

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION**

IN THE MATTER OF:

██████ *Student, and* ██████
Parent/Guardian.
Petitioners,

DOCKET NO: ██████

v.

**UNION COUNTY SCHOOL
SYSTEM,**
Respondent.

FINAL ORDER

This matter was heard in ██████ Tennessee on ██████ before Leonard Pogue, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division pursuant to T.C.A. § 49-10-606 and Rule 520-1-9-.18, Rules of State Board of Education. Petitioner ██████ student, and ██████ parent were represented by attorneys ██████ and ██████. Attorney ██████ represented Respondent Union County School System (U.C.). This matter became ready for consideration upon the filing of proposed findings and conclusions of law, Petitioners (████████) and Respondent (████████).
██████).

The subject of this proceeding, in general terms, is whether a free appropriate public education (FAPE) will be provided to ██████ under the proposed IEP. The specific issue is centered on a change in speech therapy services. ██████ mother, ██████ initiated this due process hearing on ██████ to contest U.C.'s proposal (IEP of ██████) to discontinue the provision of private speech therapy to ██████ in lieu of providing speech therapy by a speech-language pathologist who is employed by U.C.

After consideration of the entire record, testimony of witnesses, and the arguments of the parties, it is **DETERMINED** that Respondent is in compliance with the Individuals with Disabilities Act (IDEA) and providing [REDACTED] FAPE. This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. [REDACTED] is an [REDACTED] [REDACTED] who has been diagnosed with [REDACTED]

[REDACTED]

[REDACTED]

3. [REDACTED] began receiving special education and related services from U.C. in [REDACTED] [REDACTED]. From [REDACTED] through [REDACTED] [REDACTED] received speech/language therapy from U.C. that was provided by [REDACTED] ([REDACTED]). [REDACTED] coverage allows [REDACTED] to work with [REDACTED] at no out-of-pocket cost to [REDACTED].

4. [REDACTED] was diagnosed with [REDACTED] in [REDACTED] while being evaluated at the [REDACTED] Children's Hospital. [REDACTED] Supervisor for Special Education for U.C., referred [REDACTED] to [REDACTED] ([REDACTED]) for an evaluation in [REDACTED]. [REDACTED] is a company that specializes in speech-language therapy. [REDACTED] at [REDACTED] evaluated [REDACTED] on [REDACTED]. Based on [REDACTED] evaluation, [REDACTED] was diagnosed with [REDACTED] and [REDACTED] recommended speech therapy from [REDACTED] 2-4 hours per week.

5. In [REDACTED] U.C. proposed an IEP that included related services provided by [REDACTED] [REDACTED] has received four hours per week of speech language therapy from [REDACTED] (including summer sessions) since [REDACTED] through the present. During this time, [REDACTED] was also receiving speech therapy services from [REDACTED] at her school (initially 2.5 hours, then 1.5 during the [REDACTED] school year). The cost for [REDACTED] services in [REDACTED] was \$ [REDACTED]

6. According to the Tennessee Comptroller, U.C. exceeded its special education budget by \$ [REDACTED] in [REDACTED]. However, [REDACTED] noted that the budget technically balanced and that the special education budget was not a problem that year. [REDACTED] testified that money was not a factor in making the new IEP proposal for [REDACTED]

7. Prior to the [REDACTED] IEP meeting, [REDACTED] received a phone call from [REDACTED] [REDACTED] alleges [REDACTED] told her that changes needed to be made for [REDACTED] that U.C. was paying over \$ [REDACTED] and that U.C. could no longer continue paying out that amount of money for [REDACTED] since [REDACTED] was not making enough progress at [REDACTED]

8. In [REDACTED] [REDACTED] encountered [REDACTED] in the hallway of [REDACTED] school and

[REDACTED]

9. As a result of the [REDACTED] encounter, [REDACTED] decided she needed to “put together a program that would facilitate [REDACTED] being able to speak at school.” This decision was based on [REDACTED] belief that [REDACTED] program wasn’t working because [REDACTED]

[REDACTED]

believed that after three years of receiving speech therapy from [REDACTED] and [REDACTED] should have made more progress, and that it was U.C.'s responsibility to find a program that does work. To that end, [REDACTED] researched the [REDACTED] talked to colleagues, and talked with [REDACTED]. [REDACTED] did not request that [REDACTED] be re-evaluated and did not consult with anyone outside the school district concerning [REDACTED] services.

