

**DUE PROCESS HEARING DECISIONS AND APPEAL REVIEWS  
JULY 1, 2006-JUNE 30, 2007**

**INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)  
PART B**



**SANDY GARRETT  
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION  
OKLAHOMA STATE DEPARTMENT OF EDUCATION**

# SUMMARY

Due Process Requests  
(July 1, 2006-June 30, 2007)

## Due Process Cases

<sup>1</sup> Due Process Request Received	31
Due Process Hearings Cancelled, Withdrawn, or Resolved	25
Resolution Sessions	16
Resolution or Mediation Agreement	12
Due Process Hearing Decisions Rendered	4
Due Process Hearing Appeal Reviews	2
Appeal Reviews Appealed to District Court	0
District Court Decisions Appealed to 10 <sup>th</sup> Circuit Court	0

This report was compiled by:

**SPECIAL EDUCATION RESOLUTION CENTER**  
OKLAHOMA STATE UNIVERSITY  
4825 S. Peoria, Suite 2  
Tulsa, OK 74015  
(918) 712-9632  
(918) 712-9058

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<sup>1</sup> Includes 8 case received in FY 2005-06 and resolved in FY 2006-07

**Due Process Hearing Decisions and Appeal Decisions  
(July 1, 2006 – June 30, 2007)**

**Due Process  
Number**

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1860 Hearing

1861 Hearing

1875 Hearing

1896 Hearing

**Decision  
Date**

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August 7, 2006

August 7, 2006

September 25, 2006

May 1, 2007

**Due Process Appeal  
Number**

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1860 Appeal

1861 Appeal

**Decision  
Date**

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January 22, 2007

January 22, 2007

Due Process Hearing 1860

Decision and Opinion  
August 7, 2006



BEFORE THE DEPARTMENT OF EDUCATION  
STATE OF OKLAHOMA  
DECISION & OPINION

Due Process Hearings # 1860

**INTRODUCTORY STATEMENT**

1. This matter comes on for Hearing based on a Request for Due Process dated October 21<sup>st</sup>, 2005, and filed October 25<sup>th</sup>, 2005, by the Parent of Student/Claimant alleging the denial of a Free Appropriate Public Education by District/Respondent in thirteen counts. After appointment of a Hearing Officer and the setting of a Hearing date for December 8<sup>th</sup>, 2005, the Parties requested, and the Hearing Officer concurred, that this case be consolidate with Student/Claimant's sibling as the issues alleged in both cases were identical as was the diagnosis of Autism. The District/Respondent joined the issues by filing a Response on November 3, 2005, a PreHearing was set and the Parties undertook resolution of the dispute.

2. On November 10, 2005, Student requested a continuance of the scheduled hearing to January 19<sup>th</sup>, 2006, to allow the attendance of Student's Father and further allow the parties to pursue further dispute resolution. The District did not object and on November 17<sup>th</sup>, 2005, the Hearing Officer issued an Order Continuing PreHearing and Hearing. The PreHearing was continued to January 5<sup>th</sup>, 2006 and the Hearing was scheduled for January 19<sup>th</sup>, 2006.

3. Subpoenas were requested and issued by the Hearing Officer, and, after failing to resolve the matter, a combined PreHearing took place at which both parties appeared by Counsel. Some Subpoena issues were resolved, issues for hearing were refined and determined. The Student/Claimant elected to have the hearing Open. A verbatim record was made of the PreHearing Conference (73 pages) which was appended to the Hearing Record as Hearing Officer Exhibit (Hr.Off. Ex. or H.O.) #1.

4. The Hearing commenced on January 19<sup>th</sup> and continued on January 20<sup>th</sup>, 2006. The Parties were unable to agree on one set of exhibits and therefore any one document may have both Student and District Exhibit Numbers. Unless required this Decision will only refer to a document by one designator. The Parties had estimated two (2) days to present their positions but it became apparent that more time would

be needed. The Parties reached a consensus and the Hearing was continued for several days with testimony heard: February 20<sup>th</sup>, 21<sup>st</sup> & 24<sup>th</sup>; March 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> & 24<sup>th</sup>; and, April 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, & 21<sup>st</sup>, 2006, for a total of fifteen (15) days.. The last brief was filed June 7<sup>th</sup>, 2006. The decision due date was July 7, 2006, but because of health problems of the Hearing Officer, the Parties agreed to extend the due date to August 7, 2006.

## **THE HEARING**

5. At the Hearing the Parties appeared. The Parents of Student/Claimant (hereinafter “Student”) were present with Counsel and the District/Respondent (hereinafter “District”) appeared through the Superintendent with Counsel. The Student did not appear. District presented a Motion in Limine to exclude certain Student Exhibits. After full presentation and response, the Motion was Sustained and Student Exhibits 50, 51, 53, 54, 55, and 56 were excluded. This ruling did not affect Student Exhibits 50A, 51A, 53A, 54A, 55A & 56A. The District invoked the Rule of Sequestration of Witnesses. Opening Statements were made by the Parties (with District reserving it’s Opening to presentation of it’s evidence), Witnesses were sworn and examined and Exhibits were admitted into evidence (referred to as: Student=“PX” & District=“DX”), the number and identification as shown by the Record.

6. Five (5) witnesses testified on behalf of the Student, to-wit: Student’s Father, Mother, Physician, Expert on Autism and the Business Associate of the Expert. Five witness testified on behalf of the District, to-wit: Superintendent, Speech-Language Pathologist from District’s Cooperative, District’s Elementary Principal/Special Education Director, Special Education Teacher at District’s Cooperative Special Education Classroom, and Expert on Autism.

7. The proceeding, which was quite contentious at times, was taken verbatim by a Certified Shorthand Reporter furnished by the District. The record is contained in XV (15) Volumes consisting of 2,916 pages and when cited herein is referred to as “Tr. Vol. #, p.#”.

8. The Hearing Officer appended two exhibits to the Record identified as HO #. HO#1 is the transcript of the Pre-Hearing Conference and HO#3 is The Assessment of Basic Language and Learning Skills (The ABLLS). During the Hearing some

questions arose as to whether or not the Student's Autism Expert had complied with a Subpoena Duces Tecum. The Hearing Officer recalled the Expert to the witness stand, marked HO#3, discussed and appended it to the record. HO #2 was marked at one time and then later marked, identified and admitted as DX#122.

9. At the conclusion of the introduction of evidence, and after the Parties had acknowledged they had nothing further to present, arguments were made and the Hearing adjourned after a briefing schedule was requested by the Parties and established. The Hearing was to close upon receipt of the last Response Brief filed. Post Hearing Briefs were filed simultaneously on May 25<sup>th</sup>, 2006, with Student filing a Fifty- Three (53) page Brief and District filing a Fifty-One (51) page Brief. Student submitted 189 proposed Findings of Fact contained in 30 pages and 11 Exhibits with District submitting 605 proposed Findings of Fact contained in 138 pages. Student submitted 71 proposed Conclusions of Law contained in 9 pages with District submitting 40 proposed Conclusions of Law contained in 16 pages. Response or Reply Briefs, if any, were to be received on or before June 7<sup>th</sup>, 2006. District filed a twelve (12) page Response Brief on June 7<sup>th</sup>, 2006.

### **PROCEDURAL SAFEGUARDS**

10. Prior to the hearing, a determination was made that the District had complied with all aspects of the required procedural safeguards as provided by 20 USC §1415 (d) and this was acknowledged at the Hearing (Tr. Vol. I, p 15). Some questions arose at the Hearing as to whether the provisions of 20 USC §1415(f)(2)(A) had been met by Student disclosing all items required to be disclosed at least five days prior to the Hearing. (Tr. Vol. I, p 16) The District presented an oral Motion in Limine to exclude certain Student exhibits. Argument was heard, negotiations took place between Counsel with the Hearing Officer ruling on those items not resolved by Counsel. (Tr. Vol. I, p. 25 et. seq.)

### **ISSUES**

11. No issue was raised regarding the Student being qualified for or entitled to Special Education. The issues to be heard were established by the Request for Hearing as responded to and joined by the Response and are generally a complaint of the alleged failure of the District to provide special education and related services to the Student resulting in denial of a Free Appropriate Public Education (FAPE). The

Student's specific allegations follow numbered as in the Request for Due Process Hearing although the specific allegation is paraphrased):

(1) On or before August 30<sup>th</sup>, 2005, District failed to respond to parental requests to provide for Student an Applied Behavioral Analysis (ABA) program and further failed to provide written notice of the refusal and other procedural safeguards.

(2) On or before May 26<sup>th</sup>, 2005, District failed to provide appropriate Extended School Year (ESY) Services by limiting the type, amount and duration of services provided based on a predetermined district-wide schedule

(3) On May 26<sup>th</sup>, 2005, District agreed to sign a contract with a specific Speech Therapist but failed to ever take action on that agreement.

(4) District failed to provide proper notification of a September 20<sup>th</sup>, 2005, meeting, resulting in delays in services and preventing the Individual Education Program (IEP) team from discussing the parents concerns as provided to the school in writing.

(5) District failed to provide written notice to parents regarding the refusal to discuss parents' concerns at both the August 30<sup>th</sup> and September 20<sup>th</sup>, 2005, IEP meetings

(6) District failed to initiate and implement Applied Behavior Analysis program and related services since on or before August 30<sup>th</sup>, 2005.

(7) District refused the training of personnel and parents at the Sundburg conference for Applied Behavior Analysis and did not provide proper written notice to parents in a timely manner denying the parents the opportunity to decide whether or not to attend at their own expense.

(8) On or before August 30<sup>th</sup>, 2005, District refused to increase speech therapy to four (4) days per week and failed to provide a written notice of refusal.

(9) District failed to appropriately transition the child from Part C to Part B of the IDEA by failing to provide evaluations, special education, and related

services.

(10) From December 1<sup>st</sup>, 2004, through August 30<sup>th</sup>, 2005, District failed to increase Occupational Therapy services to two (2) days per week which resulted in Parents paying for these services.

(11) District failed to provide Certification of Competency for the teachers and related service providers who would be providing services.

(12) On or before March 25<sup>th</sup>, 2005, the District had not provided an assistive technology evaluation or services.

(13) District has required the parents to pay for special education and related services.

### **DISCUSSION OF THE ISSUES**

12. These Parents were thrust into a situation for which no Parent is prepared. Student was born prematurely in June 2001, and Parents were referred to SoonerStart in July 2001. With Parents consent and involvement, Student was evaluated by Soonerstart in October 2003, and determined to be developmentally delayed in several areas. Student received services from SoonerStart.

13. On May 13, 2004, after one canceled meeting, Student was transitioned from SoonerStart to District as the result of an IEP (PX #12) drawn up at a meeting conducted by Student's Mother, SoonerStart Coordinator and District's Special Education Teacher, Speech Pathologist, Elementary Principle and Regular Classroom Teacher. This same group (less the SoonerStart Coordinator) made up the Multi disciplinary Evaluation & Eligibility Team (MEETS) that reviewed SoonerStart's Evaluation with the written consent of Mother(PX# 10). and determined Student eligible for Special Education Services (PX #11). Mother consented to the initial placement in the IEP which provided the District was to provide "no service" and Student would be placed with Headstart and Rite Care in . The record as a whole discloses that Mother appeared to rely upon the advice of the SoonerStart Representative at this meeting. The Speech Pathologist testified that the Mother was advised of the District's Cooperative Special Education Facility in and the services available to Student there and declined participation and services from the

District (Tr. Vol. VIII, pp 1691-1701). Special Education Teacher also testified that Parents were adamant that they wanted no services from the District (Tr. Vol. XI, p 2156).

14. In June, 2004, on a trip to see relatives out of state with Mother, Student and her sibling exhibited maladaptive self-injurious behaviors. Parents undertook to discover the reason for this incident by consulting their Doctor who referred them to the Jim Thorpe Rehabilitation Center where Student was evaluated for Occupational Therapy in July 2004 (PX# 13). Student began receiving speech and language services from Scottish Rite Care in \_\_\_\_\_ in August, 2004, where she began receiving services at that time continuing to February, 2005. Parents had Student evaluated at the Oklahoma Child Study Center at the Oklahoma Health Science Center in September, 2004, where the diagnoses was Autism (PX# 16). Student was then evaluated for Speech at Jim Thorpe (PX# 17) Shortly thereafter, Parents employed a private Autism Consultant who established an Applied Behavioral Analysis (ABA) therapy in Student's home. Student began receiving services from Jim Thorpe Rehabilitation Facility in Oklahoma City in October, 2004, and continued into September, 2005.

15. At the request of Parents (SD# 27), another IEP Meeting was convened on February 18, 2005, which was attended by both Parents, Parent's Autism Consultant, Oral Motor Feeding Specialist and Advocate, District Special Education Teacher, Superintendent, Speech Pathologist and Occupational Therapist. Parents gave the team all the Thorpe, Scottish Rite and Child Study evaluations they had obtained along with a report and recommendation from their Autism Consultant dated January 30, 2005 (PX# 77). Parent's Autism Consultant explained the ABA, the program & methodology she had established at Student's Home and her recommendations. Parent's requested feeding intervention by their Oral Motor Feeding Specialist. The Team noted proposed speech, occupational therapy and physical therapy evaluations and observations in the home and determined it was not appropriate for evaluations to be performed in a school setting after hearing of Student's severe anxiety problems when physically transitioned and/or separated from Parents. The Superintendent was to investigate the requested feeding intervention and the Team was to reconvene Mar 4, 2005. (PX# 21). Superintendent set out to investigate Oral Motor Feeding Therapy (Tr. Vol. XIII, p. 2438 et seq.). Mother signed consents for records so District could acquire all of the Thorpe & Rite Care records on the Student and they were received by the District. The Speech Pathologist testified that Student's Mother advised the

ABA home program was being paid by another source (Tr. Vol. X, p. 1893) and Parent's Autism Consultant testified she had never signed a contract to provide services to Student with the Parents but had signed a contract with Parent's Insurance Provider. (Tr. Vol. VIII, p. 1383 et seq.).

