

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

## **Pennsylvania Special Education Hearing Officer**

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**Final Decision and Order**  
**CLOSED HEARING**  
ODR File Number 19182-1617

**Child's Name:** K. G.

**Date of Birth:** [redacted]

**Dates of Hearing:**<sup>1</sup>

8/3/17, 8/17/17, 10/25/17, 11/2/17, 11/3/17, 11/8/17, 11/14/17,  
11/16/17, 12/1/17, 12/5/17, 12/6/17, 12/12/17, 1/10/18

**Guardian:**  
[redacted]

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**Hearing Officer:** Michael J. McElligott

**Date of Decision:** 4/6/2018

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<sup>1</sup> This matter involves a complaint filed contemporaneously with another complaint regarding this child's sibling, at ODR file #19183-1617. Although the two matters were not formally consolidated, the two cases were handled as affiliated cases, as twelve of the nineteen witnesses in this matter testified as well on the record involving the sibling. This necessitated the creation of two individual, but significantly overlapping, case records regarding each of the children, with a majority of the witnesses testifying on the same day but across two records. The testimony of witnesses who would testify as to only one child was taken singularly here and there at various hearing sessions as the schedules of those witnesses allowed—in effect, woven into the course of the sessions, between the testimony of witnesses testifying as to both children. As one might imagine, the hearing processes for both cases led to very detailed, and quite varied, witness-scheduling requirements session to session, let alone accounting for the availability of the parties, counsel, and the hearing officer. The content of the November 14<sup>th</sup> session in this matter was brief and procedural as the substantive testimony on that day's session was exclusively for this child's sibling.

## **INTRODUCTION**

Student (“student”)<sup>2</sup> is a [kindergarten-aged], significantly-involved child who receives early intervention services from the Berks County Intermediate Unit 14 (“IU”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>3</sup> as a child with autism.

The child’s guardian claims that the child was denied a free appropriate public education (“FAPE”) for a period from the child’s enrollment in IU early intervention programming in January 2015 related to allegations of deficiencies in the child’s programming over that period. Parent seeks compensatory education as a remedy.

The IU counters that at all times it met its obligations to the student under IDEIA. Accordingly, the IU argues that the guardian is not entitled to any remedy.

For the reasons set forth below, I find in favor of the guardian.

## **ISSUES**

Did the IU deny the child FAPE  
over the period January 2015 to the present?

If so, is compensatory education owed to the child?

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<sup>2</sup> The generic use of “child”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the child. The term is utilized in keeping with the student’s status as an “eligible young child” under 22 PA Code §14.101.

<sup>3</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

## **HEARING OFFICER EXHIBITS**

The hearing process included a number of procedural issues which are documented both in the transcript at various points and/or through communications, directives, and interim rulings. The documentary aspect of these matters are collected in a series of Hearing Officer Exhibits ["HO"]: HO-A, HO-1 through HO-26.

## **FINDINGS OF FACT**

### General Background

1. Coming into the IU, the student has been diagnosed with autism spectrum disorder (including potential intellectual impairment and significant language deficits), anxiety disorder, and attention deficit hyperactivity disorder. (Joint Exhibit ["J"]-5).
2. A psychological report indicated that the child might have mild intellectual disability, but this has never been part of the child's identification matrix at the IU. (P-10).
3. Before entering the IU, the student was receiving birth-to-3 services in a day care environment with goals in sensory regulation/attention to adults and task, expressive/receptive communication, functional exploration of objects, increase attention, reducing toe-walking and safe negotiation of stairs and environments. (Local Education Agency Exhibit ["LEA"]-4).

### IU "Intake" Process – December 2014/January 2015

4. The child entered the IU in January 2015 and was identified as a child with autism. (J-9).
5. The child had limited skill development in the area of cognitive development compared to same-age peers. (J-9).
6. The child had significant communication delay in expressive/receptive language and pragmatic language. (J-9)
7. The child had significant delays in social/emotional development. (J-9).