10. A few weeks before [REDACTED] scheduled IEP Annual Review ([REDACTED]), [REDACTED] called [REDACTED] to inform her that U.C. was considering making some changes to [REDACTED] speech therapy program. [REDACTED] asked [REDACTED] to speak with the mother of another child in the school district who was diagnosed [REDACTED] for approximately four years from [REDACTED], a [REDACTED] by U.C. [REDACTED] spoke with the mother of the other child with [REDACTED] on the morning of [REDACTED] IEP meeting.

11. [REDACTED] IEP meeting was convened on [REDACTED] and [REDACTED] was accompanied by her neighbor and advocate, [REDACTED]. The IEP team discussed U.C.'s proposal to discontinue speech therapy with [REDACTED] and [REDACTED]. Instead, the IEP team proposed providing speech therapy within the school district by [REDACTED]. [REDACTED] was angry and upset after the U.C. staff explained their proposal. [REDACTED] didn't say a lot in response to U.C.'s proposal, but the rest of the IEP team expressed their concerns over [REDACTED] lack of progress. [REDACTED] questioned U.C.'s assertion that [REDACTED] had failed to make progress with [REDACTED] and asked about [REDACTED] qualifications. [REDACTED] voiced several times that she did not agree with U.C.'s proposal but said very little in the meeting. [REDACTED] thought the meeting was rushed but did not ask for another IEP meeting.

12. A Prior Written Notice was mailed to [REDACTED] after the IEP meeting which detailed U.C.'s proposal to discontinue the provision of speech therapy with [REDACTED] and

█████ and to provide 30 minutes per day of direct speech therapy by ██████. The Notice further provided that ██████ will receive 50 minutes per day of enriched academics, an hour-and-a-half per day of inclusion services, occupational and physical therapy, and the continuation of extended school year services in the summer.

13. The explanation for these proposed changes within the Notice were: (1) ██████ was missing class time by going to ██████; (2) ██████ and ██████ have the same credentials; and (3) ██████ was making limited progress under the current plan. To remedy U.C.'s concerns that ██████ was missing too much class time by traveling to ██████, ██████ and ██████ agreed to conduct ██████ sessions after school.

14. ██████ IEP Progress Reports track her progress towards the goals and objectives of her IEP. ██████ most recent annual goal statuses show that ██████ is anticipated to meet her IEP goals in every measured category of her ██████ IEP. This is based on information supplied by ██████ to U.C. In addition, ██████ last reporting period (RP 5) for the ██████ school year shows that ██████ made progress in every measured short-term objective. Out of the twenty-eight short-term objectives, only two objectives indicated that ██████ needs more time due to little progress.

15. ██████ believes ██████ has made progress in her speech production over the last year and wishes for ██████ to continue to provide speech therapy to ██████. ██████ usually watches ██████ sessions with ██████ and then discusses with ██████ what ██████ can work on at home. ██████ has told ██████ will talk one day.

16. ██████ is also concerned that U.C.'s proposed plan would stifle ██████ progress and that ██████ might regress because the one-to-one therapy hours are being reduced. ██████ does not