16. The IEP Team reconvened on March 25, 2005, after the noticed meeting of March 4, 2005, was cancelled by Parents. A MEETS meeting also convened at the same time. Parents and their Autism Consultant were present along with the Districts representatives. The MEETS report (PX# 28) determined Student qualified for Special Education services with the disability of Autism. The IEP Review (PX# 29) recommended increased services of Speech and Occupational Therapy in the home because of anxiety outside of the home which was confirmed in the IEP (PX#31). This subsequent IEP for pre-K Student provided for the District to furnish specific services (Early Childhood, Speech & Language, Occupational and Physical Therapy) outlined on Page 6 of 8 and stated the private ABA consult in the home would continue as a supplementary service per the Parents. Least Restrictive Environment was determined to be the home because of the reported anxiety of Student outside of the home. It should be noted here that this March 25, 2005, IEP was subsequently modified on August 30, 2005, as hereinafter discussed, and neither Party was able to present a non-modified or non-interlineated document.

17. On May 26, 2005, the IEP Team met again with Parents and their Autism Consultant participating (PX# 36) to determine the need for Extended Year Services (ESY) and receive and discuss the Feeding Therapy report (PX#32) which had been faxed to the District April 7, 2005, along with an offer to provide goals and objectives for the IEP. The Superintendent was directed to obtain a contract from the Feeding Therapist and he requested same along with her qualifications (Tr. Vol. XIII, p. 1441 et seq. ). The credentials were never received prior to the filing of this matter ( Tr. Vol. XIII, p. 2445) although it developed in the testimony that the proposed contract had been faxed in June, 2005 (PX# 38). The Team determine PT and Speech was appropriate from June 1 as specified on page 3 of 6 with the goals on the current IEP to be followed. The Team determined the frequency of services to be provided and all members of the Team signed off on the IEP without further comment.

18. It is important to note at this point that the May 26, 2005, IEP, as all the others up to now and following, did not indicate any written Parent objections or concerns to what was to be provided, although Parent Father testified he orally

objected at the May meeting that services were being reduced (Tr. Vol. III, p. 640). No other witnesses substantiated this claim. Parent's Autism Consultant testified she had never made notations or objections on any of the IEPs or ask for any notations or objections be made on the IEPs (Tr. Vol. VI, p. 1335).

19. On August 2, 2005, Parents requested the next IEP meeting to discuss the next school year schedule for Students occupational, physical and speech therapy. The meeting was scheduled on one of the dates requested ( Tr. Vol. XI, p. 2043 et seq. & DX 46) and then canceled by the Parents (Tr. Vol. III, p. 644-645). The Parents expanded the items they wanted discussed at the meeting and Mother visited the Districts cooperative classroom along with their Autism Expert. The IEP Team finally met on August 30, 2005 with both Parents and their Autism Consultant in attendance and Parents presented a written attachment stating their initial requests for: Student to be provided a 40 hour per week, year around home ABA education program to be provided by the District; reimbursement for the private ABA program up to that time; increased speech service to four days per week; District to provide an Aid for Student; District to provide oral motor feeding therapy with their requested provider; increased occupational therapy to two days per week; attendance at a specified conference and other training for team members and District personnel; and, District to furnish the certifications of District personnel. (PX# 49). The Autism Consultants written evaluation of the Districts Cooperative Classroom which concluded the Classroom was not appropriate for Student was also presented to the Team. Parents also requested an assistive technology evaluation of Student. The team concluded an increase in service would benefit Student and set physical therapy at 240 minutes monthly, increased speech to three times weekly and occupational therapy to twice weekly. The March 25, 2005, IEP was interlineated and initialed to show the changes. The team also agreed to meet on September 20, 2005 to discuss Parents written requests and educational placement. The District expressed a need for review of the records from the home program that had been provided by Parents Autism Consultant to assess the educational benefit of the program.

20. The records were not forthcoming and in September, 2005, the District asked for a release by Parents to receive the records of the home program direct from the Consultant anticipating the ability to review data and records that the Consultant had been keeping as the program progressed. District also requested Parents assistance in obtaining the credentials of the Feeding Therapist. When these requested records had not been received by September 16, 2005, the District notified Parents

by letter it would be unable to make a decision at the September 20, 2005, planned IEP Team meeting but it would still be beneficial to meet and hear from the Consultant directly what her plans were for Student.

21. At the September 20, 2005, meeting, Parent attended with an Advocate and Parent Father signed the release so District could get records direct from the Consultant. Parent requested District underwrite attendance of Parents and District Personnel at the Sundberg Conference to be held September 22 & 23, 2005. Parent Father was already aware that District had orally declined such attendance which was later confirmed in a letter dated September 27, 2005 (Tr. Vol. IV, p. 771; Tr. Vol. XIII, p. 2454; & DX# 61). The District declined attendance as the IEP did not provide for such. Parents did not attend due to financial considerations (Tr. Vol. IV, p. 772).

22. Parents furnished District the itemized list of costs they sought to be reimbursed on September 23, 2005 (SD# 56). District completed the paperwork for the assistive technology consultation on September 26, 2005, and continued attempts to obtain the qualifications of the Feeding Therapist requested by Parents in a letter dated September 27, 2005, (SD# 62) a copy of which went to Parents (Tr. Vol. IV, p. 806).

23. Parents requested an IEP meeting by letter dated October 10, 2005, for either October 19 or 20 to discuss several things (SD# 63). Parents Autism Consultant advised District on October 12, 2005, that she would charge for graphing the raw data that had been collected during the home ABA program and for updated reports on Student. She also set out the proposal for a continuing ABA Home program (SD# 64). District responded on October 13, 2005, that the information it needed to evaluate the home ABA program should not require any updated reports but that it just needed to see the documentation referred to the Consultants time logs given to the District at the September 20, 2005, IEP Meeting so it could evaluate the existing education level of Student (SD# 65). District also responded to Parents request for an IEP that it needed some other dates from Parents as Team members were already scheduled for the requested dates and it was investigating ABA (SD# 66). On the same date, Parent wrote to District stating they and their experts had provided sufficient data to support their requests and adding that if anything else was needed the District should ask for it with specificity prior to the next requested IEP meeting (SD#67). On October 18, 2005, Parents wrote Districts Special Education Director forwarding a letter from a Physician (SD# 68). Three days later Parents signed their Due Process request and

filed it seven days later.

24. After the filing of this matter, the District had the Student evaluated by an Autism Expert and she testified and her report was introduced into evidence as SD#104. She found the home program data to be spotty and educational opportunities applied sporadically. She did recommend the Student continue in the home program with transition goals having priority and the one on one ABA therapy applied regularly. This Expert also reviewed the Cooperative Classroom and found it could ultimately meet the needs of Student (SD# 103).

### **DISCUSSION OF THE LAW**

25. The Individuals with Disabilities Education Act (IDEA) requires a school district that accepts federal funds to provide disabled children within its jurisdiction a “free appropriate public education (FAPE). 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1)(A). To provide FAPE to a student, a district must formulate an individualized education plan (IEP) which is tailored to the unique needs of the disabled child. 20 U.S.C. § 1414(d). The district must also provide extended school year (ESY) services if the IEP team determines them as necessary to provide FAPE to the disabled child. 34CFR §300.309(a)(2).

26. If parents become dissatisfied with a child’s IEP, substance or implementation, they may ask for a due process hearing before an Independent Hearing Officer (IHO). 20 U.S.C. §1415(f). The IHO conducts a hearing on the issues joined between the parties at which the parents have the burden of proof [Schaffer ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005)] and makes a decision based on the substantive grounds of whether or not the child received FAPE. The IHO can determine a child did not receive FAPE based on procedural issues but only if the IHO finds the procedural issues interfered with the provision of FAPE, or, significantly impeded the child’s parents rights to participate in the decisions to provide FAPE, or, caused a deprivation of educational benefits. 20 U.S.C. §1415(f)(3)(E).

27. IDEA provides to parents a significant role in the IEP process requiring they be informed about their child and includes them as members of the IEP team where they have the right to review records concerning their child. Justice O’CONNOR, writing in Schaffer v. Weast, supra, at 537, stated that “The core of the

statute... is the cooperative process..." that IDEA establishes between parents and schools.

28. After reviewing the Request for Due Process Hearing, the Response thereto, the record of the Hearing, the testimony of witnesses, the documents admitted into evidence, the post hearing briefs and responses, and based upon a preponderance of the evidence from the Record as a whole, I enter the following:

### **FINDINGS OF FACT:**

29. This matter was commenced on October 25, 2005, by the filing with the Oklahoma State Department of Education (OSDE) of a Parent Request For Due Process Hearing (OSDE Form 9) dated October 21, 2005, signed by Student's Parent/Guardian, \_\_\_\_\_ Esquire, of \_\_\_\_\_

30. On October 26, 2005, OSDE appointed Leslie L. Conner, Jr., Esquire, as Hearing Officer.

31. Student was born \_\_\_\_\_ (Tr. Vol. I, P. 73)

32. Student's Mother participated in the transition of Student from Part C to Part B of IDEA (Early Intervention with SoonerStart to Special Education with District) on May 13, 2004, as a member of the IEP and MEETS Teams where she heard explanations of need for evaluation, gave written consent to use SoonerStart evaluations, heard explanation of services available from District and declined services electing to seek services privately. (PX #'s 11 & 12, Tr. Vol. VIII, pp 1691-1701).

33. Beginning with the February 18, 2005, IEP Meeting, Parents were always accompanied by consultants or advocates who were familiar with the IEP process and were advising Parents. Record as a whole.

34. The IEP Team determined the amount of ESY for Student at the May 26, 2005, IEP Team Meeting and all team members approved the IEP with no notations or objections made thereon (PX# 36).

35. At the May 26, 2005, IEP Team meeting the IEP Team did not agree to sign a contract with the Oral Motor Feeding Therapist. The IEP Team agreed to further investigate the matter and the District requested the qualifications and a proposed contract from the Oral Motor Feeding Therapist which the Parents requested be used for their child (Tr. Vol. XIII, p. 1441 et seq.). The Contract, goals and objectives were received but the qualifications were received after the filing of Due Process (Tr. Vol. XIII, p. 2445).

36. District never refused to provide Oral Motor Feeding Therapy or to provide ABA Therapy. District did investigate the need for both and was doing so when Parents filed this proceeding.

37. At the August 30, 2005, IEP (PX# 49) Meeting the team agreed to meet September 20, 2005 to discuss the Parent's request from the August IEP meeting and Student's educational placement. Parent signed the IEP. District's letter of September 16, 2005 (SD X51) advising of inability to acquire needed information and Parent testified he had not been to his post office box to get the letter (Tr. Vol. V, p. 881).

38. District never refused to discuss Parents concerns at August or September IEP Meetings. Record as a whole.

39. Parent's request to attend the Sundberg Conference had been made orally by Parents and denied orally by the Superintendent prior to the September IEP. The request was made in writing on September 20, 2005, at the IEP meeting after being denied orally (Tr. Vol. IV, P. 771 et seq.). The oral denial was memorialized in a letter from the Superintendent to the Father stating the reasons for the denial. (DX or SE # 61). The IEP in effect did not provide for these types of services.

40. Parents requested speech therapy four times per week for the first time at the August 30, 2005, IEP Meeting and it was increased to three times per week by the IEP team with no dissent noted on the IEP (PX# 49). Final action on the Parent's specific request was pending when this proceeding was filed.

41. The IEP Team set the Occupational Therapy (OT) sessions in the IEPs which the Parents and their consultants and advocate signed off on with out noting objections between December 1, 2004, and August 30, 2005. OT was not provided in the ESY May 26, 2005, IEP (PX# 36).

42. District provided Parents certification of service providers.

43. At the March 25, 2005, IEP, the Team considered Assistive Technology (AT) for Student as shown by PX#31 but no requirement for an evaluation was made in the IEP. Parent later requested an AT evaluation at the September 2005 IEP and District moved to obtain the evaluation (Tr. Vol. XI, p. 2077, and p. 2176).

44. Parent father told Parent's Autism Consultant he did not want Student attending District's Cooperative Special Education Class (Tr. Vol. VI, Question @ p. 1238, line 7-9, Answer @ p. 1239, line 17).

45. District had not received any records on the home ABA program from Parents or their Autism Consultant by October 18, 2005 (Tr. Vol. XI, pps. 2085-2088).

46. Based upon the entire record in this proceeding and the above Discussion of the Issues and Findings of Fact, I arrive at the following:

#### **CONCLUSIONS OF LAW:**

47. This proceeding was properly and legally conducted pursuant to 20 U.S.C. § 1400, et seq., and 34 C.F.R. § 300.1 et seq.

48. The School District's obligation under the IDEA is to provide the Student a "free appropriate public education." The IDEA defines a free appropriate public education" in 20 U.S.C.A. § 1401(8) and 34 C.F.R. § 300.13 to mean special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title..

49. The burden of proof in an administrative hearing challenging an IEP is

properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. \_\_\_, 126 S. Ct. 528 (2005); *Johnson v. Independent School District No. 4 of Bixby*, 921 F.2d 1022, 1026 (10th Cir. 1990).

50. Student was properly evaluated and transitioned from SoonerStart to District by a team that included Mother of Student and the use of the SoonerStart evaluation data was proper and authorized by the Oklahoma State Department of Education Policies and Procedures for Special Education in Oklahoma, 2002 (PX # 120), page 52.. 20 U.S.C. § 1414, 34 C.F.R. §§ 300.320, 300.533.

