, as based upon her opinion (SD 1, SD 2, NT 186-187).
59. Ms. W provided videos describing Student's participation in Conductive Education implementations during 2005 (P2) and 2006 (P3) (NT 91-128).
60. There is not any certification from the Commonwealth of Pennsylvania or licensure (such as held by a licensed occupational therapist or physical therapist) that would be held by a Conductive Educator (NT 187-188).
61. Licensed occupational therapists or licensed physical therapists provided by the AIU would provide Student's direct services, and would consult with the teaching staff, including the paraprofessionals and the speech therapist, concerning how to implement strategies, how to position, how to help Student transition from one activity to the other, and how to work consistently on Student's needs (NT 218-219).
62. On December 12, 2006, Dr. S, on behalf of the Parents, provided telephone testimony concerning her November 2006 evaluation of Student (P6; 152).
63. Dr. S stated, "*Conductive Education is a methodology*" (NT 183-184).

64. Dr. S described Conductive Education as an approach where children are asked to practice tasks that they are trying to acquire (NT 167).
65. On December 14, 2006, Dr. S2, Program Director for the AIU's DART (i.e., *Discovery Assessment Referral and Tracking*) program, identified Conductive Education as a "methodology" (NT 209).
66. Dr. S2 presented research used by the AIU in its decision-making concluding that there was no evidence to support the efficacy of Conductive Education as a methodology over the use of Physical Therapy and/or Occupational Therapy (SD 5, pages 1-37; NT 212-215, 234-236).
67. The AIU did not include Conductive Education in Student's proposed IEP because of three primary reasons: issues of qualified personnel, lack of scientifically-based research, and methodology choice by the LEA (NT 221-225).
68. On December 14, 2006, Ms. H, licensed occupational therapist, stated that she is employed by [redacted] and provided contracted Occupational Therapy services to Student for the AIU (NT 237-238).
69. Ms. H attended Student's IEP meeting November 1, 2006 and agreed with the proposed IEP goals (P4; NT 238-240).
70. Ms. H described specific goals and opportunities for practice of Student's Occupational Therapy skills through the AIU contracted services (P4; NT 238- 240).
71. Ms H stated she had gone to Student's home to provide services, seeing him for an hour and 15 minutes twice a week (NT 241-248).
72. Ms. H targeted pincher-grasp, fine motor pinching, and Student's bilateral hand use. She also targeted Student's grasping and cutting skills, and sitting unsupported to encourage trunk control during fine motor tasks. She also provided consultation to teachers (NT 241-248).
73. On December 14, 2006, Ms. S, AIU licensed physical therapist, stated she sat in and was part of Student's evaluating process and helped to put together Student's November 1, 2006 IEP based upon the evaluation process (P4; NT 197, 249-251).
74. Ms. S stated she believes the goals for Student's Physical Therapy are appropriate and as Student's Parents do not dispute the goals, Ms. S can implement them (NT 252-256).
75. Ms. S described how she would implement Student's proposed Physical Therapy goals in the preschool classroom, including

direct work with Student and by way of consultation time to explain to the teachers, the paraprofessionals, and any other staff in the preschool working with Student how to carry out goals. She would also instruct staff on how to use Student's equipment, and on how to transition Student from activity to activity (P4, pages 7-8; NT 252-256; 257-273).

76. Ms. S described how AIU personnel recognize the Parents' belief that Student is motivated through the use of music, by incorporating the use of music and singing as a motivator into the proposed IEP (P4; NT 274-275).
77. On December 14, 2006, the AIU provided an offer of proof that Ms. M, currently providing Physical Therapy under Student's April 2006 IFSP, would not testify, but if she had, would have testified that she believes that the goals as written in the proposed IEP are appropriate; and that she would be able to implement those goals (NT 275-276).
78. Ms. M expressed a great concern to testify, in that her testimony would somehow damage the therapeutic relationship that she has with Student and his Parents (NT 275-276).
79. The parties stipulated that the testimony of Ms. M was unnecessary (NT 275-276).
80. On December 14, 2006, after both sides rested, Student's due process hearing adjourned (NT 280).

IV. ISSUE

The parties agreed to the hearing issue on the record (NT 24):

- *"Is the Allegheny Intermediate Unit required to provide Conductive Education as a related service to ensure Student's free and appropriate public education?"*

V. DISCUSSION AND CONCLUSIONS OF LAW

Witness Credibility

A hearing officer holds the responsibility to "specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at 34 (2003). This Hearing Officer holds the authority in Student's due process hearing to assess the credibility of witnesses and to weigh evidence. *Carlisle Area School District v. Scott P.*, 62 F.3d 520,524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135

(1996).