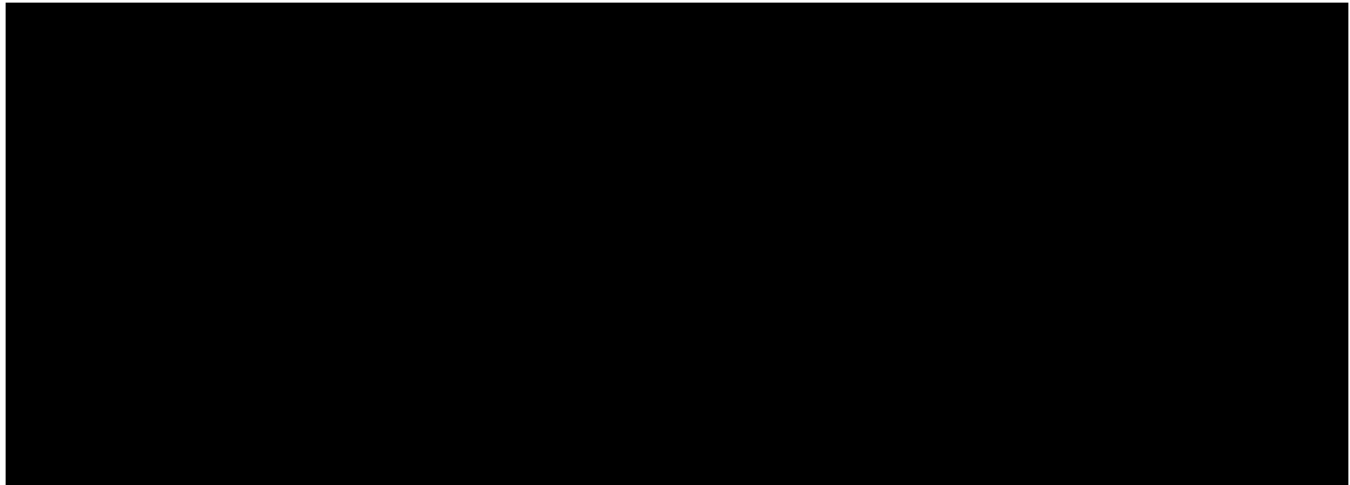
object to [REDACTED] providing speech therapy to [REDACTED] as long as [REDACTED] also continues to do so. [REDACTED] qualifications are not questioned by [REDACTED]

17. According to [REDACTED] can [REDACTED]
[REDACTED] says words that [REDACTED] understands but others may not. [REDACTED] also communicates with gestures and signs.



21. [REDACTED] has never provided speech therapy to [REDACTED] but has participated in [REDACTED] IEP meetings. [REDACTED] holds a Master's Degree in Speech Pathology, and a certificate in [REDACTED] In working with [REDACTED] [REDACTED] would focus her direct speech therapy session on

speech motor drill practice, incorporating [REDACTED] academic goals into the speech therapy. In addition, [REDACTED] would maintain daily communication with [REDACTED] teachers to ensure that [REDACTED] has multiple opportunities throughout her school day to practice speech production. [REDACTED] [REDACTED] also would communicate regularly with [REDACTED] and provide practice homework. [REDACTED] [REDACTED] also plans to use an augmentative communication device with [REDACTED] although the augmentative communication device was not listed in the IEP. Therapy sessions with [REDACTED] [REDACTED] would continue in [REDACTED] but not during the remainder of the summer break or others school holidays.



24. The evaluation reports provided each year to U.C. by [REDACTED] showed that [REDACTED] was making slow progress in her therapy goals. According to [REDACTED] [REDACTED] has increased in her expressive vocabulary but this includes word approximations that may not be understood by those who do not know [REDACTED] continues to try and is engaged in their therapy sessions.

[REDACTED]

[REDACTED]