51. The IEP Team provided appropriate ESY Services for Student in the May 26, 2005, IEP. *Johnson v. ISD # 4 of Bixby, Tulsa County, Oklahoma*, 921 F.2d 1032

52. District took sufficient steps to notify and insure Parent was notified early enough of the problems interfering with District's abilities to completely discuss and come to a conclusion on Parents request of August 30 at the September IEP Meeting. 34 C.F.R. 300.345(a).

53. District was not required to provide written notice under 20 U.S.C. § 1415 and 34 C.F.R. § 300.503 as it never denied or refused to discuss Parent's concerns at August and September, 2005, IEP meetings. 34 C.F.R. §300.503(a).

54. The oral notification and the follow-up letter denying attendance at the Sundberg Conference amount to reasonable notice, was timely and did not deprive the Student of FAPE. 20 U.S.C. § 1415(b)(3) requires prior written notice to a Parent when the District refuses a change that affects FAPE. FAPE is defined at 20 U.S.C. § 1401 (9) and 34 C.F.R. § 300.13. The notice sufficient to meet intent of IDEA.

55. No notice of refusal to provide speech therapy four times weekly is required as there has never been final action on the request due to the filing of this matter. 34 C.F.R. §300.503(a).

56. Alleged denial of FAPE based on lack of District providing certification of service providers is moot.

57. Parents fail to meet their burden on proving denial of FAPE based on failure to provide Assistive Technology evaluation or services as District provided

same as soon as it was requested in September, 2005.

58. Parents do not have the right under IDEA to compel District to provide a specific program or employ specific methodology for education of Student. *Lachman v. Illinois Bd. Of Educ.*, 852 F.2d 290, 297 (7<sup>th</sup> Cir. 1988) cert. denied 488 U.S. 925, 109 S. Ct. 308, cited in *Loque v. Shawnee Mission Public School Unified School District No. 512*, 959 F. Supp. 1338 (USDC Kansas 1997). Nor must a District maximize a Student's potential. *Bd. Of Educ. of Hendrick Hudson Public School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034.

59. Parents' decision to place Student in private ABA Therapy was made unilaterally and IDEA does not require District to reimburse Parents for costs of such program. *Tucker v. Calloway County Bd. Of Educ., et al.*, 136 F.3rd 495 (6<sup>th</sup> Cir. 1998).

60. Student fails to meet the burden of proof on all specific allegations. District did not fail to provide a free appropriate public education for Student. Parent continued a pattern of unilateral action by moving to Due Process to quickly. Student's IEP Team should convene and consider an appropriate individual education plan in light of this Decision, said plan to include but not be limited to the goals, objectives, and educational value of all methodologies.

## **DECISION**

61. There was no denial of FAPE by District to Student. The Student's IEP team shall be convened within twenty (20) days to draw an appropriate individual education plan in consideration of this Decision. The team shall consider the goals, objectives, and educational value of all methodologies and will complete a properly written plan with procedures, goals (to include transition to a less restrictive environment, i.e., out of the home and into a classroom) and measurable data collection for analysis and determination of progress or lack thereof.

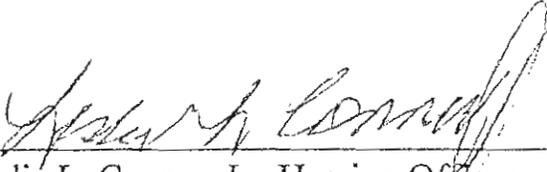
## **CONCLUDING STATEMENT**

62. Unless appealed, this decision is binding upon all parties. Either party may appeal this decision by filing a written request with: The Oklahoma State Department of Education in care of Special Education Resolution Center, 4825 S. Peoria, Suite

2, Tulsa, OK 74105. The appeal must be made with 30 days of the receipt of this decision.

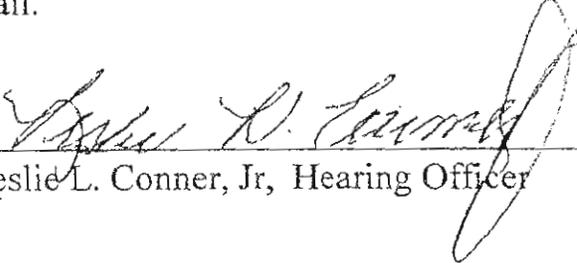
So Ordered.

Dated: August 7, 2006.

  
\_\_\_\_\_  
Leslie L. Conner, Jr, Hearing Officer

### CERTIFICATE OF MAILING

On August 7, 2006, this Decision & Opinion was filed by email with the Oklahoma Special Education Resolution Center with the signed original mailed to the Oklahoma Special Education Resolution Center and signed copies mailed to Student and District and forwarded by email.

  
\_\_\_\_\_  
Leslie L. Conner, Jr, Hearing Officer

Due Process Hearing 1861

Decision and Opinion  
August 7, 2006



BEFORE THE DEPARTMENT OF EDUCATION  
STATE OF OKLAHOMA  
DECISION & OPINION

Due Process Hearings # 1861

**INTRODUCTORY STATEMENT**

1. This matter comes on for Hearing based on a Request for Due Process dated October 21<sup>st</sup>, 2005, and filed October 25<sup>th</sup>, 2005, by the Parent of Student/Claimant alleging the denial of a Free Appropriate Public Education by District/Respondent in thirteen counts. After appointment of a Hearing Officer and the setting of a Hearing date for December 8<sup>th</sup>, 2005, the Parties requested, and the Hearing Officer concurred, that this case be consolidate with Student/Claimant's sibling as the issues alleged in both cases were identical as was the diagnosis of Autism. The District/Respondent joined the issues by filing a Response on November 3, 2005, a PreHearing was set and the Parties undertook resolution of the dispute.

2. On November 10, 2005, Student requested a continuance of the scheduled hearing to January 19<sup>th</sup>, 2006, to allow the attendance of Student's Father and further allow the parties to pursue further dispute resolution. The District did not object and on November 17<sup>th</sup>, 2005, the Hearing Officer issued an Order Continuing PreHearing and Hearing. The PreHearing was continued to January 5<sup>th</sup>, 2006 and the Hearing was scheduled for January 19<sup>th</sup>, 2006.

3. Subpoenas were requested and issued by the Hearing Officer, and, after failing to resolve the matter, a combined PreHearing took place at which both parties appeared by Counsel. Some Subpoena issues were resolved, issues for hearing were refined and determined. The Student/Claimant elected to have the hearing Open. A verbatim record was made of the PreHearing Conference (73 pages) which was appended to the Hearing Record as Hearing Officer Exhibit (Hr.Off. Ex. or H.O.) #1.

4. The Hearing commenced on January 19<sup>th</sup> and continued on January 20<sup>th</sup>, 2006. The Parties were unable to agree on one set of exhibits and therefore any one document may have both Student and District Exhibit Numbers. Unless required this Decision will only refer to a document by one designator. The Parties had estimated two (2) days to present their positions but it became apparent that more time would

be needed. The Parties reached a consensus and the Hearing was continued for several days with testimony heard: February 20<sup>th</sup>, 21<sup>st</sup> & 24<sup>th</sup>; March 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup> & 24<sup>th</sup>; and, April 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, & 21<sup>st</sup>, 2006, for a total of fifteen (15) days.. The last brief was filed June 7<sup>th</sup>, 2006. The decision due date was July 7, 2006, but because of health problems of the Hearing Officer, the Parties agreed to extend the due date to August 7, 2006.

## THE HEARING

5. At the Hearing the Parties appeared. The Parents of Student/Claimant (hereinafter "Student") were present with Counsel and the District/Respondent (hereinafter "District") appeared through the Superintendent with Counsel. The Student did not appear. District presented a Motion in Limine to exclude certain Student Exhibits. After full presentation and response, the Motion was Sustained and Student Exhibits 50, 51, 53, 54, 55, and 56 were excluded. This ruling did not affect Student Exhibits 50A, 51A, 53A, 54A, 55A & 56A. The District invoked the Rule of Sequestration of Witnesses. Opening Statements were made by the Parties (with District reserving it's Opening to presentation of it's evidence), Witnesses were sworn and examined and Exhibits were admitted into evidence (referred to as: Student="PX" & District="DX"), the number and identification as shown by the Record.

6. Five (5) witnesses testified on behalf of the Student, to-wit: Student's Father, Mother, Physician, Expert on Autism and the Business Associate of the Expert. Five witness testified on behalf of the District, to-wit: Superintendent, Speech-Language Pathologist from District's Cooperative, District's Elementary Principal/Special Education Director, Special Education Teacher at District's Cooperative Special Education Classroom, and Expert on Autism.

7. The proceeding, which was quite contentious at times, was taken verbatim by a Certified Shorthand Reporter furnished by the District. The record is contained in XV (15) Volumes consisting of 2,916 pages and when cited herein is referred to as "Tr. Vol. #, p.#".

8. The Hearing Officer appended two exhibits to the Record identified as HO #. HO#1 is the transcript of the Pre-Hearing Conference and HO#3 is The Assessment of Basic Language and Learning Skills (The ABLLS). During the Hearing some

questions arose as to whether or not the Student's Autism Expert had complied with a Subpoena Duces Tecum. The Hearing Officer recalled the Expert to the witness stand, marked HO#3, discussed and appended it to the record. HO #2 was marked at one time and then later marked, identified and admitted as DX#122.

9. At the conclusion of the introduction of evidence, and after the Parties had acknowledged they had nothing further to present, arguments were made and the Hearing adjourned after a briefing schedule was requested by the Parties and established. The Hearing was to close upon receipt of the last Response Brief filed. Post Hearing Briefs were filed simultaneously on May 25<sup>th</sup>, 2006, with Student filing a Fifty- Three (53) page Brief and District filing a Fifty-One (51) page Brief. Student submitted 189 proposed Findings of Fact contained in 30 pages and 11 Exhibits with District submitting 605 proposed Findings of Fact contained in 138 pages. Student submitted 71 proposed Conclusions of Law contained in 9 pages with District submitting 40 proposed Conclusions of Law contained in 16 pages. Response or Reply Briefs, if any, were to be received on or before June 7<sup>th</sup>, 2006. District filed a twelve (12) page Response Brief on June 7<sup>th</sup>, 2006.

### **PROCEDURAL SAFEGUARDS**

10. Prior to the hearing, a determination was made that the District had complied with all aspects of the required procedural safeguards as provided by 20 USC §1415 (d) and this was acknowledged at the Hearing (Tr. Vol. I, p 15). Some questions arose at the Hearing as to whether the provisions of 20 USC §1415(f)(2)(A) had been met by Student disclosing all items required to be disclosed at least five days prior to the Hearing. (Tr. Vol. I, p 16) The District presented an oral Motion in Limine to exclude certain Student exhibits. Argument was heard, negotiations took place between Counsel with the Hearing Officer ruling on those items not resolved by Counsel. (Tr. Vol. I, p. 25 et. seq.)

### **ISSUES**

11. No issue was raised regarding the Student being qualified for or entitled to Special Education. The issues to be heard were established by the Request for Hearing as responded to and joined by the Response and are generally a complaint of the alleged failure of the District to provide special education and related services to the Student resulting in denial of a Free Appropriate Public Education (FAPE). The

Student's specific allegations follow numbered as in the Request for Due Process Hearing although the specific allegation is paraphrased):

(1) On or before August 30<sup>th</sup>, 2005, District failed to respond to parental requests to provide for Student an Applied Behavioral Analysis (ABA) program and further failed to provide written notice of the refusal and other procedural safeguards.

(2) On or before May 26<sup>th</sup>, 2005, District failed to provide appropriate Extended School Year (ESY) Services by limiting the type, amount and duration of services provided based on a predetermined district-wide schedule

(3) On May 26<sup>th</sup>, 2005, District agreed to sign a contract with a specific Speech Therapist but failed to ever take action on that agreement.

(4) District failed to provide proper notification of a September 20<sup>th</sup>, 2005, meeting, resulting in delays in services and preventing the Individual Education Program (IEP) team from discussing the parents concerns as provided to the school in writing.

(5) District failed to provide written notice to parents regarding the refusal to discuss parents' concerns at both the August 30<sup>th</sup> and September 20<sup>th</sup>, 2005, IEP meetings

(6) District failed to initiate and implement Applied Behavior Analysis program and related services since on or before August 30<sup>th</sup>, 2005.

(7) District refused the training of personnel and parents at the Sundburg conference for Applied Behavior Analysis and did not provide proper written notice to parents in a timely manner denying the parents the opportunity to decide whether or not to attend at their own expense.

(8) On or before August 30<sup>th</sup>, 2005, District refused to increase speech therapy to four (4) days per week and failed to provide a written notice of refusal.

(9) District failed to appropriately transition the child from Part C to Part B of the IDEA by failing to provide evaluations, special education, and related

services.

(10) From December 1<sup>st</sup>, 2004, through August 30<sup>th</sup>, 2005, District failed to increase Occupational Therapy services to two (2) days per week which resulted in Parents paying for these services.

(11) District failed to provide Certification of Competency for the teachers and related service providers who would be providing services.

(12) On or before March 25<sup>th</sup>, 2005, the District had not provided an assistive technology evaluation or services.

(13) District has required the parents to pay for special education and related services.

### **DISCUSSION OF THE ISSUES**

12. These Parents were thrust into a situation for which no Parent is prepared. Student was born prematurely in June 2001, and Parents were referred to SoonerStart in July 2001. With Parents consent and involvement, Student was evaluated by Soonerstart in October 2003, and determined to be developmentally delayed in several areas. Student received services from SoonerStart.

