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HEARING OFFICER DECISION/ORDER
CHILD'S NAME: J.N.
PITTSBURGH CITY SCHOOL DISTRICT (ODR FILE NO. 6765/06-07 KE)

Date of Birth: [REDACTED]
Type of Hearing: Closed
Dates of Hearing: 8/ 31/2006; 8/14/2006; 9/15/2006

I. PARTIES TO THE HEARING

PARENTS:
[REDACTED]

DATE TRANSCRIPT RECEIVED:
September 19, 2006

PARENTS' REPRESENTATIVE:
Pamela Berger, Esquire
312 Blvd. of the Allies, Suite 600
Pittsburgh, PA 15222

HEARING OFFICER:
Dorothy J. O'Shea, Ph.D.

Signature: Hearing Officer

DISTRICT CONTACT:

Pittsburgh City School District
341 S. Bellefield Avenue
Pittsburgh, PA 15213-3516

September 28, 2006
Date of Decision/Order

DISTRICT REPRESENTATIVE:

Jocelyn M. Perry, Esquire
503 Ft. Pitt Commons Building
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Pittsburgh PA 15219

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CHILD'S NAME: J.N.
PITTSBURGH CITY SCHOOL DISTRICT (ODR FILE NO. 6765/06-07 KE)

II. BACKGROUND INFORMATION

Student was an [REDACTED] year old, eligible student during the 2005-2006 school year. On June 13, 2006, [REDACTED] (i.e., Student's Parents) made a due process hearing request, alleging that Student did not receive proper supervision and management, and suffered repeated injuries at the [REDACTED] (here-in-after "*Institute*"). Based on a Pittsburgh City School District (i.e., District) recommendation and Parental approval, Student attended *Institute* from 2002 until the start of the 2006-2007 school year. The Parents opined that Student did not make appropriate progress while at *Institute* during the 2004-2005 school year. Further, the Parents contended that Student's 2003 reevaluation report (ER), (i.e., his operational ER during the 2004-2005 and 2005-2006 school years), was insufficient in scope and information to support appropriate programming (Hearing Officer Exhibit 4, pages 26-29: HO 4, 26-29).

III. FINDINGS OF FACT

1. Student, a District resident, was born [REDACTED] (Parent's Exhibit 1, page 1: P1, page 1).
2. Student received the diagnoses of autism and Pervasive Developmental Disorder (SD 9, page 7; SD 10, page 1).
3. Student also received the diagnosis of mental retardation (Severity Unspecified) (P8, page 2,3; P9, page 1).
4. Student had a history of meningitis encephalitis, at nine months of age (P9, page 1).
5. Student received wraparound services from *Behavioral Health Rehabilitation Services*, and case management services from [REDACTED], on the basis of his mental retardation (P8, pages 1-5).
6. Wraparound and case management services consisted of a Behavior Specialist Consultant (BSC) and Therapeutic Support Staff (TSS). TSS services occurred in the home and community settings. The BSC consulted with the home and school (P8, page 4).
7. On September 3, 1999, Student received an "Early Intervention Multidisciplinary Evaluation Report" to determine his eligibility for Early Intervention services (SD 7, pages 1-8)
8. On October 5, 1999, Student received a team recommendation for Early Intervention that included speech and developmental therapy. He was to receive a vision evaluation to assess his perceptual motor skills, due to perceptual vision concerns (SD 7, pages 6-8).
9. In September 1999, and continuing through his kindergarten year, Student began special education, as provided through Early Intervention services at [REDACTED] *Elementary* (Notes of Transcript, page 25: NT 25).
10. Student received individual physical therapy, occupational therapy, and speech and language services at [REDACTED] (SD 8, page 12; SD 9, page 1).
11. On April 25, 2001, Student's Parents provided permission to *reevaluate* Student through a Comprehensive Evaluation Report (CER) (SD 10, page 1).
12. Student's June 1, 2001 CER reported on specific concerns including that Student could not be tested using standardized assessment. However, professional observation determined Student to demonstrate at least a 25% delay in all areas of development, especially cognitive, speech and language, gross motor, fine motor, social and emotional, and self help skills (SD 10, pages 4, 7).
13. On May 30, 2002, Student received psychological testing from a District school psychologist. Student scored in the "Moderately to Severe Autistic Range." He was noted to display serious problem behaviors, including crying, inattentive behavior, and repetitive hand waving. Student was recommended to be eligible as a child with "autism and mental retardation" (SD 12, page 4).
14. The District did not integrate Student's May 30, 2002 psychological report into another CER (SD 12; NT 241-245).
15. *Institute* personnel were unaware of Student's diagnosis of mental retardation until the 2005-2006 school year (SD 12; NT 241-245).