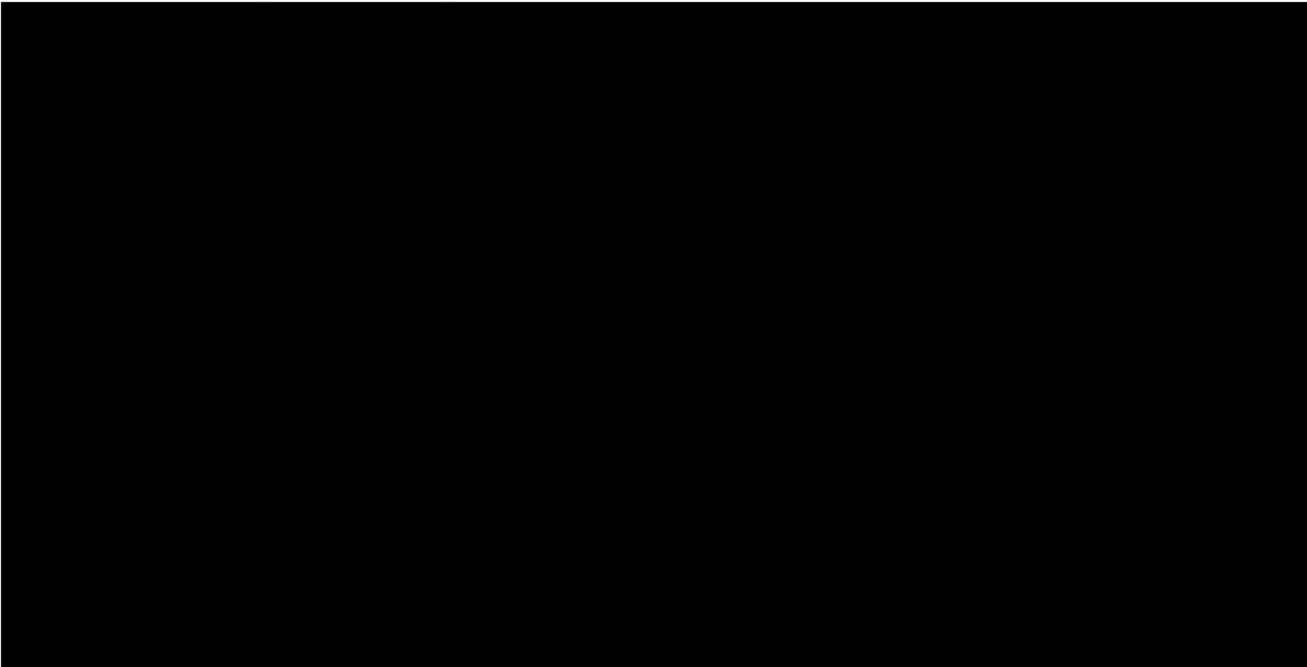
25. [REDACTED] is of the opinion that the more intense [REDACTED] therapy is the better are her chances of improving faster. [REDACTED] questions whether the proposed IEP is doable and can be carried out on a consistent basis but acknowledges that someone else could be an effective therapist for [REDACTED]. A certain amount of regression is typical of children with [REDACTED]

26. Dr. [REDACTED] was designated as an expert in speech-language pathology with a specialty in [REDACTED]. She reviewed reports from [REDACTED] doctors, U.C., [REDACTED] and [REDACTED] two videos of [REDACTED] from [REDACTED] as well as audio tapes of [REDACTED] and two videos of [REDACTED] from Respondent's expert, Dr. [REDACTED]. Dr. [REDACTED] authored her expert report and formed her opinions without having met [REDACTED] and without meeting or observing [REDACTED] or [REDACTED] therapists. Dr. [REDACTED] considered [REDACTED] report and evaluation to be excellent although she does not consider Dr. [REDACTED] to be a [REDACTED] specialist.

27. Based on her review, Dr. [REDACTED] was able to conclude that [REDACTED] has made progress since [REDACTED] that [REDACTED] is sometimes producing speech spontaneously, and that [REDACTED] has a good prognosis for continued development of speech praxis and oral language development. Dr. [REDACTED]

believes that [REDACTED] is at a turning point and that next year is important for her. Dr. [REDACTED] opined that [REDACTED] could probably start speaking in sentences and use them as her primary mode of communication within about a year although she is unlikely to ever be able to habilitate into an articulate and intelligible oral speech communicator.

28. In regard to U.C.'s proposed IEP, Dr. [REDACTED] feels that 2 ½ hours per week of speech language therapy is not adequate for [REDACTED] at this time. She further opined that [REDACTED] could regress if she doesn't receive enough therapy. Dr. [REDACTED] also noted that changing therapists would entail a learning curve for the new therapist. She feels that U.C.'s plans to involve [REDACTED] teachers throughout the day will be difficult to implement without training the teachers. In regard to an augmentative device, Dr. [REDACTED] is not opposed to this concept as long as it is not a substitute for teaching [REDACTED] to speak.



31. In regard to the proposed IEP, Dr. [REDACTED] feels that 30 minutes a day of therapy is sufficient for [REDACTED] and [REDACTED] working with [REDACTED] teachers distributes coordinated speech

practice for [REDACTED] throughout the entire day. According to Dr. [REDACTED] [REDACTED] needs to practice her speech during the school day and the proposed plan achieves this better than [REDACTED] simply working with [REDACTED]. Dr. [REDACTED] considers [REDACTED] an excellent speech-language pathologist and is fully capable of providing [REDACTED] with the necessary therapy to effect a meaningful gain. She recommends providing [REDACTED] with an augmentative device.