13. On May 13, 2004, after one canceled meeting, Student was transitioned from SoonerStart to District as the result of an IEP (PX #12A) drawn up at a meeting conducted by Student's Mother, SoonerStart Coordinator and District's Special Education Teacher, Speech Pathologist, Elementary Principle and Regular Classroom Teacher. This same group (less the SoonerStart Coordinator) made up the Multi disciplinary Evaluation & Eligibility Team (MEETS) that reviewed SoonerStart's Evaluation with the written consent of Mother(PX# 10A). and determined Student eligible for Special Education Services (PX #11A). Mother consented to the initial placement in the IEP which provided the District was to provide "no service" and Student would be placed with Headstart and Rite Care in . The record as a whole discloses that Mother appeared to rely upon the advice of the SoonerStart Representative at this meeting. The Speech Pathologist testified that the Mother was advised of the District's Cooperative Special Education Facility in and the services available to Student there and declined participation and services from the

District (Tr. Vol. VIII, pp 1691-1701). Special Education Teacher also testified that Parents were adamant that they wanted no services from the District (Tr. Vol. XI, p 2156).

14. In June, 2004, on a trip to see relatives out of state with Mother, Student and her sibling exhibited maladaptive self-injurious behaviors. Parents undertook to discover the reason for this incident by consulting their Doctor who referred them to the Jim Thorpe Rehabilitation Center where Student was evaluated for Occupational Therapy in July 2004 (PX# 13A). Student began receiving speech and language services from Scottish Rite Care in \_\_\_\_\_ in August, 2004, where she began receiving services at that time continuing to February, 2005. Parents had Student evaluated at the Oklahoma Child Study Center at the Oklahoma Health Science Center in September, 2004, where the diagnoses was Autism (PX# 16A). Student was then evaluated for Speech at Jim Thorpe (PX# 17A) Shortly thereafter, Parents employed a private Autism Consultant who established an Applied Behavioral Analysis (ABA) therapy in Student's home. Student began receiving services from Jim Thorpe Rehabilitation Facility in Oklahoma City in October, 2004, and continued into September, 2005.

15. At the request of Parents (SD# 27), another IEP Meeting was convened on February 18, 2005, which was attended by both Parents, Parent's Autism Consultant, Oral Motor Feeding Specialist and Advocate, District Special Education Teacher, Superintendent, Speech Pathologist and Occupational Therapist. Parents gave the team all the Thorpe, Scottish Rite and Child Study evaluations they had obtained along with a report and recommendation from their Autism Consultant dated January 30, 2005 (PX# 77A). Parent's Autism Consultant explained the ABA, the program & methodology she had established at Student's Home and her recommendations. Parent's requested feeding intervention by their Oral Motor Feeding Specialist. The Team noted proposed speech, occupational therapy and physical therapy evaluations and observations in the home and determined it was not appropriate for evaluations to be performed in a school setting after hearing of Student's severe anxiety problems when physically transitioned and/or separated from Parents. The Superintendent was to investigate the requested feeding intervention and the Team was to reconvene Mar 4, 2005. (PX# 21A). Superintendent set out to investigate Oral Motor Feeding Therapy (Tr. Vol. XIII, p. 2438 et seq.). Mother signed consents for records so District could acquire all of the Thorpe & Rite Care records on the Student and they were received by the District. The Speech Pathologist testified that Student's Mother

advised the ABA home program was being paid by another source (Tr. Vol. X, p. 1893) and Parent's Autism Consultant testified she had never signed a contract to provide services to Student with the Parents but had signed a contract with Parent's Insurance Provider. (Tr. Vol. VIII, p. 1383 et seq.).

16. The IEP Team reconvened on March 25, 2005, after the noticed meeting of March 4, 2005, was cancelled by Parents. A MEETS meeting also convened at the same time. Parents and their Autism Consultant were present along with the Districts representatives. The MEETS report (PX# 28A) determined Student qualified for Special Education services with the disability of Autism. The IEP Review (PX# 29A) recommended increased services of Speech and Occupational Therapy in the home because of anxiety outside of the home which was confirmed in the IEP (PX#31A). This subsequent IEP for pre-K Student provided for the District to furnish specific services (Early Childhood, Speech & Language, Occupational and Physical Therapy) outlined on Page 6 of 8 and stated the private ABA consult in the home would continue as a supplementary service per the Parents. Least Restrictive Environment was determined to be the home because of the reported anxiety of Student outside of the home. It should be noted here that this March 25, 2005, IEP was subsequently modified on August 30, 2005, as hereinafter discussed, and neither Party was able to present a non-modified or non-interlineated document.

17. On May 26, 2005, the IEP Team met again with Parents and their Autism Consultant participating (PX# 36A) to determine the need for Extended Year Services (ESY) and receive and discuss the Feeding Therapy report (PX#32A) which had been faxed to the District April 7, 2005, along with an offer to provide goals and objectives for the IEP. The Superintendent was directed to obtain a contract from the Feeding Therapist and he requested same along with her qualifications (Tr. Vol. XIII, p. 1441 et seq. ). The credentials were never received prior to the filing of this matter ( Tr. Vol. XIII, p. 2445) although it developed in the testimony that the proposed contract had been faxed in June, 2005 (PX# 38A). The Team determine PT and Speech was appropriate from June 1 as specified on page 3 of 6 with the goals on the current IEP to be followed. The Team determined the frequency of services to be provided and all members of the Team signed off on the IEP without further comment.

18. It is important to note at this point that the May 26, 2005, IEP, as all the others up to now and following, did not indicate any written Parent objections or concerns to what was to be provided, although Parent Father testified he orally

objected at the May meeting that services were being reduced (Tr. Vol. III, p. 640). No other witnesses substantiated this claim. Parent's Autism Consultant testified she had never made notations or objections on any of the IEPs or ask for any notations or objections be made on the IEPs (Tr. Vol. VI, p. 1335).

19. On August 2, 2005, Parents requested the next IEP meeting to discuss the next school year schedule for Students occupational, physical and speech therapy. The meeting was scheduled on one of the dates requested ( Tr. Vol. XI, p. 2043 et seq. & DX 46) and then canceled by the Parents (Tr. Vol. III, p. 644-645). The Parents expanded the items they wanted discussed at the meeting and Mother visited the Districts cooperative classroom along with their Autism Expert. The IEP Team finally met on August 30, 2005 with both Parents and their Autism Consultant in attendance and Parents presented a written attachment stating their initial requests for: Student to be provided a 40 hour per week, year around home ABA education program to be provided by the District; reimbursement for the private ABA program up to that time; increased speech service to four days per week; District to provide an Aid for Student; District to provide oral motor feeding therapy with their requested provider; increased occupational therapy to two days per week; attendance at a specified conference and other training for team members and District personnel; and, District to furnish the certifications of District personnel. (PX# 49A). The Autism Consultants written evaluation of the Districts Cooperative Classroom which concluded the Classroom was not appropriate for Student was also presented to the Team. Parents also requested an assistive technology evaluation of Student. The team concluded an increase in service would benefit Student and set physical therapy at 240 minutes monthly, increased speech to three times weekly and occupational therapy to twice weekly. The March 25, 2005, IEP was interlineated and initialed to show the changes. The team also agreed to meet on September 20, 2005 to discuss Parents written requests and educational placement. The District expressed a need for review of the records from the home program that had been provided by Parents Autism Consultant to assess the educational benefit of the program.

20. The records were not forthcoming and in September, 2005, the District asked for a release by Parents to receive the records of the home program direct from the Consultant anticipating the ability to review data and records that the Consultant had been keeping as the program progressed. District also requested Parents assistance in obtaining the credentials of the Feeding Therapist. When these requested records had not been received by September 16, 2005, the District notified Parents

by letter it would be unable to make a decision at the September 20, 2005, planned IEP Team meeting but it would still be beneficial to meet and hear from the Consultant directly what her plans were for Student.

21. At the September 20, 2005, meeting, Parent attended with an Advocate and Parent Father signed the release so District could get records direct from the Consultant. Parent requested District underwrite attendance of Parents and District Personnel at the Sundberg Conference to be held September 22 & 23, 2005. Parent Father was already aware that District had orally declined such attendance which was later confirmed in a letter dated September 27, 2005 (Tr. Vol. IV, p. 771; Tr. Vol. XIII, p. 2454; & DX# 61). The District declined attendance as the IEP did not provide for such. Parents did not attend due to financial considerations (Tr. Vol. IV, p. 772).

22. Parents furnished District the itemized list of costs they sought to be reimbursed on September 23, 2005 (SD# 56). District completed the paperwork for the assistive technology consultation on September 26, 2005, and continued attempts to obtain the qualifications of the Feeding Therapist requested by Parents in a letter dated September 27, 2005, (SD# 62) a copy of which went to Parents (Tr. Vol. IV, p. 806).

23. Parents requested an IEP meeting by letter dated October 10, 2005, for either October 19 or 20 to discuss several things (SD# 63). Parents Autism Consultant advised District on October 12, 2005, that she would charge for graphing the raw data that had been collected during the home ABA program and for updated reports on Student. She also set out the proposal for a continuing ABA Home program (SD# 64). District responded on October 13, 2005, that the information it needed to evaluate the home ABA program should not require any updated reports but that it just needed to see the documentation referred to the Consultants time logs given to the District at the September 20, 2005, IEP Meeting so it could evaluate the existing education level of Student (SD# 65). District also responded to Parents request for an IEP that it needed some other dates from Parents as Team members were already scheduled for the requested dates and it was investigating ABA (SD# 66). On the same date, Parent wrote to District stating they and their experts had provided sufficient data to support their requests and adding that if anything else was needed the District should ask for it with specificity prior to the next requested IEP meeting (SD#67). On October 18, 2005, Parents wrote Districts Special Education Director forwarding a letter from a Physician (SD# 68). Three days later Parents signed their Due Process request and

filed it seven days later.

24. After the filing of this matter, the District had the Student evaluated by an Autism Expert and she testified and her report was introduced into evidence as SD#104. She found the home program data to be spotty and educational opportunities applied sporadically. She did recommend the Student continue in the home program with transition goals having priority and the one on one ABA therapy applied regularly. This Expert also reviewed the Cooperative Classroom and found it could ultimately meet the needs of Student (SD# 103).

### **DISCUSSION OF THE LAW**

25. The Individuals with Disabilities Education Act (IDEA) requires a school district that accepts federal funds to provide disabled children within its jurisdiction a “free appropriate public education (FAPE). 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1)(A). To provide FAPE to a student, a district must formulate an individualized education plan (IEP) which is tailored to the unique needs of the disabled child. 20 U.S.C. § 1414(d). The district must also provide extended school year (ESY) services if the IEP team determines them as necessary to provide FAPE to the disabled child. 34CFR §300.309(a)(2).

26. If parents become dissatisfied with a child’s IEP, substance or implementation, they may ask for a due process hearing before an Independent Hearing Officer (IHO). 20 U.S.C. §1415(f). The IHO conducts a hearing on the issues joined between the parties at which the parents have the burden of proof [Schaffer ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005)] and makes a decision based on the substantive grounds of whether or not the child received FAPE. The IHO can determine a child did not receive FAPE based on procedural issues but only if the IHO finds the procedural issues interfered with the provision of FAPE, or, significantly impeded the child’s parents rights to participate in the decisions to provide FAPE, or, caused a deprivation of educational benefits. 20 U.S.C. §1415(f)(3)(E).

27. IDEA provides to parents a significant role in the IEP process requiring they be informed about their child and includes them as members of the IEP team where they have the right to review records concerning their child. Justice O’CONNOR, writing in Schaffer v. Weast, supra, at 537, stated that “The core of the

statute... is the cooperative process..." that IDEA establishes between parents and schools.

28. After reviewing the Request for Due Process Hearing, the Response thereto, the record of the Hearing, the testimony of witnesses, the documents admitted into evidence, the post hearing briefs and responses, and based upon a preponderance of the evidence from the Record as a whole, I enter the following:

**FINDINGS OF FACT:**

29. This matter was commenced on October 25, 2005, by the filing with the Oklahoma State Department of Education (OSDE) of a Parent Request For Due Process Hearing (OSDE Form 9) dated October 21, 2005, signed by Student's Parent/Guardian,

30. On October 26, 2005, OSDE appointed Leslie L. Conner, Jr., Esquire, as Hearing Officer.

31. Student was born (Tr. Vol. I, P. 73)

32. Student's Mother participated in the transition of Student from Part C to Part B of IDEA (Early Intervention with SoonerStart to Special Education with District) on May 13, 2004, as a member of the IEP and MEETS Teams where she heard explanations of need for evaluation, gave written consent to use SoonerStart evaluations, heard explanation of services available from District and declined services electing to seek services privately. (PX #'s 11A & 12A, Tr. Vol. VIII, pp 1691-1701).

33. Beginning with the February 18, 2005, IEP Meeting, Parents were always accompanied by consultants or advocates who were familiar with the IEP process and were advising Parents. Record as a whole.

34. The IEP Team determined the amount of ESY for Student at the May 26, 2005, IEP Team Meeting and all team members approved the IEP with no notations or objections made thereon (PX# 36A).

35. At the May 26, 2005, IEP Team meeting the IEP Team did not agree to sign a contract with the Oral Motor Feeding Therapist. The IEP Team agreed to further investigate the matter and the District requested the qualifications and a proposed contract from the Oral Motor Feeding Therapist which the Parents requested be used for their child (Tr. Vol. XIII, p. 1441 et seq.). The Contract, goals and objectives were received but the qualifications were received after the filing of Due Process (Tr. Vol. XIII, p. 2445).

36. District never refused to provide Oral Motor Feeding Therapy or to provide ABA Therapy. District did investigate the need for both and was doing so when Parents filed this proceeding.