16. On September 3, 2002, Student began his elementary school career in a District- recommended placement in a full time life skills support program at *Institute*, an Approved Private School (APS) (SD 9, page 1).
17. On July 29, 2002, Mrs. Parent approved the *Institute* recommendation (SD 11).
18. On October 16, 2003, Student received another District reevaluation. The reason for Student's referral stated, "2 year mandate/routine" (P4, pages 1-7).
19. Student's IEP team did not include a school psychologist when reviewing Student's existing evaluation data (P 4, pages 5, 7).
20. On October 30, 2003, Student's IEP team reconvened to review and update Student's IEP (HO 5, pages 1-15).
21. Student's October 30, 2003 IEP *Goals* focused on imitation skills (HO 5, page 5), use of switches (HO 5, pages 5-6), bilateral tasks (HO 5, page 6); self-feeding skills (HO 5, page 7), increased wait time (HO 5, pages 7-8), and self-care skills (toileting) (HO 5, page 8).
22. On October 21, 2004, Student's IEP team reconvened to update Student's IEP (HO 6).
23. Student's October 21, 2004 IEP *Goals* focused on receptive language skills (HO 6, page5), life skills tasks of hanging up coat and backpack (HO 6, page 6), life skills tasks of cleaning up after snack or lunch (HO 6, pages 6-7), computer skills (HO 6, page 7), self-care skills (zipping) (HO 6, page 8), and ability to make a request from crying/handing requested object to adult (HO 6, page 9).
24. On September 8, 2005, the District reported to Student's Parents that Student's reevaluation is unnecessary at this time because "*Institute... continues to collect data on goals, makes observations, and is in contact with the parents on a regular basis. There is enough documentation to support the child continuing in special education programming*" (P5, pages 1-2).
25. Student began the 2005-2006 school year at *Institute* in [REDACTED's] classroom (HO 7, page 1).
26. On October 12, 2005, Student's IEP team reconvened to update Student's IEP (HO 7).
27. Student's October 12, 2005 IEP is Student's pendent IEP (HO 7).
28. Student's October 12, 2005 IEP *Goals* focused on receptive language skills (HO 7, pages 7-8), use of object schedule without physical guiding (HO 7, pages 8-9), life skills tasks of cleaning up after snack or lunch (HO 7, pages 10-11), computer skills (HO 7, pages 11-12), and ability to make a request from physically leading/consistent use of object icons (HO 7, pages 12-13).
29. Student's October 12, 2005 IEP named Adaptive Physical Education as a related service although there are no goals/specially designed instruction related to this domain on the IEP (HO 7).
30. Student's IEP team sent "progress reports" to Student's Parents that summarized Student's IEP goals, specials' updates, staff comments, and progress representation. Progress representation named the dates when Student met criteria on objectives; whether he was progressing toward meeting the criteria; and whether Student had not been introduced to the objective as of the reported period (SD 1, pages 1-27; SD 6, pages 1-34; P6, pages 1-12; P7, pages 1- 7).
31. Student's mother was unsure of the "progress reporting" system (NT 68-70, 127, 260).
32. The key used with the "progress reports" sent to Student's Parents did not contain a means for indicating "No Progress" made (NT 330-331, 368).
33. On September 12, 2005, Student's mother signed an *Agreement To Waive* Student's reevaluation (P 5).
34. Student's mother was unaware of the meaning of signing the September 12, 2005 *Agreement To Waive*. She believed she was removing her request for Student's intelligence quotient (IQ) testing because his case management and wraparound services did not require IQ testing (NT 53-55, 96-97).
35. During the 2005-2006 school year, Student was involved in multiple incidents that resulted in his injuries at *Institute* (SD 4, pages 1-2; P1, P2; NT 333-335; 359-362; 372-374, 395-396).
36. Student's mother testified that Student received injuries from a trampoline incident in the class that necessitated a trip to the hospital in September 2005 (P1, page 1; NT 395-396).
37. On September 16, 2005, Student visited the *Emergency Department, [REDACTED] Hospital* for treatment of a "closed head injury" (P1, page 1).
38. At least four (4) separate incidents occurred after the September 2005 hospital visit and involved the same peer in Student's class (SD 4, NT 348-351, 381).
39. On October 27, 2005, Student received an injury in his classroom as a result of his peer's action against Student (SD 4, NT 333-334, 361).