CONCLUSIONS OF LAW

1. Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioners' favor. Rule 1360-4-1-.02, Uniform Rules of Procedure for Hearing Contested Cases before State Administrative agencies; Schaffer v. Weast, 126 S. Ct. 528, 546 U.S. 49 (2005).

2. The IDEA provides that children with disabilities be provided FAPE (free appropriate public education). Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176 (1982). As part of providing FAPE, school districts are required to establish an IEP (individual education plan) for each child with a disability. Id.

3. Under the IDEA, "related services" means transportation, and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education. Cedar Rapids Community School District v. Garret F., et al., 526 U.S. 66 (1999). Special education instruction can take place, "in the classroom, in the home, and in other settings." IDEA, 20 U.S.C. § 1401(a)(29)(a).

4. The inquiry of the courts regarding the provision of FAPE is twofold: 1) has the school district complied with the procedures set forth in the Act? and, 2) is the IEP developed

through the Act's procedures reasonably calculated to enable the child to receive educational benefits? Rowley at 206-207.

5. With regard to procedural matters, a court should "strictly review an IEP for procedural compliance," although technical deviations will not render an IEP invalid. Deal v. Hamilton County Board of Education, 392 F.3d 840, 853 (6th Cir. 2004) *citing* Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch., 197 F.3d 793, 800 (6th Cir. 1999). A finding of procedural violations does not necessarily entitle Petitioners to relief. Id. The procedural violation must cause substantive harm, and thus constitute a denial of FAPE, for relief to be granted. Id. In the instant case, Petitioners do not argue in their Proposed Findings of Fact and Conclusions of Law that any procedural violations occurred. In the Due Process Complaint, as well as a limited amount of testimony at the hearing, there is reference to the time of and short length of the IEP meeting. [REDACTED] attended the meeting with an advocate and was invited to participate in the discussions [REDACTED] said little in response to U.C.'s proposal. There simply is not proof of U.C. predetermining [REDACTED] placement or [REDACTED] being deprived of the opportunity to meaningfully participate in the IEP process. It is determined that there are no procedural violations.

6. States and school districts should be afforded discretion in determining what type of program is appropriate based on the individual needs of a disabled child. McLaughlin v. Holt Public Schools Board of Education, 320 F.3d 663 (6th Cir. 2003). The IDEA does not compel school districts to provide special education and related services that are preferred by a child's parent. Tucker v. Calloway County Board of Education, 136 F.3d 495, 505 (6th Cir. 1998). The burden of proof is on the parent to prove by a preponderance of the evidence that the IEP proposed by the school violates the IDEA. McLaughlin.

7. In developing an IEP, related services must provide a meaningful educational benefit gauged in relation to the potential of the child at issue. Deal at 862. While the educational benefits accruing to the child must be “meaningful,” there is no requirement that the program provide the maximum benefit or the best available program. Rowley at 200-201.

8. Petitioners argue that the proposed IEP would significantly and suddenly alter any progress [REDACTED] has made under her treatment plan with [REDACTED], resulting in a denial of FAPE. [REDACTED] IEP Progress Reports indicate that she is on track to meet her goals although [REDACTED] noted that [REDACTED] is making very minimal progress toward those goals. [REDACTED] written evaluation reports show [REDACTED] making slow progress in her therapy goals. Dr. [REDACTED] opined that [REDACTED] has progressed since [REDACTED] while Dr. [REDACTED] believes the progress is minimal and unacceptable. Based on all the proof, it appears there has been slight progress. [REDACTED] fears [REDACTED] will regress without therapy from [REDACTED] and Dr. [REDACTED] opined that there could be regression. This possibility of regression alone is not enough to establish that [REDACTED] slight progress will be so significantly altered that [REDACTED] will be denied FAPE under U.C.’s proposed IEP.

9. [REDACTED] indicated that the basis for the change in the new IEP was her feeling that [REDACTED] was not progressing enough with [REDACTED] therapy. Petitioners have suggested that finances were a factor in the decision to change therapists. There is insufficient proof to support this allegation and this argument is without merit.