37. At the August 30, 2005, IEP (PX# 49A) Meeting the team agreed to meet September 20, 2005 to discuss the Parent's request from the August IEP meeting and Student's educational placement. Parent signed the IEP. District's letter of September 16, 2005 (SD X51) advising of inability to acquire needed information and Parent testified he had not been to his post office box to get the letter (Tr. Vol. V, p. 881).

38. District never refused to discuss Parents concerns at August or September IEP Meetings. Record as a whole.

39. Parent's request to attend the Sundberg Conference had been made orally by Parents and denied orally by the Superintendent prior to the September IEP. The request was made in writing on September 20, 2005, at the IEP meeting after being denied orally (Tr. Vol. IV, P. 771 et seq.). The oral denial was memorialized in a letter from the Superintendent to the Father stating the reasons for the denial. (DX # 61). The IEP in effect did not provide for these types of services.

40. Parents requested speech therapy four times per week for the first time at the August 30, 2005, IEP Meeting and it was increased to three times per week by the IEP team with no dissent noted on the IEP (PX# 49A). Final action on the Parent's specific request was pending when this proceeding was filed.

41. The IEP Team set the Occupational Therapy (OT) sessions in the IEPs which the Parents and their consultants and advocate signed off on with out noting objections between December 1, 2004, and August 30, 2005. OT was not provided in the ESY May 26, 2005, IEP (PX# 36A).

42. District provided Parents certification of service providers.

43. At the March 25, 2005, IEP, the Team considered Assistive Technology (AT) for Student as shown by PX#31A but no requirement for an evaluation was made in the IEP. Parent later requested an AT evaluation at the September 2005 IEP and District moved to obtain the evaluation (Tr. Vol. XI, p. 2077, and p. 2176).

44. Parent father told Parent's Autism Consultant he did not want Student attending District's Cooperative Special Education Class (Tr. Vol. VI, Question @ p. 1238, line 7-9, Answer @ p. 1239, line 17).

45. District had not received any records on the home ABA program from Parents or their Autism Consultant by October 18, 2005 (Tr. Vol. XI, pps. 2085-2088).

46. Based upon the entire record in this proceeding and the above Discussion of the Issues and Findings of Fact, I arrive at the following:

#### **CONCLUSIONS OF LAW:**

47. This proceeding was properly and legally conducted pursuant to 20 U.S.C. § 1400, et seq., and 34 C.F.R. § 300.1 et seq.

48. The School District's obligation under the IDEA is to provide the Student a "free appropriate public education." The IDEA defines a free appropriate public education" in 20 U.S.C.A. § 1401(8) and 34 C.F.R. § 300.13 to mean special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title..

49. The burden of proof in an administrative hearing challenging an IEP is

properly placed upon the party seeking relief. Schaffer v. Weast, 546 U.S. \_\_\_\_, 126 S. Ct. 528 (2005); Johnson v. Independent School District No. 4 of Bixby, 921 F.2d 1022, 1026 (10th Cir. 1990).

50. Student was properly evaluated and transitioned from SoonerStart to District by a team that included Mother of Student and the use of the SoonerStart evaluation data was proper and authorized by the Oklahoma State Department of Education Policies and Procedures for Special Education in Oklahoma, 2002 (PX # 120), page 52.. 20 U.S.C. § 1414, 34 C.F.R. §§ 300.320, 300.533.

51. The IEP Team provided appropriate ESY Services for Student in the May 26, 2005, IEP. Johnson v. ISD # 4 of Bixby, Tulsa County, Oklahoma, 921 F.2d 1032

52. District took sufficient steps to notify and insure Parent was notified early enough of the problems interfering with District's abilities to completely discuss and come to a conclusion on Parents request of August 30 at the September IEP Meeting. 34 C.F.R. 300.345(a).

53. District was not required to provide written notice under 20 U.S.C. § 1415 and 34 C.F.R. § 300.503 as it never denied or refused to discuss Parent's concerns at August and September, 2005, IEP meetings. 34 C.F.R. §300.503(a).

54. The oral notification and the follow-up letter denying attendance at the Sundberg Conference amount to reasonable notice, was timely and did not deprive the Student of FAPE. 20 U.S.C. § 1415(b)(3) requires prior written notice to a Parent when the District refuses a change that affects FAPE. FAPE is defined at 20 U.S.C. § 1401 (9) and 34 C.F.R. § 300.13. The notice sufficient to meet intent of IDEA.

55. No notice of refusal to provide speech therapy four times weekly is required as there has never been final action on the request due to the filing of this matter. 34 C.F.R. §300.503(a).

56. Alleged denial of FAPE based on lack of District providing certification of service providers is moot.

57. Parents fail to meet their burden on proving denial of FAPE based on failure to provide Assistive Technology evaluation or services as District provided

same as soon as it was requested in September, 2005.

58. Parents do not have the right under IDEA to compel District to provide a specific program or employ specific methodology for education of Student. *Lachman v. Illinois Bd. Of Educ.*, 852 F.2d 290, 297 (7<sup>th</sup> Cir. 1988) cert. denied 488 U.S. 925, 109 S. Ct. 308, cited in *Loque v. Shawnee Mission Public School Unified School District No. 512*, 959 F. Supp. 1338 (USDC Kansas 1997). Nor must a District maximize a Student's potential. *Bd. Of Educ. of Hendrick Hudson Public School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034.

59. Parents' decision to place Student in private ABA Therapy was made unilaterally and IDEA does not require District to reimburse Parents for costs of such program. *Tucker v. Calloway County Bd. Of Educ., et al.*, 136 F.3rd 495 (6<sup>th</sup> Cir. 1998).

60. Student fails to meet the burden of proof on all specific allegations. District did not fail to provide a free appropriate public education for Student. Parent continued a pattern of unilateral action by moving to Due Process to quickly. Student's IEP Team should convene and consider an appropriate individual education plan in light of this Decision, said plan to include but not be limited to the goals, objectives, and educational value of all methodologies.

## **DECISION**

61. There was no denial of FAPE by District to Student. The Student's IEP team shall be convened within twenty (20) days to draw an appropriate individual education plan in consideration of this Decision. The team shall consider the goals, objectives, and educational value of all methodologies and will complete a properly written plan with procedures, goals (to include transition to a less restrictive environment, i.e., out of the home and into a classroom) and measurable data collection for analysis and determination of progress or lack thereof.

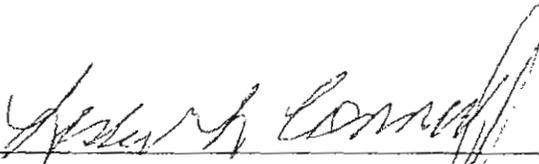
## **CONCLUDING STATEMENT**

62. Unless appealed, this decision is binding upon all parties. Either party may appeal this decision by filing a written request with: The Oklahoma State Department of Education in care of Special Education Resolution Center, 4825 S. Peoria, Suite

2, Tulsa, OK 74105. The appeal must be made with 30 days of the receipt of this decision.

So Ordered.

Dated: August 7, 2006.

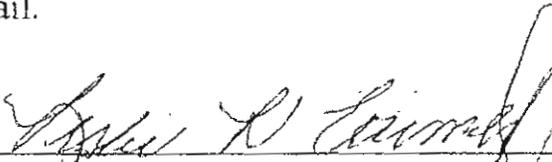


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Leslie L. Conner, Jr, Hearing Officer

**CERTIFICATE OF MAILING**

On August 7, 2006, this Decision & Opinion was filed by email with the Oklahoma Special Education Resolution Center with the signed original mailed to the Oklahoma Special Education Resolution Center and signed copies mailed to Student and District and forwarded by email.



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Leslie L. Conner, Jr, Hearing Officer

Due Process Hearing 1875

Decision and Opinion  
September 25, 2006

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SEP 27 2006  
*[Signature]*

**DUE PROCESS DECISION  
CASE NO. 1875**

**PETITIONER**

**RESPONDENT**

**Name:**

**Address:**

**Date of Birth:**

**Home School:**

**Counsel for the Student:**

**Counsel for the School:**

**Hearing Dates:** September 1, 2006

**Brief Submitted:** None

**Petitioner:** , Father of the Student

**Respondent:**

**Background**

On February 9, 2006 the Parent completed and signed a *Parent Request for Special Education Due Process Hearing* and submitted the same to the Special Education Resolution Center on March 2, 2006. A Hearing Officer was assigned to this case on March 6, 2006. The hearing was scheduled for Friday, April 14, 2006 at 9:00 am with decision to be rendered on or before Sunday, May 14, 2006.

A request for a telephone Pre-Hearing Conference was made by Counsel for the School to clarify various issues in the case. This request was granted and a Pre-Hearing telephone conference was made with Counsel for the Parent, father of the student and Counsel for the School on Wednesday, April 28, 2006.

A written request from Counsel for the Parent requested an extension of the date of the hearing. The request was granted in writing by the Hearing Officer and the hearing was rescheduled for August 4, 2006. A second written request from Counsel for the Parent on July 27, 2006 to the Hearing Officer indicated he would be out of town on the scheduled hearing date and requested an extension. There was no objection to this request from the School stating "as it appears we are continuing to make progress toward resolving all issues identified in the due process complaint." The extension was granted with all parties being notified in writing a new hearing date was set for Friday, September 1, 2006, 9:00 am at a specified location.

**Procedural Safeguards**

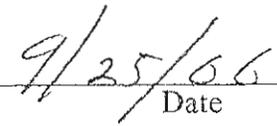
Prior to the hearing, a determination was made the School District had complied with all aspects of the required procedural safeguards. In addition, the full disclosure requirement was met by the exchange of written evidence and lists of witnesses at least five days prior to the hearing. The Parent had not exchanged witness list or written evidence in compliance with the full disclosure requirement.

Upon opening the Hearing, Counsel for the Parent indicated that an agreement had been reached by all parties (Tr.P. 4 & 5). The settlement (agreement) had been reduced to writing and had been signed by the Parent and Representative of the School (Tr.P.4). There being no other issues the hearing was concluded.

**Concluding Statements**

The transcript of these proceedings are on file with the Jo Anne Pool, Director of the Special Education Resolution Center, 4825 S. Peoria, Suite 2, Tulsa Oklahoma 74105.

  
\_\_\_\_\_  
Ben Harper, Ph.D.  
Hearing Officer for the State

  
\_\_\_\_\_  
Date

Due Process Hearing 1896

Decision and Opinion  
May 1, 2007

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF OKLAHOMA

MAY 02 2007  
RECEIVED  
*[Signature]*

on behalf of	minor child,	)	
		)	
	Student/Complainant,	)	Due Process Hearing No. 1896
		)	
v.		)	
		)	
DISTRICT,		)	
		)	
	District/Respondent.	)	

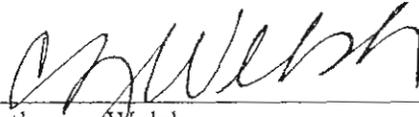
ORDER

This matter came on for due process hearing at 9:00 a.m. on April 19, 2007. Petitioners, \_\_\_\_\_ and \_\_\_\_\_ appeared in person and by and through their counsel of record, \_\_\_\_\_, Esq. The District Respondent, \_\_\_\_\_, appeared through its attorney of record, \_\_\_\_\_ Esq., of \_\_\_\_\_. Following a pre-hearing conference and conferences between and among counsel and their respective clients, the Petitioners announced on the record that they have elected to dismiss their Complaint in its entirety. The hearing officer, after making a record of the same, finds that both Petitioners are comfortable with this request for dismissal and are in agreement with the same.

It is, therefore, Ordered, Adjudged, and Decreed that the Complaint in Due Process Hearing Number 1896 is dismissed in its entirety this 19th day of April 2007.

IT IS SO ORDERED.

Dated this 1st day of May 2007.

A handwritten signature in cursive script, appearing to read "C. Welsh", written over a horizontal line.

Catherine Welsh  
Hearing Officer  
1831 East 71st Street, Suite 305  
Tulsa, Oklahoma 74136  
(918) 585-8600 – telephone  
(918) 877-2787 – facsimile

Due Process Hearing Appeal 1860

Decision  
January 22, 2007

Due Process Hearing Appeal Decision - #1860

Student:

Parent(s):

Attorney:

School:

Superintendent:

Attorney:

Dates:

Hearing Decision: August 7, 2006

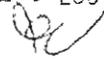
Appeal Request: September 6, 2006

Appeal Decision: January 22, 2007

Appeal Officer: Louis Lepak, Jr., Ph.D.

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## BACKGROUND

Parents of a Student with Autism filed a Due Process Hearing Request alleging denial of a Free Appropriate Public Education (FAPE) by the School District.

The Hearing Officer's Decision was no denial of FAPE by District to Student. The Hearing Officer ordered the Student's IEP team to convene within twenty (20) days to draw an appropriate Individual Education Plan (IEP) in consideration of the Hearing Officer Decision.

The Parent Appealed the Decision of the Hearing Officer.

## ABBREVIATIONS

Appeal Officer - AO  
Applied Behavioral Analysis - ABA  
Autism Spectrum Disorder - ASD  
Conclusions of Law - CL  
Developmental Delays - DD  
Early Intervention Program - EIP  
Early Intervention Unit - EIU  
Extended School Year - ESY  
Findings of Fact - FF  
Free Appropriate Public Education - FAPE  
Hearing Officer- HO  
Individualized Education Program - IEP  
Individualized Family Service Plan - IFSP  
Local Education Agency - LEA  
Least Restrictive Environment - LRE  
Multidisciplinary Evaluation and Eligibility Team Summary - MEETS  
Occupational Therapy - OT  
Physical Therapy - PT  
Review of Existing Data - RED  
Speech / Language Pathologist - SLP  
Transition Planning Conference - TPC

## ISSUE(S)

The Parent has appealed the Due Process Decision and identified twelve (12) specific reasons for the request.