40. Student's peer with autism, prone to impulsive behaviors, pushed and/or knocked Student down in the classroom (NT 333-334, 361).
41. On October 27, 2005, after the incident, the school nurse saw Student, however, no incident report can be located (HO 4, page 5; NT 348, 388-389, 403).
42. In Student's health file were data by the school nurse regarding evaluation and treatment of Student's October 27, 2005 injury (HO 4, page 5; SD 4, pages 1-2).
43. The classroom teacher's supervisor, Ms. [REDACTED], and Student's mother, received oral notification of Student's October 27, 2005 injury. The supervisor met with Student's teacher and discussed the incident (HO 4, page 5; NT 333).
44. On November 9, 2005, Student received another injury in the classroom as a result of the same peer's action against Student (NT 335, 359-361).
45. After his peer pushed Student on November 9, 2005, Student fell down backwards and banged the right side of his forehead (P2, page 1; SD 3, page 6).
46. On November 9, 2005, after the head-banging incident, the school nurse evaluated Student and completed an incident form. Student sustained a large contusion with edema on the back of his head and a small cut on his scalp (SD 4, page 1).
47. Student's mother received notification of Student's November 9 2005 injury when she came to pick up Student. She was advised to take Student to the [REDACTED] Hospital Emergency Room for another evaluation (SD 4, page 1).
48. The classroom teacher and supervisor met again and orally discussed the incident (NT 359-361).
49. On December 1, 2005, Student received another injury in the classroom as a result of the same aggressive peer's action against Student (SD 4, page 1; NT 336).
50. On December 1, 2005, after being hit, Student fell to the ground striking his chin on the floor. Student sustained a laceration on his chin. His Parents were advised that Student might need sutures (SD 4, page 1).
51. On December 1, 2005, the school nurse again saw Student, however, no incident report can be located (HO 4, page 5).
52. On December 2, 2005, *Institute's* [REDACTED] and [REDACTED] held a meeting with Student's mother. As a result of the meeting, Student's mother was informed that staff members were to remain in close proximity to Student within the classroom; specials staff were to be close to Student and when possible, extra staff would be provided to the classroom, although it "*was also discussed that this would not always be possible*" (SD 5, page 1; NT 37, 336-338, 361-362).
53. On January 18, 2006, the same peer again pushed Student in the classroom (NT 338-341).
54. On January 18, 2006, as a result of his peer's push, Student hit the floor face first. Student's fall resulted in his broken front tooth and a cut and swollen lip (P3, page 1; SD 3, page 3; NT 359-360, 372-374).
55. On January 18, 2006, after Student's injury, Student had a seizure, necessitating a call to the school nurses and Student's Parents. Student continued to have three additional seizures that day, so his Parents took him home (SD 3, pages 4-5; NT 378-379, 393-394, 400-401).
56. After the fourth incident involving the same peer, *Institute* personnel agreed to remove the peer from Student's classroom (NT 341-342)
57. On April 18, 2006, Student was outside on the playground with his class. The students were waiting to exit the playground. A student slapped Student once on the side of the face (SD 3, page 2; NT 346).
58. The school nurse saw Student, and Mrs. Parent again received notification of Student's injury that entailed a red mark on his cheek from the face slap (SD 3, page 2).
59. On May 10, 2006, Student wore a "squeeze vest" and again received an injury at *Institute*. Student received a two (2) inch abrasion on the left side of his neck (SD 3, pages 1).
60. *Institute's* Program Director and the classroom teacher met with Mrs. Parent May 10, 2006 to explain what happened with the vest (NT 347, 369-370).
61. Student's mother reported that since Student's school incidents, there has been an increase in Student's seizure activity. Student receives prescribed medication to assist with his seizure disorder, including *Depakote*, *Lamactil*, and *Clonopin*. (P8, page 2).
62. Following the close of the 2005-2006 school year, Student attended *Institute* for Extended School Year services (HO 7, page 15).