10. It is contended by Petitioners that the proposed IEP would result in a denial of FAPE because the one-on-one therapy hours are reduced from 5.5 hours to 2.5 hours and the plan relies, in part, on [REDACTED] teachers to provide therapy in the classroom. Five speech pathologists testified in this matter. Two of the five were designated experts but all of them were well credentialed, knowledgeable of [REDACTED] background and seemingly very competent. Despite

their collective knowledge, there was not complete agreement regarding the treatment options and proposed IEP for [REDACTED]. [REDACTED] noted that she felt confident with U.C.'s proposed IEP. [REDACTED] authored much of the IEP and believes she can enable [REDACTED] to be more intelligible. [REDACTED] would provide 30 minutes per day of speech-language therapy. In addition, she would communicate daily with [REDACTED] teachers and assistants to ensure that [REDACTED] has multiple opportunities throughout her school day to practice speech production. [REDACTED] believes more intense therapy is best for [REDACTED] but admits that someone else could be an effective therapist for [REDACTED]. [REDACTED] questions whether the proposed IEP can be consistently performed. The two designated experts simply disagree as to whether or not the proposed plan is proper for [REDACTED]. Dr. [REDACTED] is of the opinion that 2 ½ hours a week of one-on-one therapy is insufficient for [REDACTED]. She also doubts whether U.C. will be able to involve [REDACTED] teachers as planned since they are not specially trained. Dr. [REDACTED] believes the combination of 30 minutes a day of therapy with [REDACTED] and [REDACTED] working with [REDACTED] teachers, by providing additional speech practice for [REDACTED] throughout the day, is the appropriate IEP for [REDACTED]. She observed the teachers working with [REDACTED] and thinks they can continue to do so with additional guidance from [REDACTED].

11. Dr. [REDACTED] prefers the current plan wherein the gains have been slight. She questions reduced one-on-one therapist hours. However, as noted by Dr. [REDACTED] there is limited research on interventions for [REDACTED] thus, research is not a reason to find the new plan is insufficient to meet [REDACTED] individual needs. Although one-to-one therapist time would be reduced under the new IEP, [REDACTED] arguably will receive more total hours of interventions and support with the integrated and coordinated speech practice and language work within her academic program throughout the day. Dr. [REDACTED] doubts U.C.'s ability to implement a plan where non-therapists are involved but has not observed or interviewed the teachers. Other than

the skepticism of Dr. [REDACTED] and [REDACTED], there is no other basis to find that the proposed IEP will not provide a meaningful educational benefit for [REDACTED]. Petitioners assertion that the proposed IEP plan would result in a denial of FAPE because the one-on-one therapy hours are reduced from 5.5 hours to 2.5 hours and because the plan relies, in part, on [REDACTED] teachers to provide therapy in the classroom is rejected.

[REDACTED]

for [REDACTED]. The evidence does not preponderate that [REDACTED] is unqualified to provide speech-language therapy for [REDACTED].

13. The proof has demonstrated that U.C. has proposed an IEP based on the unique needs of [REDACTED] and that will enable [REDACTED] to receive a meaningful educational benefit. Petitioners

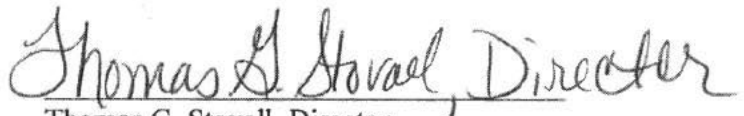
have alleged, but have failed to prove, that U.C.'s proposed IEP for the [REDACTED] school year would deny the provision of a "free appropriate public education" to [REDACTED]

It is **Determined** that Respondent is in compliance with IDEA procedures, has not committed any procedural or substantive violations of IDEA, and Respondent's proposed IEP will provide [REDACTED] FAPE. It is **ORDERED** that the remedies and relief sought by Petitioners are denied. Respondent is the prevailing party in this matter.

Entered this 29th day of November, 2012.


LEONARD POGUE
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 29 day of November, 2012.


Thomas G. Stovall, Director
Administrative Procedures Division