Burden of Proof

In the instant matter, Student's Parents hold the burden of producing evidence and of proving by a preponderance of evidence that the relief they sought is appropriate. The burden of proof consists of both the burden of production and the burden of persuasion.

Burden of Production. In Pennsylvania, the order of presentation of the case is left to the discretion of the hearing officer (*Pennsylvania Special Education Dispute Resolution Manual*, Section 810). Because they initiated the request for due process on or about October 9, 2006, Student's Parents presented their case-in-chief first (HO 5, pages 2-3).

Burden of Persuasion. The burden of persuasion, as an element of the burden of proof, rests with Student's Parents/petitioners, who raised the due process claim (HO 2, pages 2-7). See *Schaffer v. Weast*, 126 S. Ct. 528 (2005), which makes this principle applicable when the evidence presented by both sides is of nearly equal weight (i.e., in "equipoise").

Justice O'Connor, of the United States Supreme Court held,

"The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Where a "case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, Schaffer controls..." 126 S.Ct. at 537.

Because the burden of persuasion in an administrative proceeding lies with the party seeking relief, this requires this Hearing Officer to make a determination of whether or not the evidence in Student's record is "equipoise," rather than preponderant. Preponderance of the evidence is evidence presented by one party that is of greater weight or more convincing than the evidence offered by the other party (*Pennsylvania Special Education Dispute Resolution Manual*, Section 810). That is, where there is evidence that tips the scales, the party, which presented that evidence, prevails. However, where a hearing officer finds the evidence is equally balanced on an issue,

the non-moving party prevails.

IS THE ALLEGHENY INTERMEDIATE UNIT REQUIRED TO PROVIDE CONDUCTIVE EDUCATION AS A RELATED SERVICE TO ENSURE Student's FAPE?

Federal mandates of the *Individuals with Disabilities Education Act of 2004* ("IDEA") (Public Law 108-446) direct that an eligible student must be assured of a free, appropriate public education (FAPE). Part B of the IDEA requires that States provide a FAPE to eligible children from age three to twenty-one. 20 U.S.C. § 1412; 34 C.F. R. Part 300.

FAPE means special education and related services that meet state standards, provided in conformity with an IEP, at public expense, under public supervision and direction, without charge, and include an appropriate preschool, elementary, or secondary school education. 20 U.S.C. §1401(8).

Under the birth to three years program, an IFSP is family centered, focusing on the needs of the family to help the child. An IEP is centered and responsive to the needs of the individual student, particularly his or her educational needs and related services. *Pardini v. Allegheny Inter. Unit*, 280 F. Supp. 2d 447 (W.D. Pa. 2003).

The following are relevant in Student's due process hearing, as based on the factual evidence of record:

1. The AIU followed both procedural and substantive requirements to address Student's provision of a FAPE. 20 U.S.C. §1401(8). The AIU evaluated Student; prepared an evaluation report, which confirmed his eligibility for services under Part B; and proposed an IEP (P4; NT 202-204). At the start of the transition from Infant and Toddler services provided through Student's ISFP to preschool services offered through his IEP, Student's Parents informed the AIU that they considered Student's Conductive Education to be necessary, refusing to accept his IEP without inclusion of Conductive Education as provided for under his IFSP (NT 202). Student's Parents refused to approve the AIU's initial evaluation report and requested an independent evaluation at public

expense. After a due process settlement in early October 2006, the AIU did provide an IEE at public expense, which represented three evaluation reports over a period of four months. Student's Parents again asked the AIU to provide Conductive Education in Student's IEP. The AIU proposed to provide essentially the same services that Student had received under his IFSP, except for Conductive Education (NT 202-204). Student's Parents did not object to IEP goals as set forth in Student's proposed November 1, 2006 IEP (P4; NT 10). In fact, all evidence of record and all witnesses underscored the appropriateness of all IEP goals (P4; NT 10, 179, 238-240, 252-256).