63. Sometime around the beginning of June 2006, counsel for Student's Parents contacted *Institute* and a request was made for copies of all of the incident reports involving Student. Institute had not contacted the District previously concerning the incidents that occurred over the previous school year (NT 344).
64. On June 13, 2006, Student's Parents made a due process hearing request (HO 4, page2).
65. On July 10, 2006, the District answered the Parent's *Request for Due Process* (HO 4, pages 2-3).
66. On July 24, 2006, a *Notice of Hearing* from the *Office for Dispute Resolution* (i.e., ODR) identified the Hearing Officer and named August 21, 2006 as the hearing initiation date (HO1, pages 1-2).
67. On July 26, 2006, the Hearing Officer sent a letter to the parties naming responsibilities of the District and Parent when a party requests a due-process hearing under the *Individuals with Disabilities Education Act* (IDEA) (HO1, page 2).
68. On August 7, 2006, the representatives participated in an initial pre-hearing telephone conference with the Hearing Officer. Due to administrative confusion and the availability of counsel for the parties, the parties asked that the August 21, 2006 hearing be cancelled and rescheduled (HO 3, pages 1-7).
69. On August 7, 2006, the Hearing Officer cancelled the hearing scheduled for August 21, 2006 and rescheduled for August 31, 2006 at the parties' request (HO2, pages 1-5).
70. On August 8, 2006, the District issued Student's updated reevaluation report. Noted areas related to Student's difficulties in motor skills, daily living skills, and communication. Student was reported to continue to need modifications in all curriculum areas including those addressing functional everyday routines. He displayed a "severe discrepancy between his chronological age and functional levels. Student also has difficulty attending and with on task behaviors" (page 7) (SD 9, pages 1-8).
71. On August 9, 2006, the District invited Student's Parents to a Resolution Meeting (SD 2, page 1).
72. On August 28, 2006, the representatives participated in another pre-hearing telephone conference with the Hearing Officer (HO2, pages 1-5).
73. On August 31, 2006, Student's hearing initiated (NT 1).
74. On August 31, 2006, in a pre-hearing discussion with the Hearing Officer, the Parents' counsel agreed to a stipulation to the effect that the parties, the school district and the parents, were in the process of discussing an appropriate placement for Student for the 2006-2007 school year. The District qualified that the District does not believe that *Institute* is inappropriate, but the District was still continuing to discuss other options for placement for Student (NT 12).
75. Based on her authority (34 C.F.R. §300.511(c)), the Hearing Officer granted continuances at the parties' request, including the Hearing Officer's August 31, 2006 grant of Student's hearing to the agreed upon dates of September 14, 2006 and September 15, 2006 (HO 8, NT 130-131).
76. On September 14, 2006, [REDACTED], Student's BSC, testified that Student's mother had expressed specific educational concerns to Ms. BSC concerning Student's *Institute* attendance and educational goals not being met (NT 148-149, 155, 157).
77. On September 14, 2006, [REDACTED], *Institute's* Program Director at the Education Center, testified that all school incident reports could not be located, although there were six documented cases of Student's injuries (NT 182-183, 222).
78. Ms. PROGRAM DIRECTOR testified that the District did not receive notice of Student's *Institute* injuries (NT 185-187).
79. On September 15, 2006, *Institute* personnel, including [REDACTED] (Student's Speech Therapist), [REDACTED] (Team Coordinator and Supervisor), [REDACTED] (Student's 2005-2006 classroom teacher), and [REDACTED] (District Director of Special Education) all testified concerning *Institute's* and the District's response to Student's injuries (NT 273-293, 300-331, 332-357, 358-385).
80. On September 15, 2006, after both sides rested, Student's due process hearing adjourned (NT 406).

IV. ISSUES

The parties agreed to the hearing issues on the record (NT 23):

- Was Student improperly supervised and monitored, and repeatedly injured at *Institute*?
- Did Student make inappropriate progress in the 2004-2005 school year?

- Was the 2003 reevaluation insufficient in scope and information to support programming through the 2004-2005 IEPs and the 2005-2006 IEPs?

V. DISCUSSION AND CONCLUSIONS OF LAW

The burden of proof rests with the petitioners, in this case Student's Parents, who raised their due process claims on or about June 13, 2006 (HO 4, pages 27-29). See *Schaffer v. West, _S.Ct._*, 2005 WL 3028015 (November 14, 2005). In the instant matter, Student's Parents held the burden of producing evidence and of proving by a preponderance of evidence that the Parents' relief sought is appropriate.

Based on this Hearing Officer's authority to assess the credibility of witnesses and weigh evidence (See *Carlisle Area School District v. Scott P.*, 62 F.3d 520,524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996)), and based on preponderant evidence, **Student's Parents met their burdens.**

WAS STUDENT IMPROPERLY SUPERVISED AND MONITORED, AND REPEATEDLY INJURED AT *INSTITUTE*?

In order to ensure a free, appropriate public education (FAPE), federal mandates of the *Individuals with Disabilities Education Act of 2004*(IDEA) (Public Law 108-446) direct that an eligible student must be assured of an appropriate education, based on needs. §§ 300.300-300.313; §§ 300.340-300.350; 20 U.S.C. §1401(8). Further, all students are entitled to reasonably safe learning environments, as promulgated by provisions of the *Elementary and Secondary Education Act* (ESEA), reauthorized and entitled the *No Child Left Behind Act of 2001* (NCLB) (Public Law 107-110). School districts have a special relationship with all students, which imposes a duty to protect. All students, including students with autism and mental retardation, have the right to safe, secure, and peaceful classrooms in that district accountability and student proficiency are unlikely to be realized when the teaching and learning environment is unsafe {See ESEA § 9532; §1111(b)(2)(C) of ESEA}.