The specific reasons (#1-12) refer to the following issues: Advocacy / Consultants (#9); Case Law / Educational Benefit (#4); Evaluation / IEP (#2,6,9); FAPE (#1,3,5,6); Transition (#11); Unilateral Placement / Financial (#7,8); Written Notice (#10) and previously filed briefs with proposed findings of fact and conclusions of law of May 26, 2006 (#12).

The Decision itself is found at #61 of the August 7, 2006 Due Process Hearing Decision and states: "There was no denial of FAPE by District to Student. The Student's IEP team shall be convened within twenty (20) days to draw an appropriate individual plan in consideration of this decision. The team shall consider the goals, objectives, and educational value of all methodologies and will complete a properly written plan with procedures, goals (to include transition to a less restrictive environment, i.e., out of the home and into a classroom) and measurable data collection for analysis and determination of progress or lack thereof".

### PROCEDURAL ISSUES

This matter was consolidated by the Hearing Officer (HO) as the Student's sibling has identical issues alleged and an identical diagnosis of Autism. (Tr. Vol. I, p.5, Ln.6-10; HO Decision, item #1)

The parties agreed that the two (2) cases were properly consolidated for hearing. (Tr. Vol. I, p.12, Ln. 4-25, p.13, Ln. 1)

The Appeal Officer (AO) received a request to submit new evidence from the Parent's Attorney.

The new evidence related to a complaint filed by the Parent(s) during the Due Process Hearing against the Licensed Psychologist who was a witness for the School District.

The complaint was filed with the State Board of Examiners of Psychology and this matter became part of the Hearing record. (Tr. Vol. IV, p.674, Ln. 16 to p.732, Ln. 3' Vol. XIV, p.2718, Ln.6 to p.2719, Ln.9; DE #122)

The Appeal Officer ruled this new evidence could affect the Appeal Decision under (34CFR.300.510(b)(2)(iii)) and granted specific extensions of time under 34CFR.300.512(c) to include the date (January 20, 2007) at which time the final complaint was to be received by the State Board of Examiners of Psychology.

Before the Appeal Decision was rendered the School District's Attorney requested an opportunity to present new evidence regarding a complaint filed with the State Department of Health against the Board Certified Behavioral Analyst who testified on behalf of the Parent at the Hearing.

Before the Appeal Decision was rendered the Parent Attorney requested a continuance of not more than thirty (30) days to allow for receipt of results of an investigation of a complaint filed against the Parent Expert Witness alleging unauthorized practice of behavioral health services.

The Parent Attorney advised the meeting of the State Board of Examiners in Psychology scheduled for January 20, 2007 will be rescheduled due to the significant and hazardous ice storm currently occurring in the state.

Expert witnesses for both Parent and School are thus involved in ongoing complaint procedures with licensing boards in the state in which they practice.

These complaints are not moot and one or both could relate to matters raised in the Due Process Hearing / Decision.

The Appeal Officer cannot extend the Appeal Decision indefinitely to allow for completion of complaint procedures with licensing boards.

Any matter not resolved within the current timeframes will be reserved for a future setting with appropriate jurisdiction.

The Appeal Officer denies the Parent request for a continuance and the District's proposed new evidence.

#### FINDINGS OF FACT

1) The Parent testified the Student was born [redacted] became involved with the state EIP in [redacted] following release from the hospital NICU. The Student was born approximately two (2) months premature and shortly after birth the Parent was advised the Student was developmentally delayed because of the early birth. The state EIP was recommended to the Parent. (Tr. Vol. I, p. 73, Ln.7-10, 20-25; p.74, Ln.1-5,p.75, Ln.1-5)

2) The Student was referred to the state EIP July 9, 2001. The referral reasons were the Student was at home on an Apnea monitor, the gestation period was 32 weeks and the Student was a premature identical twin. A family interview was conducted August 8, 2001. The Parent initiated another referral to the Early Intervention Program September 16, 2003 because the Student was not talking at all, was a little resistant to table food and had tubes placed in January. The initial MEETS of October 6, 2003 determined the Student was eligible for early intervention services because of a 50% delay in five (5) developmental areas. The date of the initial / full IFSP was November 10, 2003. The Parent identified outcomes and a transdisciplinary approach in the home two (2) times per month was agreed upon. Assistive technology was not needed to reach outcomes. Services were to begin November 10, 2003 and end at the six (6) month review May 10, 2004. The transition date was scheduled for June 7, 2004 and the TPC was scheduled for March 23, 2004. (PE 5, 6; DE 12,14,16)

3) The EIP Resource Coordinator notified the District by phone March 22, 2004 the Parent had cancelled the March 23, 2004 TPC. The District Elementary Principal / Special Education Director had scheduled the TPC through the EIP Resource Coordinator in the same fashion as always in her eleven (11) years as Elementary Principal and nine (9) years as Special Education Director and the TPC had never been cancelled before in her experience. She asked to reschedule the TPC but was advised by the Resource Coordinator the Parent did not feel they needed a meeting and were not interested in any services at this point. The District SLP called the Parents after the Principal /

Special Education Director informed her of the cancellation of the TPC. The SLP asked if there were any services or something the School could do and what they thought about going ahead and transitioning the Student. The Parents indicated they were looking into other possibilities suggested by EIP staff and did not want School services until the Student was school age. The SLP shared her experience of an easier process if they could go ahead and transition the Student. At that point the transition meeting was scheduled for May 13, 2004 with notification provided to the Parent. (TR. Vol. X, p.1972, Ln. 4-7, Ln. 15-18, p.1974, Ln. 13-25, p.1975, Ln. 1-23, p. 1976, Ln.9 -25,p.1977, Ln.1-5; DE 19,20; PE 7A,8A; Tr. Vol. VIII, p.1668, Ln. 20-22. p.1670, Ln. 22 -25,p.1672,Ln.5-10,12-24)

4) The transition meeting was held May 13, 2004 and the Parent gave consent for the pre placement initial evaluation. The MEETS indicated all testing was reflected on the RED. The Student was determined to be multi handicapped and eligible for special education and related services. An IEP was developed which indicated the Student showed delays in all areas of development, actively investigated the environment and communicated through gestures and vocalization. Parent support was a strength and the relevant special factor of communication needs would be addressed through Related Service / Speech Therapy at Rite Care. A Special Education Consultation would be provided one (1) time each nine (9) weeks to assist in the provision of Special Education services at Head Start. LRE consideration of placement options resulted in a decision of no service as the Student was full time Special Ed. ESY services were not needed. The Parent received Parent Rights in Special Education and no disagreements with the IEP were noted in the Additional Comments or otherwise on the document. One of the considerations indicated modifications and one to one instruction were needed to maximize learning. (PE 7-12; DE 19,21,23.)

5) The Parent (Mother) attending the May 13, 2004 Transition meeting testified the District SLP was in charge or seemed to be chairing the meeting, the relationship with the Principal/Special Education Director who also attended was "struggling" related to school issues with another of their children. The Co-op Special Education teacher said the Student was beautiful and she noticed the Student still needed OT. (Tr. Vol. VIII p.1524, Ln. 5-19, p. 130, Ln. 17-22,p. 1548,Ln.18-25, p.1549, Ln.1)

5) The Parent (Father) testified that, at the time of the Due Process Hearing, the Student was age appropriate for the School District Pre-K. The Parent had become aware, after age 2 or 3, the Student's actions compared to an older sibling and nieces and nephews were not identical or similar based on age. The Student was approximately eighteen (18) months behind others and the Parent attributed the Student's actions to the developmental delay he had been previously advised of. (Tr. Vol. I, p.73, Ln. 16-17; p.74, Ln.15-22; p.75, Ln.6-8)

6) The Parent (Father) testified over time he observed the Student to engage in odd behaviors that were then attributed to developmental delay but later were recognized as very typical with autistic children. Examples included placing hands in the face and the slow period of time to do things. (Tr. Vol. I, p.75, Ln.9-18)

7) The Parent (Father) received an urgent call from the other Parent (Mother) in June of 2004. During an out of state trip to participate in a family wedding, the Student sibling

had started screaming, crying, banging her head, scratching and biting herself. The behaviors were continuous and significant to a degree not seen before. Local police had been called to the hotel by unknown persons which the Parent believes reflects the severity of the behaviors exhibited by the Student. The behaviors worsened the next day as the trip continued. The Parent then traveled to the out of state location of the incident and along with two family members returned home with the Student and sibling. In the month following, the self injurious behavior and screaming increased in intensity. The Mother testified for months following she lived with the child screaming, banging her head in the crib and hitting herself. The Parent cried, prayed and feared the Student had gone insane and was going to end up in a mental institution. (Tr. Vol. I, p.76, Ln.12-25, p.77, Ln. 1-25, p.79, Ln.24-25; Vol. VIII p.1553, Ln. 3-14)

8) The Student was referred for an occupational therapy initial evaluation by her pediatrician. The July 21, 2004 history and background section of the report indicated no motor (occupational or physical therapy) services were in the IEP. Recommendation included OT one (1) to Two (2) times per week for 45-60 minutes per session for a minimum of six (6) months. The Parent testified the OT report was provided to the District at the February, 2005 IEP meeting. (PE13; Tr. Vol. I, p.80, Ln.18-25, p.81, Ln.1-5)

9) The Parent testified the first time the Student received a definitive diagnosis of autism was the September 14, 2004 Jumpstart Developmental Clinic Interdisciplinary Assessment Report. The Department of Pediatrics Child Study Center Evaluation Team assessed the Student as a then three (3) year, three (3) month old child who after a difficult twin gestation had developed symptoms of autism and was severely developmentally delayed meeting criteria for the diagnosis of mental retardation. The specific diagnoses were Autism Spectrum Disorder and Mental Retardation. The Parent testified the report was provided to the District at the latest in February of 2005. (Tr.Vol I, p.84, Ln. 3-22; PE 16; DE 26)

10) IEP meetings were held May 13, 2004, February 18, March 25, May 26, August 30 and September 20 of 2005. The Parent initiated a Request for Special Education Due Process Hearing October 21, 2005. The Request was received October 25, 2005 at the State Department of Education Special Education Resolution Center and the Due Process Hearing timeline began on that date. (PE 12,21,29,31,36,49,57; DE 2,21,29,36,41,48,53; Tr.Vol.I, P.9, Ln.5-6)

11) The IEP of May 13, 2004 reflects Special Education and Related Services at Head Start and Rite Care. The LEA initially was responsible for Special Education consultation one (1) time each nine (9) weeks to help with the Student's program. (PE12; DE21)

12) The February 18, 2005 IEP Review increased the amount of services by proposing Speech, OT and PT evaluations and observations in the Student's home due to her difficulty functioning and learning outside the home at that time. The Parents requested feeding intervention and the District was investigating this area. (PE21; DE29)

13) The March 25, 2005 IEP Review/ Subsequent IEP increased services to 115 minutes per week in home early childhood service / placement by the SLP / OT and Related SLP

Services 25 minutes three (3) times per week. PT 240 minutes per month and OT 30 minutes two (2) times per week were to begin August 30, 2005. ESY Services were deemed necessary and the Parents wanted to continue with ABA therapy. LRE placement outside the home was not appropriate at that time due to anxiety and this would result in the Student missing socialization. (PE31;DE36)

14) The The May 26, 2005 IEP Review proposed ESY Services of a minimum of nine (9) hours PT beginning June 1, 2005 through August 1, 2005 and Speech Therapy 30 minutes one (1) time per week for six (6) weeks beginning June 8, 2005. (PE36; DE41)

15) At the August 30, 2005 IEP Review the team felt the Student would benefit from increased services. PT was increased to 240 minutes monthly, Speech to three (3) times weekly for 25 minutes and OT two (2) times per week for 30 minutes. At this meeting the Parent presented an attachment / reports containing proposed changes / enhancements to the IEP. The Parent attachment stated the following concerns and requests: The Parent experts have not been allowed to be members of the IEP team and

1. An in home forty plus (40+) hours per week ABA program for the Student;
2. Reimbursement of expenses from the first (1st) IEP to the present. The Parent and their Autism consultant visited the District Co-Op Program and concluded it was not appropriate, would not meet the Student's needs and safety and security there could not be assured;
3. Increase of speech services to four (4) days per week;
4. Provision of an aid;
5. Oral Sensory Motor Feeding Therapy with the Parent SLP;
6. increase OT to two (2) days per week;
7. Increase OT Sensory Integration Disorder Training;
8. School Board / Administration attend IDEA / No Child Left behind Act conferences or individualized training;
9. Persons selected by the IEP team and LEA attend an Autism specific conference at LEA expense (September 2005 - Sundberg Conference) and all IEP team members receive ABA training from the Parent ABA consultant or her designee;
10. Review of certificates of attendance / completion of autism and / or related courses of instruction;
11. LEA or consultants / contractors reports be provided to Parent or Parent representative the same day the LEA receives the report and in an unaltered form. (PE49,a,b,c,d.; DE 48)

16) The September 20, 2005 IEP Review team continued the same type of service delivery, discussed the specific methodology of ABA and data collection and the Parent requested the District and Parent attend the Sundberg conference September 22 & 23, 2005. The Parent provided information regarding Feeding Therapy, OATC evaluation and professional training were discussed and proposed costs were requested by the Parent. The regular classroom teacher did not attend this meeting. Team input was the basis for recommendations. (PE57Aabc, DE52,54)

17) The Student was determined to be eligible for early intervention services based on developmental delay October 6, 2003. The initial Evaluation (MEETS) determined the Student was eligible for special education and related services May 13, 2004 as multi handicapped. The Student was determined to have the disability of autism March 25, 2005 at the MEETS Reevaluation. (PE6,11,28 DE14,23,38)