2. Student's Parents did not approve the AIU's September 12, 2006 Notice of Recommended Educational Placement (NOREP) (HO 2, pages 2-3). Student's Parents requested a due process hearing stating, "*the Early Intervention services proposed in the 9-11-06 IEP were insufficient and inappropriate to implement the IEP goals as written*" (HO 2, pages 1-3). However, the AIU and Student's Parents agreed to place Student, stipulating to Student's April 28, 2006 IFSP implementation (P1, pages 1-36). The AIU had agreed to treat the IFSP as pendent as a result of the *Pardini* decision, but prior to the October 13, 2006 effective date of the IDEA 2006 regulations. *Pardini v. AIU*, 420 F.3d 181, 201 Ed. Law Rep. 44, (3d Cir. 2005) cert. denied, 126 S. Ct.1646; 34 C.F.R. 300.518 (c).

3. The AIU proposed an appropriate IEP with goals that are reasonably calculated to provide Student's meaningful educational benefit from a preschool environment (P4). Student's proposed November 1, 2006 IEP named goals to address directly and explicitly Student's needs for special education and related services. All goals appropriately reflected Student's present levels of academic achievement and functional performance. 34 C.F.R. § 300.320 (1). His proposed IEP included a statement of measurable annual goals. 34C.F.R. § 300.320 (2). His proposed IEP provided a description of Student's progress toward meeting the annual goals and when periodic reports on the progress Student is making will be provided. 34C.F.R. § 300.320 (3). His proposed IEP included a statement of the special education and related services and supplementary aids and services, and a statement of program modifications or supports for school personnel.

34C.F.R. § 300.320 (4). His proposed IEP offered an explanation concerning Student's participation with nondisabled children in the regular class. 34C.F.R. § 300.320 (5). It addressed Student's appropriate accommodations to measure Student's academic achievement and functional performance. 34 C.F.R. § 300.320 (6). His proposed IEP specified the projected dates for the beginning of Student's services and modifications, including the anticipated frequency, location, and duration of those services and modifications. 34 C.F.R. § 300.320 (7). His proposed November 1, 2006 IEP focused directly on Student's needs, addressing therapies based on Student's identified needs for Occupational Therapy and Physical Therapy as defined by the federal regulations. 34 C.F.R. § 300.34 (c) (6) (9). Student's proposed November 1, 2006 IEP met procedural and substantive requirements and was designed to provide meaningful educational benefit to Student. *Board of Education v. Rowley*, 458 U.S. 176, 107 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. of PA 1996).

4. The AIU's proposed November 1, 2006 IEP was based upon and responsive to the results of Student's October 27, 2006 evaluation report. Based on the credible testimony of AIU therapists Ms. H (licensed occupational therapist) (NT 237-248) and Ms. S (licensed physical therapist) (NT 197-275), Student's resulting proposed November 1, 2006 IEP pinpointed appropriate Occupational Therapy goals (P4, page 10) and appropriate Physical Therapy goals (P4, pages 7-9) to address Student's identified adaptive, fine motor, and gross motor needs (SD 4, pages 1-10). The proposed IEP addressed Student's Parents' preferences for therapeutic aides and equipment (including the ladder and slatted bench) and incorporated these items along with other supportive devices into its proposed IEP (P4, pages 7-12). Student's proposed IEP, also, addressed appropriate supports to program personnel (e.g., appropriate training or materials for personnel) in order to enable Student to be involved in appropriate activities, participate with non-disabled children, and to progress toward annual therapy goals (P4, page 12). Student's proposed November 1, 2006 IEP addressed Student's identified fine motor needs in pre-academic tasks (e.g., drawing/coloring, self-help skills

(e.g., feeding), and visual motor skills (e.g., manipulation of objects) (P 4, pages 10-12). His proposed November 1, 2006 IEP targeted Student's identified gross motor balance, gross motor mobility, and gross motor transition needs (P4, pages 7-9, 12). Further, his therapists testified that Student's IEP contained appropriate specially designed instruction and program modifications, including content (e.g., gait and weight-bearing activities); method (multisensory, verbal cueing, use of extra processing time); and materials (e.g., rifton chair, personal wheel chair, slatted stool, gait trainer, ladder) to enable Student to attain goals and to be involved and progress in appropriate activities with non-disabled children (SD 4, page 11). In short, the AIU provided credible evidence and testimony that Student's proposed November 1, 2006 IEP (P4) offered Student a FAPE, based on Student's identified needs (SD 4).