8. The child was found to have age-appropriate gross motor skills but could not negotiate stairs safely and would often navigate spaces without regard to safety. These had been identified and ongoing needs in the birth-to-3 programming. (J-9; LEA-4).
9. The child had significant delays in the areas of self-help/self-care. (J-9).
10. The child exhibited the need for significant sensory input, especially through deep pressure and mouthing objects. (J-9).
11. The IU's process for "intake" includes a standard team of professionals—a school psychologist, a speech and language therapist, an occupational therapist, a physical therapist, and a special education teacher—who administers assessments and prepares the initial individualized education program ("IEP"). (J-9; Notes of Testimony ["NT"] at 287-357, 361-418, 579-639, 751-825, 828-887).
12. The IU "intake" team based its results on single assessments, input from the guardian and, for some of the team members, input from the birth-to-3 day care providers, and observations of the child during the assessment process. The child was not observed in the birth-to-3 day care setting. (J-9); NT at 287-357, 361-418, 579-639, 751-825, 828-887).

### Spring 2015

13. In late January 2015, the child's IEP team developed the IEP. (J-10).
14. The January 2015 IEP was developed by the "intake" special education teacher, a teacher that would have no role in the instruction of the child. (J-10; NT at 361-418).
15. The January 2015 IEP indicated that the child did not exhibit behaviors that impeded the child's learning or that of others. There was no functional behavior assessment. (J-10).
16. The child's IEP contained four goals: development of pre-readiness skills to engage in a structured routine and increase attention/engagement, use of language with others, attention to others, and developing fine-motor skills/imitation. (J-10).
17. The child was in a half-day program, two days per week. (J-10).

18. The child's instruction had two aspects—verbal behavior (“VB”) and intensive trial teaching (“ITT”). Broadly, VB involves the concept of ‘manding’ where a student will request objects to build associations and learn demand/response. Broadly, ITT involves the concept of a teacher making a request, or giving an instruction, which is immediately, positively reinforced with a preferred object/snack when the student gives the desired response. Both VB and ITT involve numerous repetitive trials and require extensive data collection for each trial, session by session.
19. From January – May 2015, the child's teacher was a day-to-day substitute without training in the VB or ITT models being employed in the classroom. (NT at 1676-1712).
20. The spring 2015 teacher testified that data was collected over January – May 2015 but no such data is in the record or reported in the subsequent IEP. (NT at 1676-1712).
21. In April 2015, the child's IEP team met and the IEP was updated, showing that the IU was still trying to understand the child's diverse needs. The April 2015 IEP indicates, in the context of the goal for the child's communication, that an assistive technology (“AT”) needs assessment was being undertaken. (J-11).
22. The April 2015 IEP continued to indicate that the child did not exhibit behaviors that impeded the child's learning or that of others. There was no functional behavior assessment. (J-11).
23. In the April 2015 IEP, the child continued to receive services in the ‘integrated’ model. The child began to attend the half-day session for three days per week in a different classroom. (J-11).

#### S&L

24. The January 2015 IEP provided for 2 hours of ‘integrated’ speech and language services (“S&L”), once per week. ‘Integrated’ services in the IU's programming means, roughly, an immersion in the classroom experience, with strategies ostensibly engaged in by all adult participants (teachers, IU paraprofessionals, personal care assistants, and—when present—therapy providers). ‘Integrated’ services, or ‘integrated’ instruction, might include direct therapy or direct instruction (whether 1:1 or small group) but usually refers to the milieu of the classroom outside of direct therapy/instruction. (J-10; NT at 942-1111, 1117-1233, 1434-1522, 1727-1814, 1913-1989, 2005-2118).

25. The child utilized a picture-exchange system for communication. There was no picture-exchange book with the student through the spring of 2015. (NT at 1676-1712, 1819-1907).

OT

26. The January 2015 IEP provided for 2 hours of 'integrated' occupational therapy services ("OT"), once per week. (J-10).

Summer 2015

27. The child received services over school breaks, as well as in the summers. (NT at 645-723).

Fall 2015 – Spring 2016

28. In December 2015, the child's IEP team met again. (J-13).
29. The number of goals in the IEP was reduced from four goals in the April 2015 IEP to two goals in the December 2015 IEP (appropriate learning interactions and learning-readiness). (J-13).
30. The December 2015 IEP indicated that the child did not exhibit behaviors that impeded the child's learning or that of others. There was no functional behavior assessment. (J-13).
31. In March 2016, the child's IEP tem met. (J-14).
32. The March 2016 IEP indicated that the child did not exhibit behaviors that impeded the child's learning or that of others. There was no functional behavior assessment. (J-14).
33. The March 2016 IEP contained the same goals as the December 2015 IEP. (J-13, J-14).
34. In the March 2016 IEP, the child continued to receive services in the 'integrated' model. The child began to attend the half-day session for four days per week. (J-14).