18) The District Superintendent notified the Parent by telephone the District denied their request to attend at school district expense a parent/staff training workshop in Dallas in late September. The Superintendent confirmed this in writing September 27,

2005. (PE61; DE62;TR. Vol. XIII, p.2453, Ln.17-23, p.2454, Ln.23-25,p.2455, Ln.1-2,14-25,p.2456,Ln.22-25,p.2457, Ln.1-8)

### CONCLUSIONS OF LAW

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) was signed into law December 3, 2004. Other than the personnel requirements which went into effect when the bill was signed, the new statutory provisions went into effect July 1, 2005. The title may be cited as the 'Individuals with Disabilities Education Act'. (Pub. L. 108-446)

- 1) Free Appropriate Public Education - FAPE means special education and related services that-
  - (A) have been provided at public expense, under public supervision, and without charge;
  - (B) meet the standards of the State educational agency;
  - (C) include an appropriate preschool, elementary school or secondary school education in the State involved; and
  - (D) are provided in conformity with the individualized education program required under section 1414(d) of this title. (20 U.S.C. 1401 (9))
- 2) The transition from Part C to part B of IDEA shall be initiated by the EIU six to twelve months prior to a child's third birthday. The EIU will notify the child's LEA, with parental permission, at the appropriate time for a transition planning conference. (34CFR300.132(a)(b)(c); Policies and Procedures for Special Education in Oklahoma, p.49. 2002)
- 3) Under the IDEA, the burden of proof in an administrative hearing challenging an IEP is placed on the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528 (2005)
- 4) The Education for All Handicapped Children's Act requirement of a "free appropriate public education" did not require the state to maximize potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et.al., v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982)
- 5) Determination of whether a structured summer program was warranted for a multiply handicapped child required consideration of not only retrospective data but predictive data. *Johnson by and through Johnson v. Independent School Dist. No.4 of Bixby, Tulsa County, Okla.*, 921 F.2nd 1022, 64 Ed. Law Rep. 1027 (10th Cir (Okla), Dec.11, 1990) No. 89-5111)
- 6) Use of the term "autism" for eligibility purposes under IDEA may include related spectrum disorders. (Policies and Procedures for Special Education in Oklahoma, p. 69. 2002)
- 7) Error, if any, in having expert witness give opinion as to whether child fit definition of student who was "seriously emotionally disturbed" under regulation was harmless, as

it had been invited. A.E. by and through Evans v. Independent School Dist. No. 25 of Adair County, Okla., 936 F.2d 472, 68 Ed. Law Rep. 278, 33 Fed.R.Evid. Serv. 247 (10th Cir. (Okla), June 10, 1991) (No. 90-7018)

8) Parents must be given written notice a reasonable time before the public agency: proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child; or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child; and initiated the evaluation process. (Policies and Procedures for Special Education in Oklahoma, p.39. 2002

9) A public special education preschool placement was not the least restrictive environment for a student with autism spectrum disorder who was succeeding in private mainstream preschool with the assistance of an aide and an intensive applied behavioral analysis program. L.B. ex rel. K.B. v. Nebo School Dist., 379 F.3d 966, 191 Ed. Law Rep. 92 (10th Cir. (Utah), Aug. 11, 2004) (No. 02-4169)

10. Parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that: 1) The School's IEP is not appropriate; 2. The Parent's IEP is appropriate; and 3. Equitable factors may be taken into consideration. Burlington Sch. Comm. V. Dept. Ed., 471 U.S. 359, 105 S. Ct. 1996 (1985)

#### DECISION

The Appeal Officer finds:

1. The Student was denied a FAPE when the District failed to offer Special Education Services to the Student.
2. The Student was denied a FAPE when the district failed to refuse the Parent's proposed home based ABA program.
3. The effective date of denial of FAPE is August 30, 2005.
4. The District shall reimburse Parent and Parent ABA Consultant expenses for the period beginning August 30, 2005 through January 31, 2007. These expenses must be reasonable and similar to the monthly average expense of invoices parents previously requested reimbursement for. The AO calculates the average monthly amount for Parent at \$133.00 and the Parent ABA Consultant at \$126.00 per month which is a total of \$4,403.00 for seventeen (17) months for this Student's Special Education expenses.
5. The District shall implement, at District expense, the Parent home based forty (40) hour per week ABA program beginning February 1, 2007 until the Student reaches the age of six (6) years and two (2) months on August 7, 2007.

#### DISCUSSION

The Parent faced a complicated situation with the birth of the Student. The record reflects commendable personal and professional efforts to meet the needs of the Student since birth.

The transition from part B to part C of IDEA reflected difficulty in identifying the disability category and issues in relationships between the Parents and District staff. The Student did not experience a smooth and effective transition to preschool and had three (3) different disability classifications in seventeen (17) months.

The Student's Uncle is a member of the District school Board and the School Board President is a neighbor. The Student's older sibling had School related matters which made the relationship with District staff less than optimal.

The record, particularly the IEPs, reflect the District provided Related Services and the Parent provided Special Education. The District did frequently seek further information in order to demonstrate a willingness to consider the Parent's wishes but failed to specifically offer special Education or reject the Parent's proposed program. The District offered to investigate specific requests such as feeding and an SLP contract but did not take affirmative action in the agreed to investigations.

Parent's do not have the right to select a methodology for the District. The Co-op program the District serves children with autism in is reported to be successful. The record indicates out of home placement was not a viable option.

If consensus cannot be reached regarding IEP decisions, the public agency has the ultimate responsibility to ensure FAPE and make the decision. In such a case the agency must provide the parents prior written notice. Consensus was generally reached on Related Services but not on Special Education. The record indicates ongoing disagreement in spite of Parent signatures on IEPs.

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#### APPEAL STATEMENT

The Decision made by the Appeal Officer is final, unless a party brings a civil action under the IDEA in a State or Federal Court of competent jurisdiction.

A handwritten signature in black ink, appearing to read "Louie Lepak Jr.", is written over a large, stylized, circular scribble.

Louie Lepak Jr., Ph.D.  
Appeal Officer

Due Process Hearing Appeal 1861

Decision  
January 22, 2007

SERC  
RECEIVED  
JAN 30 2007

Due Process Hearing Appeal Decision - #1861

Student:

Parent(s):

Attorney:

School:

Superintendent:

Attorney:

Dates:

Hearing Decision: August 7, 2006

Appeal Request: September 6, 2006

Appeal Decision: January 22, 2007

Appeal Officer: Louis Lepak, Jr., Ph.D.

## **BACKGROUND**

Parents of a Student with Autism filed a Due Process Hearing Request alleging denial of a Free Appropriate Public Education (FAPE) by the School District.

The Hearing Officer's Decision was no denial of FAPE by District to Student. The Hearing Officer ordered the Student's IEP team to convene within twenty (20) days to draw an appropriate Individual Education Plan (IEP) in consideration of the Hearing Officer Decision.

The Parent Appealed the Decision of the Hearing Officer.

## **ABBREVIATIONS**

Appeal Officer - AO  
Applied Behavioral Analysis - ABA  
Autism Spectrum Disorder - ASD  
Conclusions of Law - CL  
Developmental Delays - DD  
Early Intervention Program - EIP  
Early Intervention Unit - EIU  
Extended School Year - ESY  
Findings of Fact - FF  
Free Appropriate Public Education - FAPE  
Hearing Officer- HO  
Individualized Education Program - IEP  
Individualized Family Service Plan - IFSP  
Local Education Agency - LEA  
Least Restrictive Environment - LRE  
Multidisciplinary Evaluation and Eligibility Team Summary - MEETS  
Occupational Therapy - OT  
Physical Therapy - PT  
Review of Existing Data - RED  
Speech / Language Pathologist - SLP  
Transition Planning Conference - TPC

## ISSUE(S)

The Parent has appealed the Due Process Decision and identified twelve (12) specific reasons for the request.

The specific reasons (#1-12) refer to the following issues: Advocacy / Consultants (#9); Case Law / Educational Benefit (#4); Evaluation / IEP (#2,6,9); FAPE (#1,3,5,6); Transition (#11); Unilateral Placement / Financial (#7,8); Written Notice (#10) and previously filed briefs with proposed findings of fact and conclusions of law of May 26, 2006 (#12).

The Decision itself is found at #61 of the August 7, 2006 Due Process Hearing Decision and states: "There was no denial of FAPE by District to Student. The Student's IEP team shall be convened within twenty (20) days to draw an appropriate individual plan in consideration of this decision. The team shall consider the goals, objectives, and educational value of all methodologies and will complete a properly written plan with procedures, goals (to include transition to a less restrictive environment, i.e., out of the home and into a classroom) and measurable data collection for analysis and determination of progress or lack thereof".

## PROCEDURAL ISSUES

This matter was consolidated by the Hearing Officer (HO) as the Student's sibling has identical issues alleged and an identical diagnosis of Autism. (Tr. Vol. I, p.5, Ln.6-10; HO Decision, item #1)

The parties agreed that the two (2) cases were properly consolidated for hearing. (Tr. Vol. I, p.12, Ln. 4-25, p.13, Ln. 1)

The Appeal Officer (AO) received a request to submit new evidence from the Parent's Attorney.

The new evidence related to a complaint filed by the Parent(s) during the Due Process Hearing against the Licensed Psychologist who was a witness for the School District.

The complaint was filed with the State Board of Examiners of Psychology and this matter became part of the Hearing record. (Tr. Vol. IV, p.674, Ln. 16 to p.732, Ln. 3' Vol. XIV, p.2718, Ln.6 to p.2719, Ln.9; DE #122)

The Appeal Officer ruled this new evidence could affect the Appeal Decision under (34CFR.300.510(b)(2)(iii)) and granted specific extensions of time under 34CFR.300.512(c) to include the date (January 20, 2007) at which time the final complaint was to be received by the State Board of Examiners of Psychology.

Before the Appeal Decision was rendered the School District's Attorney requested an opportunity to present new evidence regarding a complaint filed with the State Department of Health against the Board Certified Behavioral Analyst who testified on behalf of the Parent at the Hearing.

Before the Appeal Decision was rendered the Parent Attorney requested a continuance of

not more than thirty (30) days to allow for receipt of results of an investigation of a complaint filed against the Parent Expert Witness alleging unauthorized practice of behavioral health services.

The Parent Attorney advised the meeting of the State Board of Examiners in Psychology scheduled for January 20, 2007 will be rescheduled due to the significant and hazardous ice storm currently occurring in the state.

Expert witnesses for both Parent and School are thus involved in ongoing complaint procedures with licensing boards in the state in which they practice.

These complaints are not moot and one or both could relate to matters raised in the Due Process Hearing / Decision.

The Appeal Officer cannot extend the Appeal Decision indefinitely to allow for completion of complaint procedures with licensing boards.

Any matter not resolved within the current timeframes will be reserved for a future setting with appropriate jurisdiction.

The Appeal Officer denies the Parent request for a continuance and the District's proposed new evidence.

#### FINDINGS OF FACT

1) The Parent testified the Student was born [redacted] and became involved with the state EIP in [redacted] following release from the hospital NICU. The Student was born approximately two (2) months premature and shortly after birth the Parent was advised the Student was developmentally delayed because of the early birth. The state EIP was recommended to the Parent. (Tr. Vol. I, p. 73, Ln.7-10, 20-25; p.74, Ln.1-5,p.75, Ln.1-5)

2) The Student was referred to the state EIP July 9, 2001. The referral reasons were the Student was at home on an Apnea monitor, the gestation period was 32 weeks and the Student was a premature identical twin. A family interview was conducted August 8, 2001. The Parent initiated another referral to the Early Intervention Program September 16, 2003 because the Student was not talking at all, was a little resistant to table food and had tubes placed in January. The initial MEETS of October 6, 2003 determined the Student was eligible for early intervention services because of a 50% delay in five (5) developmental areas. The date of the initial / full IFSP was November 10, 2003. The Parent identified outcomes and a transdisciplinary approach in the home two (2) times per month was agreed upon. Assistive technology was not needed to reach outcomes. Services were to begin November 10, 2003 and end at the six (6) month review May 10, 2004. The transition date was scheduled for June 7, 2004 and the TPC was scheduled for March 23, 2004. (PE 5A, 6A; DE 11,13,15)

3) The EIP Resource Coordinator notified the District by phone March 22, 2004 the Parent had cancelled the March 23, 2004 TPC. The District Elementary Principal / Special Education Director had scheduled the TPC through the EIP Resource Coordinator in the same fashion as always in her eleven (11) years as Elementary Principal and nine (9) years as Special Education Director and the TPC had never been cancelled before in her experience. She asked to reschedule the TPC but was advised by the Resource

Coordinator the Parent did not feel they needed a meeting and were not interested in any services at this point. The District SLP called the Parents after the Principal / Special Education Director informed her of the cancellation of the TPC. The SLP asked if there were any services or something the School could do and what they thought about going ahead and transitioning the Student. The Parents indicated they were looking into other possibilities suggested by EIP staff and did not want School services until the Student was school age. The SLP shared her experience of an easier process if they could go ahead and transition the Student. At that point the transition meeting was scheduled for May 13, 2004 with notification provided to the Parent. (TR. Vol. X, p.1972, Ln. 4-7, Ln. 15-18, p.1974, Ln. 13-25, p.1975, Ln. 1-23, p. 1976, Ln.9-25,p.1977, Ln.1-5; DE 19,20; PE 7A,8A; Tr. Vol. VIII, p.1668, Ln. 20-22. p.1670, Ln. 22-25,p.1672,Ln.5-10,12-24)

4) The transition meeting was held May 13, 2004 and the Parent gave consent for the pre placement initial evaluation. The MEETS indicated all testing was reflected on the RED. The Student was determined to be multi handicapped and eligible for special education and related services. An IEP was developed which indicated the Student showed delays in all areas of development, actively investigated the environment and communicated through gestures and vocalization. Parent support was a strength and the relevant special factor of communication needs would be addressed through Related Service / Speech Therapy at Rite Care. A Special Education Consultation would be provided one (1) time each nine (9) weeks to assist in the provision of Special Education services at Head Start. LRE consideration of placement options resulted in a decision of no service as the Student was full time Special Ed. ESY services were not needed. The Parent received Parent Rights in Special Education and no disagreements with the IEP were noted in the Additional Comments or otherwise on the document. One of the considerations indicated modifications and one to one instruction were needed to maximize learning. (PE 7A-12A; DE 19,20,22.)