5. The testimony of Dr. S, M.D., on behalf of the Parents, was not convincing (P 5; NT 152-159). Dr. S provided a November 9, 2006 report stating, "*evaluation with chief concerns regarding whether the request for a classroom conductor to continue conductive education in a preschool classroom is indicated*" (P6, pages 1-3). Dr. S stated she is a consultant for [redacted] Institute, where Student received additional IFSP Occupational Therapy services that focused on "*adaptive seating and motorized power mobility and fine motor training.*" Student's additional IFSP Physical Therapy services, also received at [redacted] Institute, focused on "*aquatic therapy as well as neurodevelopmental PT, advancing his abilities to go from commando crawling to quadriped mobility*" (P6, page 1; NT152).

Dr. S's testimony was diminished by her admission that she had never observed Student at the AIU and had never contacted anyone from the AIU concerning her own November 2006 evaluation or Student's proposed IEP. Dr S was not familiar with Student's proposed November 1, 2006 IEP, although she agreed with the goals. She was unaware of educational or related service opportunities available through the AIU. Except for Student's Parent, Dr. S testified that she evaluated Student without any input from the individuals who participated in Student's proposed IEP development and/or evaluation meetings, and without any

personal knowledge of potential benefits being offered to Student as a result of AIU educational opportunities (NT 152-159).

6. The Parents provided no evidence that Conductors are state-approved providers, and that the Commonwealth certifies or licenses Conductors. Ms. W implemented Student's Conductive Education, as set forth in Student's April 28, 2006 IFSP (P1, pages 1-36). Ms. W is an experienced conductor, however, she is not a certified or licensed occupational therapist and is not a certified or licensed physical therapist. 34 C.F.R. § 300.34 (c) (6) (9). In videos supplied by Student's Parents, Ms. W described Student's motor actions in a 2005 DVD (P2) and a 2006 DVD (P3). However, Ms. W did not provide credible testimony differentiating Conductive Education services/progress of Student's April 28, 2006 ISFP (P1, pages 19-20, 24-25) with Occupational Therapy and Physical Therapy services/progress of Student's April 28, 2006 ISFP (P1, pages 19-20, 24-25). Ms. W did not provide credible testimony differentiating Conductive Education services with therapy services of Student's proposed November 1, 2006 IEP (P 4, pages 7-12) (NT 34-37, 37-42, 48-49). Ms. W did not use standardized tests to evaluate Student's needs and failed to employ objective measurements in evaluating progress (NT 125-126, 137). The charts Ms. W submitted in support of Student's progress were solely based upon her subjective opinion of effects of Conductive Education (SD 1, SD 2). The Parents did not provide convincing evidence that Conductive Education is the only means by which Student has achieved progress.

The IDEA and implementing regulations specifically require the AIU to provide related services by properly certified, licensed and/or state approved personnel. Conductors are not state-approved providers, nor does the Commonwealth certify or license Conductors. The AIU is specifically prohibited by the regulations from providing Conductive Education as a related service. 34 C.F.R. 300.156 (b) (1).

7. Conductive Education is not included as a related service under the federal regulations. 34 C.F.R. § 300.34 (a). The dispute targeted whether Conductive Education entailed a related service that the AIU must include to ensure Student's FAPE.

Related Services

The federal regulations define related services. 34 C.F.R. § 300.34 (a). Related services mean,

"transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and Occupational Therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training."

Despite the statutory language that would allow other *"supportive services...as may be required to assist a child with a disability to benefit from special education,"* because a FAPE means *"special education and related services that meet state standards ..."* (20 U.S.C. §1401(8)), Student's Conductive Education, as set forth and implemented under his April 28, 2006 IFSP, does not represent a related service under the IDEA. § 1401(26) 34 C.F.R. 300.34(a). § 602(26); *Federal Register*: August 14, 2006 (Volume 71, Number 156), page 46569.

His Parents failed to establish by testimonial and documentary evidence that Student will be denied a FAPE without the Parents' preferred methodology. *Miller ex rel. S.M. v. Bd. of Educ. of the Albuquerque Pub Schs.*, 46 IDELR 162 (D.N. M. 2006). That is, the Parents have failed to demonstrate that absent the Parents' preferred method of Conductive Education, Student will not receive a FAPE.

8. Responsibility for choosing the educational methodology most suitable to Student's needs is left to the AIU. The AIU presented evidence that Conductive Education is a model of intervention, created to assist children with motor dysfunction to attain "orthofunction" (i.e., the capacity of individuals to respond to biological and social

demands made upon the individual through an intervention that integrates education and rehabilitation goals into one program) (SD 5, page 5). Dr. S, the Parents' own expert, described Conductive Education as a "methodology" (NT 183-184). Dr. S2, the AIU/DART program director, also described Conductive Education as a "methodology" (NT 204). Dr. S2's credible testimony introduced record evidence that Conductive Education lacked a strong empirical basis to support Conductive Education implementation in Student's IEP (SD 5, pages 1-37; NT 212-215, 234-236).