V-B

35. In the December 2015 IEP, the child was scored at the 0-18 months level across all sub-measure of the VB assessment, earning 9.5 out of a possible 170 points. (J-13).
36. VB assessments and data were not updated in the March 2016 IEP. (J-14).

S&L

37. In the December 2015 IEP, the child was able to discriminate between two pictures with 73% accuracy, but no picture-exchange system was in use in the classroom. (J-13; NT at 942-1111, 1819-1907).
38. The December 2015 IEP increased the amount of S&L services, providing for two sessions per week of 2 hours of 'integrated' S&L services. (J-13).
39. In the December 2015 IEP, there was no mention of the AT assessment or its results. (J-13).
40. The March 2016 IEP increased the amount of S&L services, providing for 30 minutes weekly of direct S&L instruction in addition to the twice-weekly session of 2-hour 'integrated' S&L services. (J-14).
41. In the March 2016 IEP, the child's picture-discrimination rate was left blank. (J-14).
42. The AT assessment was completed in March 2016. The student was not utilizing any functional communication system reliably. (J-36).
43. In the March 2016 IEP, the IEP team began to trial the use of signing for communication. (J-14, J-36).
44. As of the March 2016 IEP, the S&L therapist opined: "(The child) needs to continue to work to establish a reliable communication system using either pictures, signs, or verbalizations in order to make requests and meet...wants and needs." (J-14 at page 5).

OT

45. In the December 2015 IEP, the child exhibited minimal sustained attention, solely one-handed grasp, infantile grasp, and only occasional imitation. (J-13).

46. The December 2015 IEP provided for the same level of OT services, 2 hours of 'integrated' occupational therapy services ("OT"), once per week. (J-10).
47. By the time of the March 2016 IEP, the OT was reporting tantrum behavior with non-preferred activities and reported head-butting and body-slamming behavior. The March 2016 IEP did not include a sensory schedule, or scheduled sensory breaks. (J-14).
48. The March 2016 IEP continued the same level of OT services, 2 hours of 'integrated' occupational therapy, once per week. (J-14).

### Progress

49. The four goals over the period January – December 2015 and two goals initiated in December 2015 are dissimilar such that assessing progress between the two documents is not possible. (J-11, J-13).
50. In the March 2016 IEP, the student's progress measures were significantly reduced for the goal in appropriate learning interactions. The progress measures for learning-readiness remained the same, although there were significant changes in the specially designed instruction. (J-13, J-14).
51. There is no progress reporting in the March 2016 IEP. (J-14).

### Re-Evaluation

52. In March 2016, the IU requested permission to re-evaluate the child. (J-15).
53. In June 2016, the IU issued its re-evaluation report ("RR"). (J-17).
54. In light of the June 2016 RR, the guardian requested an independent educational evaluation ("IEE") at public expense. The IU declined to provide an IEE and filed a special education due process complaint in defense of its re-evaluation process and June 2016 RR. (HO-1).
55. A different hearing officer conducted a hearing and, in January 2017, issued a decision, finding that the June 2016 RR was deficient. The IU was ordered to provide IEEs in various areas (physical therapy ["PT"], OT, and AT). (HO-1).<sup>4</sup>

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<sup>4</sup> The decision is at ODR file # 18242-1617KE and speaks for itself. Because there were extensive findings of fact, the June 2016 RR is not covered extensively herein as a