Thus, the District holds responsibility for providing a FAPE, when the District recommends and places a student in an Approved Private School (APS). FAPE includes responsibility for overseeing the student's appropriate education, including the assurance of a safe environment. The following are relevant in Student's due process hearing, as based on the factual evidence of record:

- **There was showing by Student's Parents that a pattern of incidents from which Student's injuries arose was foreseeable.** The District argued that impulsive and unpredictable behavior is typical in many students with autism (NT 343-363). However, Student's pattern of assaults in his classroom was reasonably foreseeable, was not accidental, and was caused over a period of time by the same peer demonstrating physical aggression. See *Nordo v. School Dist. of Philadelphia*, 172 F.Supp.2d 600 (E.D. Pa. 2001). The pattern of injuries was established by December 1, 2005. Student had sustained a number of head injuries according to *Institute's* nurse's log (SD 4). The school incident reports (P2, P3) and hospital record (P1) provided evidence of Student's head injuries. *Institute* personnel should have responded in a faster manner to the pattern of Student's risk for danger imposed by his aggressive peer. His peer's behaviors against Student increased in predictability through the year. Although targeting by the same peer appeared to occur without warning, after two behavioral incidents involving the same peer resulting in Student's injuries, *Institute* personnel should have anticipated that Student was at risk when in the peer's direct presence. After the third incident, *Institute* personnel should have been alerted to the need to protect Student by securing explicit, direct adult management to supervise Student more closely. There can be no excuse for a fourth incident involving severe injuries to Student caused by the same peer.
- **There was showing that the incidents from which Student's injuries arose were due to *Institute* employees' failure to take reasonable steps to prevent Student's injuries.** While school personnel cannot guarantee that students will not be hurt, school personnel must take steps to ensure that predictable dangers are avoided. (See *Ings-Ray v. School Dist. of Philadelphia*, 2003 WL 21250556 (E.D. Pa. 4/30/03)). In Student's case, the Parents showed that *Institute* personnel could have delimited and/or prevented Student's injuries by a higher level of adult supervision, but did not do so. On December 2, 2005, *Institute's* personnel assured Student's mother that classroom and specials staff would remain in close proximity to Student, and when possible, extra staff would be provided to the classroom (NT 336-338, 361-362). However, it "*was also discussed that this would not*

always be possible” (SD 5, page 1). Why wasn’t it possible for Student to be assured of extra adult help by reconvening his IEP team? Why didn’t Student’s IEP team reconvene after the second, third, and fourth incidents to discuss Student’s safety considerations? The testimony reflected the conclusion that serious injuries could have been prevented given increased adult supervision. While no individual can be charged with predicting unmotivated outbursts from an aggressive peer with autism, Student’s IEP team did not, but should have reconvened and inquired whether an emerging pattern of these incidents indicated that Student, a frequently injured student, should have received the benefit from a one-on-one aide nearby to watch for dangers. His fourth serious injury was preventable if Student had been given increased adult supervision. {Although inconclusive, Student’s injuries involving the playground incident also may have been related to the aggressive peer (NT 346). The trampoline incident data were inconclusive (NT 395-396). Further, the incident involving the vest used for sensory stimulation did not appear to be related to the more serious incidents involving Student’s peer. The vest incident did not entail a reasonably predictable injury nor did it appear that any negligence was involved in this incident (NT 347).}

- **Student’s injuries did not receive monitoring.** The Parents received only two incident reports (P2, P3). [REDACTED], *Institute* Program Director, confirmed that other incident reports of known injuries did not receive documentation (NT 182-183). *Institute* personnel did not take reasonable steps to ensure the monitoring of Student’s safety. Student’s mother asked for an aide to Student much sooner than the fourth incident after which the APS removed Student’s peer from Student’s classroom (NT 365-366). Student’s mother asked for more direct help again after the fourth incident (NT 378-379, 393-394, 400-401). Even Student’s classroom teacher, Ms. TEACHER, had expressed concerns about Student’s safety to Ms. TEACHER’s supervisor (NT 362-364). The District argued that after the fourth incident occurred, the Chief Operating Officer and the Program Director met with Student’s mother to discuss changing Student’s classroom assignment (NT 341-342). The District and *Institute* contended that Student’s mother was happy with the progress Student was making and did not want to see him moved. *Institute* agreed to maintain Student’s assignment and remove the other child from the classroom (NT 341-342). However, *Institute* personnel should have removed the reasonably predictable danger (i.e., the aggressive peer) much sooner than they did, while documenting all attempts to address previous incidents. *Institute* personnel were not monitoring data consistently due to the pattern of Student’s serious injuries in less than a one-year time span. Student was injured numerous times during the 2005-2006 school year, at least four times by the same peer. Had the District been contacted to reconvene the IEP team, shown maintained health and classroom incident reports, and preventative measures employed, the January 18, 2006 incident, which preceded four seizures and resulted in Student’s broken tooth, would not have occurred (SD 18). By not notifying the District, *Institute* personnel did not make proper inquiries and a reasonable response on Student’s behalf.
- **The District was unaware of Student’s injuries until Student’s Parents obtained counsel (NT 344). However, the onus still remained with the District.** The District administrator, Ms. [REDACTED], testified that the District had no protocol for receiving APS school reporting injuries to the District (NT 278-279, 286-289). Ms. [REDACTED], the *Institute* administrator, confirmed the lack of protocols (NT 221-228, 229) and explained that had *Institute* concluded that Student required an aide for his safety, *Institute* would have contacted the District and requested the aide. *Institute* personnel did not do this because Student’s IEP team did not reconvene (NT 265-266). The injuries caused by a peer’s disabilities were, in part, the result of a lack of monitoring and disseminating appropriate data to and from the APS and the District.