5) The Parent (Mother) attending the May 13, 2004 Transition meeting testified the District SLP was in charge or seemed to be chairing the meeting, the relationship with the Principal/Special Education Director who also attended was "struggling" related to school issues with another of their children. The Co-op Special Education teacher said the Student was beautiful and she noticed the Student still needed OT. (Tr. Vol. VIII p.1524, Ln. 5-19, p. 130, Ln. 17-22,p. 1548,Ln.18-25, p.1549, Ln.1)

5) The Parent (Father) testified that, at the time of the Due Process Hearing, the Student was age appropriate for the School District Pre-K. The Parent had become aware, after age 2 or 3, the Student's actions compared to an older sibling and nieces and nephews were not identical or similar based on age. The Student was approximately eighteen (18) months behind others and the Parent attributed the Student's actions to the developmental delay he had been previously advised of. (Tr. Vol. I, p.73, Ln. 16-17; p.74, Ln.15-22; p.75, Ln.6-8)

6) The Parent (Father) testified over time he observed the Student to engage in odd behaviors that were then attributed to developmental delay but later were recognized as very typical with autistic children. Examples included placing hands in the face and the slow period of time to do things. (Tr. Vol. I, p.75, Ln.9-18)

7) The Parent (Father) received an urgent call from the other Parent (Mother) in June of 2004. During an out of state trip to participate in a family wedding, the Student had started screaming, crying, banging her head, scratching and biting herself. The behaviors were

continuous and significant to a degree not seen before. Local police had been called to the hotel by unknown persons which the Parent believes reflects the severity of the behaviors exhibited by the Student. The behaviors worsened the next day as the trip continued. The Parent then traveled to the out of state location of the incident and along with two family members returned home with the Student and one of her siblings. In the month following, the self injurious behavior and screaming increased in intensity. The Mother testified for months following she lived with the child screaming, banging her head in the crib and hitting herself. The Parent cried, prayed and feared the Student had gone insane and was going to end up in a mental institution. (Tr. Vol. I, p.76, Ln.12-25, p.77, Ln. 1-25, p.79, Ln.24-25; Vol. VIII p.1553, Ln. 3-14)

8) The Student was referred for an occupational therapy initial evaluation by her pediatrician. The July 21, 2004 history and background section of the report indicated no motor (occupational or physical therapy) services were in the IEP. Recommendation included OT one (1) to Two (2) times per week for 45-60 minutes per session for a minimum of six (6) months. The Parent testified the OT report was provided to the District at the February, 2005 IEP meeting. (PE13A; Tr. Vol. I, p.80, Ln.18-25, p.81, Ln.1-5)

9) The Parent testified the first time the Student received a definitive diagnosis of autism was the September 14, 2004 Jumpstart Developmental Clinic Interdisciplinary Assessment Report. The Department of Pediatrics Child Study Center Evaluation Team assessed the Student as a then three (3) year, three (3) month old child who after a difficult twin gestation had developed symptoms of autism and was severely developmentally delayed meeting criteria for the diagnosis of mental retardation. The specific diagnoses were Autism Spectrum Disorder and Mental Retardation. The Parent testified the report was provided to the District at the latest in February of 2005. (Tr.Vol I, p.84, Ln. 3-22; PE 16A; DE 25)

10) IEP meetings were held May 13, 2004, February 18, March 25, May 26, August 30 and September 20 of 2005. The Parent initiated a Request for Special Education Due Process Hearing October 21, 2005. The Request was received October 25, 2005 at the State Department of Education Special Education Resolution Center and the Due Process Hearing timeline began on that date. (PE 12A,21A,29A,31A,36A,49A,57A; DE 1,20,28,35,40,47,52; Tr.Vol.I, P.9, Ln.5-6)

11) The IEP of May 13, 2004 reflects Special Education and Related Services at Head Start and Rite Care. The LEA initially was responsible for Special Education consultation one (1) time each nine (9) weeks to help with the Student's program. (PE12A; DE20)

12) The February 18, 2005 IEP Review increased the amount of services by proposing Speech, OT and PT evaluations and observations in the Student's home due to her difficulty functioning and learning outside the home at that time. The Parents requested feeding intervention and the District was investigating this area. (PE21A; DE28)

13) The March 25, 2005 IEP Review/ Subsequent IEP increased services to 115 minutes per week in home early childhood service / placement by the SLP / OT and Related SLP Services 25 minutes three (3) times per week. PT 240 minutes per month and OT 30 minutes two (2) times per week were to begin August 30, 2005. ESY Services were deemed necessary and the Parents wanted to continue with ABA therapy. LRE placement outside the home was not appropriate at that time due to anxiety and this would result in the Student missing socialization. (PE31A;DE35)

14) The The May 26, 2005 IEP Review proposed ESY Services of a minimum of nine (9) hours PT beginning June 1, 2005 through August 1, 2005 and Speech Therapy 30 minutes one (1) time per week for six (6) weeks beginning June 8, 2005. (PE36A; DE40)

15) At the August 30, 2005 IEP Review the team felt the Student would benefit from increased services. PT was increased to 240 minutes monthly, Speech to three (3) times weekly for 25 minutes and OT two (2) times per week for 30 minutes. At this meeting the Parent presented an attachment / reports containing proposed changes / enhancements to the IEP. The Parent attachment stated the following concerns and requests: The Parent experts have not been allowed to be members of the IEP team and 1. An in home forty plus (40+) hours per week ABA program for the Student; 2. Reimbursement of expenses from the first (1st) IEP to the present. The Parent and their Autism consultant visited the District Co-Op Program and concluded it was not appropriate, would not meet the Student's needs and safety and security there could not be assured; 3. Increase of speech services to four (4) days per week; 4. Provision of an aid; 5. Oral Sensory Motor Feeding Therapy with the Parent SLP; 6. increase OT to two (2) days per week; 7. Increase OT Sensory Integration Disorder Training; 8. School Board / Administration attend IDEA / No Child Left behind Act conferences or individualized training; 9. Persons selected by the IEP team and LEA attend an Autism specific conference at LEA expense (September 2005 - Sundberg Conference) and all IEP team members receive ABA training from the Parent ABA consultant or her designee; 10. Review of certificates of attendance / completion of autism and / or related courses of instruction; 11. LEA or consultants / contractors reports be provided to Parent or Parent representative the same day the LEA receives the report and in an unaltered form. (PE49A,a,b,c,d.; DE 47)

16) The September 20, 2005 IEP Review team continued the same type of service delivery, discussed the specific methodology of ABA and data collection and the Parent requested the District and Parent attend the Sundberg conference September 22 & 23, 2005. The Parent provided information regarding Feeding Therapy, OATC evaluation and professional training were discussed and proposed costs were requested by the Parent. The regular classroom teacher did not attend this meeting. Team input was the basis for recommendations. (PE57Aabc, DE52,54)

17) The Student was determined to be eligible for early intervention services based on developmental delay October 6, 2003. The initial Evaluation (MEETS) determined the Student was eligible for special education and related services May 13, 2004 as multi handicapped. The Student was determined to have the disability of autism March 25, 2005 at the MEETS Reevaluation. (PE6A,11A,28A; DE13,22,37)

18) The District Superintendent notified the Parent by telephone the District denied their request to attend at school district expense a parent/staff training workshop in Dallas in late September. The Superintendent confirmed this in writing September 27, 2005. (PE61A; DE61;TR. Vol. XIII, p.2453, Ln.17-23, p.2454, Ln.23-25,p.2455, Ln.1-2,14-25,p.2456,Ln.22-25,p.2457, Ln.1-8)

#### CONCLUSIONS OF LAW

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) was

signed into law December 3, 2004. Other than the personnel requirements which went into effect when the bill was signed, the new statutory provisions went into effect July 1, 2005. The title may be cited as the 'Individuals with Disabilities Education Act'. (Pub. L. 108-446)

1) Free Appropriate Public Education - FAPE means special education and related services that-

- (A) have been provided at public expense, under public supervision, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title. (20 U.S.C. 1401 (9))

2) The transition from Part C to part B of IDEA shall be initiated by the EIU six to twelve months prior to a child's third birthday. The EIU will notify the child's LEA, with parental permission, at the appropriate time for a transition planning conference. (34CFR300.132(a)(b)(c); Policies and Procedures for Special Education in Oklahoma, p.49. 2002)

3) Under the IDEA, the burden of proof in an administrative hearing challenging an IEP is placed on the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528 (2005)

4) The Education for All Handicapped Children's Act requirement of a "free appropriate public education" did not require state to maximize potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Board of Education of the Hendrick Hudson Central School District, Westchester County, et.al., v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982)

5) Determination of whether a structured summer program was warranted for a multiply handicapped child required consideration of not only retrospective data but predictive data. Johnson by and through Johnson v. Independent School Dist. No.4 of Bixby, Tulsa County, Okla., 921 F.2d 1022, 64 Ed. Law Rep. 1027 (10th Cir (Okla), Dec.11, 1990) No. 89 -5111)

6) Use of the term "autism" for eligibility purposes under IDEA may include related spectrum disorders. (Policies and Procedures for Special Education in Oklahoma, p. 69. 2002)

7) Error, if any, in having expert witness give opinion as to whether child fit definition of student who was "seriously emotionally disturbed" under regulation was harmless, as it had been invited. A.E. by and through Evans v. Independent School Dist. No. 25 of Adair County, Okla., 936 F.2d 472, 68 Ed. Law Rep. 278, 33 Fed.R.Evid. Serv. 247 (10th Cir. (Okla), June 10, 1991) (No. 90-7018)

8) Parents must be given written notice a reasonable time before the public agency: proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child; or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child; and initiated the evaluation process. (Policies and Procedures for Special Education in Oklahoma, p.39. 2002)

9) A public special education preschool placement was not the least restrictive environment for a student with autism spectrum disorder who was succeeding in private mainstream preschool with the assistance of an aide and an intensive applied behavioral analysis program. L.B. ex rel. K.B. v. Nebo School Dist., 379 F.3d 966, 191 Ed. Law Rep. 92 (10th Cir. (Utah), Aug. 11, 2004) (No. 02-4169)

10. Parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that: 1) The School's IEP is not appropriate; 2. The Parent's IEP is appropriate; and 3. Equitable factors may be taken into consideration. Burlington Sch. Comm. V. Dep't. Ed., 471 U.S. 359, 105 S. Ct. 1996 (1985)

### DECISION

The Appeal Officer finds:

1. The Student was denied a FAPE when the District failed to offer Special Education Services to the Student.
2. The Student was denied a FAPE when the district failed to refuse the Parent's proposed home based ABA program.
3. The effective date of denial of FAPE is August 30, 2005.
4. The District shall reimburse Parent and Parent ABA Consultant expenses for the period beginning August 30, 2005 through January 31, 2007. These expenses must be reasonable and similar to the monthly average expense of invoices parents previously requested reimbursement for. The AO calculates the average monthly amount for Parent at \$133.00 and the Parent ABA Consultant at \$126.00 per month which is a total of \$4,403.00 for seventeen (17) months for this Student's Special education expenses.
5. The District shall implement, at District expense, the Parent home based forty hour per week (40) ABA program until the Student reaches the age of six (6) years and two (2) months on August 7, 2007.

### DISCUSSION

The Parent faced a complicated situation with the birth of the Student. The record reflects commendable personal and professional efforts to meet the needs of the Student since birth.

The transition from part B to part C of IDEA reflected difficulty in identifying the disability category and issues in relationships between the Parents and District staff. The Student did not experience a smooth and effective transition to preschool and had three (3) different disability classifications in seventeen (17) months.

The Student's Uncle is a member of the District school Board and the School Board President is a neighbor. The Student's older sibling had School related matters which made the relationship with District staff less than optimal.

The record, particularly the IEPs reflect the District provided Related Services and the

Parent provided Special Education. The District did frequently seek further information in order to demonstrate a willingness to consider the Parent's wishes but failed to specifically offer special Education or reject the Parent's proposed program. The District offered to investigate specific requests such as feeding and an SLP contract but did not take affirmative action in the agreed to investigation.

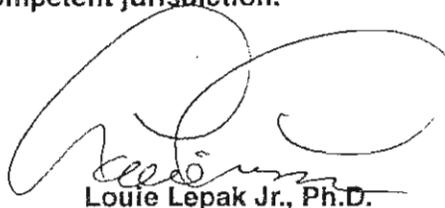
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The record reflects a contentious struggle to come to grips with the needs of the Student as seen by the Parent and the District. Due to the numerous inconsistent perceptions, the AO selected the date at which all parties would clearly know the specific Parental request(s) (August 30, 2005) to mark the denial of FAPE.

#### APPEAL STATEMENT

The Decision made by the Appeal Officer is final, unless a party brings a civil action under the IDEA in a State or Federal Court of competent jurisdiction.



Louie Lepak Jr., Ph.D.