## Summer 2016

56. The child received services over the summer of 2016. (NT at 645-723).
57. In July 2016, the child's IEP team met and based on that meeting and ongoing consultation, in August 2016, the IEP team crafted a new IEP for implementation in the 2016-2017 school year, beginning in August 2016. (J-19, J-20; NT at 426-563, 1819-1907).
58. The August 2016 IEP contained updated information only from the teacher who worked with the child over breaks and during the summer. There was no updated information from the teacher who had been working with the child in the previous school year. (J-20).
59. For the first time, the August 2016 IEP indicated that the child exhibited behaviors that impeded the child's learning or that of others. The August 2016 IEP included a functional behavior assessment to address the student's longstanding problematic behaviors: hitting others, self-injurious behavior (self-hitting), throwing items, eloping, crying, dropping to the floor, head-butting, and self-stimulatory behavior (hand-flapping, [intense] focus on hands and hand movement). (J-20).
60. In the August 2016 IEP, a new goal was created from an amalgam of the two goals in the March 2016 IEP—the goals for learning readiness and for appropriate learning interactions were roughly merged into a new goal. Two additional goals were written for the August 2016 IEP (functional communication and reducing challenging behaviors). (J-14, J-20).
61. A personal care assistant for the child was added in the August 2016 IEP. (J-20).
62. The August 2016 IEP continued the child's placement in the half-day program, four days per week. (J-20).
63. The IU provides no regular services to any student on Fridays. Instead, some students may be recommended for a non-instructional group at the IU on Fridays (referred to as the CARE group) where some assortment of programming may be available. (NT at 426-563).

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factual matter. Its legal conclusion that the June 2016 RR was not sufficiently comprehensive enough in certain areas, though, is adopted here as the rule of the case involving this child.

64. The August 2016 IEP indicated that the student would attend the CARE group on Friday. (J-20).

V-B

65. In the August 2016 IEP, the child was scored at the 0-18 months level across all sub-measures of the VB assessment, earning 11 out of a possible 170 points. (J-13).

S&L

66. The August 2016 IEP indicated that the signing implemented in March 2016 was quickly abandoned (April 2016). The child returned to utilizing a picture communication system and was having some success. The AT assessment was updated to introduce an eventual voice-output device. (J-20, J-36).
67. The August 2016 IEP continued the same amount of S&L services, providing for 30 minutes weekly of direct S&L instruction in addition to the twice-weekly session of 2-hour 'integrated' S&L services. (J-20).

OT

68. The August 2016 IEP continued the same level of OT services, 2 hours of 'integrated' occupational therapy, once per week. (J-20).

Progress

69. There is no progress reporting in the August 2016 IEP. (J-20).
70. The changes in the goals between the March 2016 IEP and the August 2016 IEP render impossible an assessment of progress between the two documents. (J-14, J-20).

Fall 2016 – Spring 2017

71. In September 2016, the child's IEP team met multiple times to continue to revise the child's IEP. (J-24, J-25, J-27).
72. The September 2016 IEP increased the child's programming, in effect doubling it, to full-day instruction, four days per week and the continuation of the Friday CARE group. (J-27).

73. The decision in the special education due process hearing related to the June 2016 RR was issued in January 2017. (HO-1).
74. In April 2017, the child's IEP was revised. (J-30).<sup>5</sup>
75. The April 2017 contained no updated data or progress in the present levels of performance—those are replicated from the September 2016 IEP. (J-24, J-30 at pages 11 - 20).
76. The level of programming—four full days of class, with CARE group on Friday—and level of services (S&L, OT) remained the same. (J-30 at pages 39-42).
77. For the first time, however, accessible progress-monitoring was included in the child's IEP across goals which had been consistent for an extended period of time (i.e., not wholly new goals or significantly revised IEP-to-IEP). (J-24, J-30 at pages 22-38).

#### VB

78. The VB results were not updated in the April 2017 IEP. The last-reported results from May 2016 were in the April 2017 IEP. (J-30).

#### S&L

79. In the April 2017 IEP, from November 2016 – March 2017, the child was able to progress from not being able to discriminate between five pictures to discriminating between five pictures and their corresponding objects, and the child was requesting eight objects. (J-30 at pages 22-26).
80. The child was able to progress from difficulty with imitation and following directions to imitating one action and following three one-word directions. (J-30 at pages 22-26).
81. The S&L therapist testified that she completed an updated AT assessment in March 2017, but her AT assessment is not in the April 2017 IEP nor in the record at any other point. (J-30 at pages 1-50; NT at 1913-1989).

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<sup>5</sup> The April 2017 IEP at J-30 was provided in duplicate. It is a 104-page exhibit, but operationally it is a 54-page exhibit copied twice. Rather than have the exhibit pulled and re-numbered, the entire 104-page exhibit remained in the record. But references to J-30 will be page-specific so that a reader of the record can navigate that document more effectively.