Therefore, based on a preponderance of evidence, Student’s FAPE was improperly supervised and monitored in an unsafe learning setting, based on his needs. His repeated injuries at *Institute* were tragic and unfortunate, infringing on Student’s right to a FAPE.

DID STUDENT MAKE INAPPROPRIATE PROGRESS IN THE 2004-2005 SCHOOL YEAR?

Student’s mother contended that the District had not complied with the substantive requirements of the IDEA. Substantive violations are those that result in a child’s failure to make meaningful progress. The IDEA’s substantive component requires that eligible children be provided with a FAPE, one which “*consists of educational instruction specifically designed to meet the unique needs of the child, supported by such services as are necessary to permit the child to benefit from the instruction.*” 20 U.S.C. § 1412(1).

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

- **Student's Parents Were Delimited in Knowing Whether Student's Progress Was Obtained.** Student's IEP team sent "progress reports" to Student's Parents that summarized Student's goals, specials' updates, staff comments, and progress representation. Progress representation named the dates when Student met criteria on objectives; whether he was progressing toward meeting the criteria; and whether Student had not been introduced to the objective as of the reported period. The progress representation, however, did not appear to be "parent friendly" (SD 1, pages 1-27; SD 6, pages 1-34; P6, pages 1-12; P7, pages 1- 7) and posed problems to the Parents (NT 68-70, 127, 260). Further, if *Institute* personnel introduced an objective, the progress reporting form allowed only description of mastery or progress, but not the degree of progress. The key sent to Student's Parent included no symbol for "lack of progress," when an objective had been introduced (SD 1, pages 1-27). Staff notes at the conclusion of the 2004-05 progress reports named other data to the effect that Student was not progressing in key areas: attending, using switches, and self care. Student's October 21, 2004 IEP *Goals* focused on receptive language skills (HO 6, page5), life skills tasks of hanging up coat and backpack (HO 6, page 6), life skills tasks of cleaning up after snack or lunch (HO 6, pages 6-7); computer skills (HO 6, page 7); self-care skills (zipping) (HO 6, page 8) and ability to make a request from crying/handing requested object to adult (HO 6, page 9). However, why goals were or were not continued during the next IEP revision did not receive adequate explanation by the progress reporting system.
- **Student's October 12, 2005 IEP Goals added new skills without explaining why other skills from 2004 were removed.** (For example, his progress reports by the end of the 2004-2005 school year did not include mastery of life skills tasks of hanging up coat and backpack when given a verbal directive (SD 1, page 24). Why wasn't this objective continued to his October 12, 2005 IEP? What happened to his zipping skills and request from crying skills?) There was no explanation for removal of goals in the life skills tasks of hanging up coat and backpack (HO 6, page 6), self-care skills (zipping) (HO 6, page 8) and ability to make a request from crying/handing requested object to adult (HO 6, page 9). Lack of progress could not be discerned from the reporting form used to describe Student's goals. (His October 12, 2005 IEP included the addition of use of object schedule without physical guiding (HO 7, pages 8-9), and ability to make a request from physically leading/consistent use of object icons (HO 7, pages 12-13). Why Student's IEP team dropped 2004-2005 goals and added others at the start of the 2005-2006 school year did not receive appropriate attention.

Therefore, based on a preponderance of evidence, because progress and lack of progress remained unclear, Student made inappropriate progress in the 2004-2005 school year.

WAS THE 2003 REEVALUATION INSUFFICIENT IN SCOPE AND INFORMATION TO SUPPORT PROGRAMMING THROUGH THE 2004-2005 IEPs AND THE 2005-2006 IEPs?