{The Parents raised an objection to the Hearing Officer's decision to admit research-based evidence of Conductive Education (HO 5, HO 6, HO 7; NT 209-213; 231-232). The Parents argued on the grounds that this admission allowed a new issue to be raised by the AIU. However, while the 2004 Amendments to the IDEA mandated a new, notice-pleading process that limits the parties from raising issues during, rather than at the outset, without the other party's concurrence, (20 U.S.C.A. § 1415(c)(2)), and limits hearing officers from raising and deciding an issue sua sponte (Id. § 1415(f)(3)(B)), in order to decide whether Conductive Education would apply to related services (34 CFR 300.34 (a)) relevant to Student's IFSP (P1), and would apply to the decision-making process in the proposed IEP (P4), this Hearing Officer determined that the AIU research data and testimony were relevant to the agreed-upon hearing issue in the instant matter (SD 5, pages 1-37; NT 24, 212-215, 234-236)}. The IDEA underscored the use of research-based methodologies to ensure a FAPE. 34 C.F.R. § 300.35; 34 C.F.R. § 300.320 (4); § 9101(37) of ESEA; 20 U.S.C. 1411(e)(2)(C)(xi)). See Federal Register / Vol. 71, No. 156 / August 14, 2006 / Rules and Regulations. p. 46576.

Conductive Education, in the treatment of children with cerebral palsy, purportedly promotes independent motor functioning. However, the AIU evidence established that there exists scant research-based support for such claims (SD 5, pages 1-37). The Parents presented no evidence to refute the AIU's scientifically-based evidence or peer-reviewed research of Conductive Education.

The AIU, through Student's proposed November 1, 2006 IEP (P 4, pages 1- 16), offered Student a FAPE. Therefore, the AIU has discretion

over what educational methods are most suitable to Student's needs and what instructional methodologies will be used.

The primary responsibility for formulating the education to be accorded to a child with a disability, and for choosing the educational method most suitable to the child's needs was left by the IDEA to the state and local educational agencies. *Hendrick Hudson Dist. Bd. Of Edu. V. Rowley*, 458 U.S. 176 (1982). So long as a school district or educational agency offers the student a FAPE, the educational authority has discretion over what instructional methodologies will be used. *E.S. v. Indep. School Distr. No. 196*, 27 IDELR 503 (8th Cir. 1998).

Conclusions

After carefully reviewing, analyzing, and giving due weight to all of the evidence and testimony of record in the instant matter, this Hearing Officer finds that Student's Parents have not met their burden pursuant to *Schaffer v. Weast*, 44 IDELR 150 (2005). Student's Parents have failed to establish that Student will be denied a FAPE without the Parents' preferred methodology.

The preponderance of evidence, including testimony and documents of record helping to comprise it, do not support Student's Parents in their claims that the AIU is required to provide Conductive Education as a related service to ensure Student a FAPE. The AIU's November 1, 2006 IEP offered a FAPE, without including Conductive Education as a related service.

HEARING OFFICER ORDER

CHILD'S NAME: Student

ALLEGHENY INTERMEDIATE UNIT SCHOOL DISTRICT

(ODR FILE NO. 6985/06-07 LS)

AND NOW, this 22nd day of December 2006, this Hearing Officer orders the Allegheny Intermediate Unit to take the following action:

1. The Allegheny Intermediate Unit shall view Student's IEP, developed November 1, 2006, as appropriate and designed to provide meaningful educational benefit.
2. The Allegheny Intermediate Unit is not required to amend Student's November 1, 2006 IEP to include Conductive Education. Conductive Education does not represent Student's related service under the IDEA. 34 C.F.R. § 300.34 (a).
3. The Allegheny Intermediate Unit has discretion over what educational methods are most suitable to Student's needs and what instructional methodologies will be used when implementing his IEP.
4. The Allegheny Intermediate Unit shall view Student's IEP, developed November 1, 2006, as Student's pendent placement. 34 C.F.R. §300.518 (c).

Dorothy J. O'Shea, Ph.D.
Hearing Officer

DECISION DATE: _____

MAILING DATE: _____