82. The S&L therapist testified that, at that time (March 2017), the idea of a voice-output communication device was broached with the guardian, but the guardian did not want that as part of the potential communication interventions for the child. (NT at 1913-1989).

### OT

83. In the April 2017 IEP, the OT reported, from November 2016 – March 2017, inconsistency across the board in attention, visual motor tasks and fine motor tasks. (J-30 at pages 34-38).

84. After seeming progress with sensory input/sensory strategies in November 2016, by March 2017 the OT reported “sensory inputs have little impact on (the child’s regulation)”. (J-30 at pages 34-38).

### Progress

85. The April 2017 IEP shows inconsistent progress, from November 2016 – March 2017, in reduction of challenging behaviors. (J-30 at pages 27-33).

86. The number of times the child responded to instructional demands without challenging behaviors was reduced but still far from the goal (90% of the time); the child responded by imitation and directive to “quiet hands” or “ready hands” more frequently; and the child continued to require multiple and consistent redirection. (J-30 at pages 27-33).

### Special Education Complaint

87. In May 2017, the guardian filed the complaint which led these proceedings. (HO-2).

### Summer 2017

88. The child received services over the summer of 2017. (NT at 645-723).

89. In July 2017, the IU proposed an IEP. (J-35).

90. Once again, the child’s goals changed markedly from the April 2017 IEP to the July 2017 IEP. (J-30 at pages 22-38, J-35).

91. There is a functional communication goal in the July 2017 IEP, but it is vague in comparison to the functional communication goal in the April 2017 IEP. (J-30 at pages 22-26, J-35).
92. The July 2017 IEP removed the learning readiness/appropriate learning interactions goal and replaced it with the following goal, in its entirety: "(The Child) will attend to instruction." (J-35 at page 26).
93. The July 2017 IEP removed the goal related to reducing challenging behaviors and replaced it with the following goal, in its entirety: "(The child) will attend to instruction without behaviors." (J-35 at page 18).
94. The level of programming—four full days of class, with CARE group on Friday—and level of services (S&L, OT) remained the same. (J-35).
95. The guardian approved implementation of the program/placement outlined recommended by the IU in the July 2017 IEP, although on the notice of recommended educational placement, she indicated: "I disapprove of this IEP for reasons stated previously, and through my attorney, but I give permission for the BCIU to implement the program as our due process hearing is on going." (J-35 at page 63; NT at 1819-1907).

#### VB

96. In the July 2017 IEP, the child was scored at the 0-18 months level across all sub-measure of the VB assessment, except for manding/requesting, where the child scored at the 18-30 months level. The child earned 19 out of a possible 170 points. (J-35).

#### S&L

97. The July 2017 IEP contained updated S&L levels, showing progress in picture/object discrimination, requesting multiple preferred objects, requesting two preferred actions. (J-35).
98. The child was more successfully utilizing the picture exchange book, although physical gestures and grabbing hold of someone remained the consistent way for the child to initiate and communicate. (J-35).
99. The child was showing signs of increasing vocalizations. (J-35).

## OT

100. The July 2017 IEP contained updated OT levels, continuing to show significant inconsistency with visual motor tasks, fine motor tasks, and sensory processing/integration. (J-35).
101. The child was just beginning to refine self-help skills (clothing, toileting, drinking, eating utensils). (J-35).

## Independent Evaluations

102. In July 2017, the independent PT evaluation ordered through the prior round of special education due process was issued. (Guardian's Exhibit ["P"]-7<sup>6</sup>; J-39).
103. The independent PT evaluator identified the child with significant gross motor needs, including balance, falling, toe-walking, reciprocal gross-motor peer play (ball skills). The independent PT evaluator made multiple recommendations for physical therapy programming. (P-7, J-39; NT at 1315-1395).
104. In July 2017, the independent OT evaluation ordered through the prior round of special education due process was issued. (P-8).
105. The independent OT evaluator identified numerous, significant needs, including adaptive functioning, fine motor development, visual processing skills, ocular motor skills, posture, balance, coordination, social engagement, and play skills/play development. Additionally, the evaluator identified the child with sensory processing disorder, a global condition that impacts the processing of sensory information. The independent OT evaluator made multiple recommendations. (P-8).