Although the IDEA's reevaluation requirement was modified by the 1997 IDEA Amendments to allow evaluation teams to forego testing where new information is unnecessary to assist the IEP team in decisions, however, the IEP Team must still review and consider all data. 34 CFR § 300.533. These data include:

- (a) *Review of existing evaluation data.*
- (1) *Review existing evaluation on the child, including-*
 - (i) *Evaluations and information provided by the parents of the child;*
 - (ii) *Current classroom-based assessments; and*
 - (iii) *Observations by teachers and related services providers;*
- (2) *On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine-*
 - (i) *...whether the child continues to have such a disability;*
 - (ii) *The present levels of performance and educational needs of the child;*
 - (iii) *Whether the child continues to need special education and related services; and*
 - (iv) *Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals...*
- (d) *Requirements if additional data are not needed.*

- (1) *If the determination...is that no additional data are needed..., the public agency shall notify the child's parents-*
- (i) *...Of that determination and the reasons for it; and*
- (ii) *Of the right of the parents to request an assessment to determine whether, for purposes of services under this part, the child continues to be a child with a disability.*

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

- **The October 16, 2003 ER (P4) was in effect when Student began the 2004-2005 school year and remained in effect as Student's operating ER until the District reevaluated Student again on August 8, 2006 (SD 9, pages 1-8).** However, Student's October 2003 ER (P4) contained virtually no information. The District reevaluation did not appear to be conducted to help plan appropriate services. 34 CFR §§ 300.321, 300.536. Student's reevaluation report was insufficient in scope and depth to investigate information relevant to Student's disabilities, strengths, and needs. The District provided unconvincing evidence of a data review based on a team decision as per 34 CFR § 300.533. A preponderance of the evidence was unable to determine that the District relied on relevant data to evaluate Student during his October 16, 2003 reevaluation. 20 U.S.C. §14(b) (3); 22 Pa. Code §14.53 (f). The District did not elicit information from Student's Parents to be included in the reevaluation. Additionally, the District did not present convincing data that it considered reviews of Student's existing evaluation report, evaluations and information provided by the parents, current classroom based assessments and observations, observations by teachers and service providers, and whether any additions or modifications to the special education and related services were needed to enable Student to meet the measurable annual goals in his IEP and to participate as appropriate in the general curriculum (P4).
- **The District held the position that the Parents' view that Student made progress in 2005-06 made consideration of his *reevaluation unnecessary.*** Any lapse would be, in that view, harmless. Although the Parent did state that 2005-06 was the first year that Student had demonstrated some progress, part of the role of the evaluation and *reevaluation* is to give Student's IEP team a picture of his abilities so that expectations may be grounded in objective information. Student came to *Institute* with evaluation data that transitioned him from early intervention services (SD 7; SD 8). However, the District ignored the presentation of Student's May 30, 2002 psychological report to Student's IEP team, including not updating his Parents on these District findings (SD 12, pages 1-4). On May 30, 2002, Student received psychological testing from a District school psychologist that was not integrated into any evaluation report or *reevaluation* report (SD 12). On this May 30, 2002 report, Student scored in the "Moderately to Severe Autistic Range." He was noted to display serious problem behaviors. Student was recommended to be eligible as a child with autism and mental retardation (SD 12, page 4). Student's IEP teams from the 2002-2003 through the 2005-2006 school years were unable to consider Student's May 30, 2002 psychological report including his recommended diagnosis of mental retardation and his diagnosis of severe behavioral problems, and thus, were unaware of Student's noted needs. His resulting IEPs did not address appropriately Student's needs because his teams did not receive all relevant diagnostic information.
- **Student's mother signed an Agreement to Waive a Reevaluation Form on September 8, 2005 that should not have been provided (P5).** At the request of the parents, Student was reevaluated in the summer of 2006, after the due process hearing was requested (SD 9; HO 1). The 2006 reevaluation included Student's receptive and expressive language skills. The examiner could not obtain a Receptive Language Age based on Student's chronological age but noted that he achieved 86% accuracy at 16 months with scattering scores up to 28 months. On expressive language tests, Student scored in the eight to ten months age range. These scores may not be compared to earlier scores because earlier scores are non-existent, as per the District's October 16, 2003 reevaluation report (P4). His 2003 reevaluation stated Student remained eligible for special education as a student with autism and PDD and that the team had considered data, parents' information, classroom-based observations, and assessments, and whether any additions or modifications to the special education and related services are needed to enable Student to meet the measurable annual goals in the IEP and to participate as appropriate in the general curriculum. The team making the decision that no further data were needed did not include a school psychologist (NT 241-245), in violation of §14.124(a). The

team apparently did not consider the May 2002 psychological evaluation given the testimony that the *Institute* staff was unaware that Student had a diagnosis of mental retardation (NT 263-265). Student's final progress report of the 2003-04 school year had indicated that he mastered three objectives out of 12 on his IEP. Arguably, the team should have considered changes in programming that might have led to greater success. Because of Student's recommended diagnosis of autism and mental retardation, a reevaluation is mandated every two years. Student's mother should not have been presented with the waiver form (NT 97, 213). While Student's mother testified she knowingly would not waive important rights (NT 53-55, 96-97), she should not have been asked to sign the waiver. The District's *Permission to Reevaluate/Agreement to Waive Reevaluation* (P5, pages 1-2) states explicitly on the form that a parent's option to waive a reevaluation "Is not available for parents of children with mental retardation, as they must be reevaluated every two years" (P5, page 2).

- **Student's IEP team met in October 2005 and reviewed the draft IEP.** Student's case manager, [REDACTED], testified that the team had no other documents to review (HO 7, page 1; NT 163, 176). She testified that when she attended an earlier IEP meeting in 2004, an occupational therapist was present and provided information without data concerning provision of that therapy to Student. (HO 6, page 1). [REDACTED], Student's speech therapist, testified that she did not bring data to IEP meetings (NT 310-312). Student's October 12, 2005 IEP named Adaptive Physical Education as a related service although there were no goals/specially designed instruction related to this domain on the IEP (HO 7).

- **The District placed Student at *Institute* and by law remains responsible for the provision of a FAPE.** The nature of Student's disabilities and his safety considerations as a nonverbal child with behavioral problems might have been used by Student's IEP team if the team had reconvened after Student's pattern of injuries emerged during the 2005-2006 school year. His IEP team was unable to consider relevant data because his reevaluation reports were inappropriate and his IEP team never reconvened after the incidents during the 2005-2006 school year. Discussion of safety concern goals and supplemental services in the form of a one-on-one aide for Student, written into a revised IEP, may have been valuable to Student's IEP team in relation to how Student, who was injured numerous times, could have been programmed for in another setting where children with those propensities to commit aggressive behaviors on a vulnerable child are not present.

The Parents showed that the District's evaluation and IEP processes were inappropriate. That is, the District's October 16, 2003 reevaluation of Student (P4) was inappropriate and his resulting IEPs (HO 5, HO 6, HO 7) were inappropriate. Based on a preponderance of evidence, Student's 2003 reevaluation was insufficient in scope and information to support programming through the 2004-2005 IEPs and the 2005-2006 IEPs.

CONCLUSIONS

The evidence and documents of record support the Parents in their claims that Student did not make appropriate progress in 2004-05, that he was not provided with an appropriate reevaluation report, and that he was not supervised in his APS placement. This Hearing Officer agrees with the Parents' view that the first two issues are closely associated. Without the link between appropriate reevaluation and IEP processes, Student's IEP team cannot determine whether he is a child making progress or requires a change in approach. Therefore, Student has been denied a FAPE. Because he has been denied a FAPE, Student is entitled to compensatory education.

COMPENSATORY EDUCATION

Compensatory education is designed to remedy a failure to provide an appropriate education for a period of time. *Lester v. Gilbool* 916 F.2d 865 (3d Cir. 1990). There is a threshold question of whether or not an appropriate program was provided. An appropriate program is one "reasonably calculated to enable the child to receive educational benefits." *Ridgewood Board of Education v. N.E. for M.E.* 172 F. 3d 238 (3d Cir. 1999).

The duration is the period of denial. (See *Lester H. v. Gilbool*, 916 F.2d 865, 868 (3d Cir. 1990). Also see, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). All of Student's submitted IEPs indicated that he should receive 100% of his special education and related services at the APS. In order to calculate compensatory education, Student should be awarded compensatory education based on the following:

Student should receive compensatory education in the form of five (5) full school days per week for each school week of appropriate special education and related services denied from the start of the 2004-2005 school year through the end of the 2005-2006 school year. The Total Compensatory Education hours for the two year period are to supplement, not replace appropriate instruction according to Student's IEP.

HEARING OFFICER ORDER

**CHILD'S NAME: J.N.
PITTSBURGH CITY SCHOOL DISTRICT (ODR FILE NO. 6765/06-07 KE)**

AND NOW, this 28th day of September 2006, this Hearing Officer orders the Pittsburgh City School District to take the following action:

- 1) Within 35 calendar days of the receipt of this Decision/Order, Student's IEP team must reconvene for the purpose of updating his program and placement. The IEP team must consider all information available to it in making the determination.
- 2) Student should receive compensatory education in the form of five (5) full school days per week for each school week of appropriate special education and related services denied from the start of the 2004-2005 school year through the end of the 2005-2006 school year. The Total Compensatory Education hours for the two year period are to supplement, not replace appropriate instruction according to Student's IEP.
- 3) Student's Parents shall decide how the compensatory education hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers Student's needs and furthers the goals of Student's pendent or future IEPs. These services may occur during the weekday, on weekends and during the summer months, when convenient for Student and Student's Parents.

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

DECISION DATE: _____

MAILING DATE: _____