## Private Evaluation

106. In July 2017, a private evaluator, with a deep background in special education and qualified as a board certified behavior analyst ("BCBA"), issued a two-page critique and opinion, based on a paper review of IEPs and programming, of the IU's programming. (P-2; NT at 1566-1667).

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<sup>6</sup> Guardian's exhibits were marked with a "P", customary in these types of proceedings for "parent".

### August Hearing Sessions

107. The hearing in this matter convened on August 3, 2017 and the second session was held on August 17, 2017. (HO-3, HO-5, HO-6, HO-7; NT at 1-272).
108. Not having the context of the history, scope, and intricacy of the child's programming, this hearing officer (naively, as it turned out) anticipated that the two August sessions would be utilized for evidence leading to an interim ruling while the retrospective denial-of-FAPE evidence was developed at follow-on sessions. The tsunami of witnesses and IEPs soon rendered any targeted understanding of the child's needs and programming soon rendered impossible the hope of issuing an interim ruling.

### Fall/Winter 2017

109. In August 2017, the child's entire educational team—teacher, S&L therapist, and OT therapist—changed. The child also began to attend a different classroom. (NT at 1117-1233, 1727-1814, 2005-2118).
110. In September 2017, the independent AT evaluation ordered through the prior round of special education due process was issued. (P-9).
111. The independent AT evaluator confirmed the child's significant delays in expressive and receptive language. (P-9).
112. The independent AT evaluator made recommendations for voice-output augmentative alternative communication device and the child demonstrated remarkable interactivity with a tablet computer based application, requesting preferred items/objects from a field of nine images with 80% accuracy. The trial included "minimal gestural cues". While utilizing the app, the child verbalized "tuh" twice when requesting a snack item and provided eye contact. (P-9 at page 4).
113. In October 2017, prior to the third session in the hearing (the first retrospective denial-of-FAPE session), the child's IEP team met to revise the IEP. There was no agreement on potential revisions. (LEA-5; HO-9, HO-10, HO-11).
114. In January 2018, the hearing officer issued an interim ruling, instructing that the current IEP being implemented for the child be revised with specific amendments to the programming and adding certain goals/instruction that was not being provided. (HO-24).

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115. A consistent theme running through the testimony of all classroom-based witnesses was the impossibility of collecting consistent data for the child, given the needs of instructing all the children in the classroom (approximately 8-10 students over the 3.5 years the child attended IU classrooms). (NT at 942-1111, 1117-1233, 1434-1522, 1676-1712, 1727-1814, 1913-1989, 2005-2118).
116. A consistent theme running through the testimony of the S&L therapists and OT therapists who testified was that they were present in the classroom, and provided whatever services the child might require, on a set schedule that was inflexible. The therapist was present either one day, or two days, per week on a set schedule and that dictated the provision of services to the child. (NT at 1434-1522, 1727-1814, 1913-1989, 2005-2118).

### **WITNESS CREDIBILITY**

All witnesses testified credibly.

Heavier weight was accorded to the testimony of the child's guardian, the independent PT evaluator, and the private BCBA.

Although the testimony of IU witnesses was not viewed as disingenuous, each witness's testimony was accorded less weight as the testimony of each of those witnesses was diminished by the documentary evidence in the record (or lack thereof) and in light of the testimony of the witnesses whose testimony was more heavily credited.

### **CONSIDERATION OF THE RECORD**

The entire record, all testimony and all exhibits, was reviewed in the writing of this decision. Lack of citation to a particular portion of testimony or a particular exhibit does not mean it was not considered as part of the record.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Denial of FAPE

To assure that an eligible young child receives FAPE (34 C.F.R. §300.17), the child must be appropriately evaluated for early intervention services and an IEP must be developed, an IEP reasonably calculated to yield meaningful educational benefit to the child. Board of Education v. Rowley, 458 U.S. 176 (1982).

In terms of the evaluation of a child, the evaluation process must be comprehensive and seek to develop an understanding of the child's needs. The evaluation process "must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent"<sup>7</sup>, with Pennsylvania early intervention regulations going on to provide that "(e)valuations shall be sufficient in scope and depth to investigate information relevant to the young child's suspected disability, including physical development, cognitive and sensory development, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family's perceived strengths and needs which will enhance the child's development."<sup>8</sup>

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<sup>7</sup> 34 C.F.R. §§300.122, 300.304(b)(c).

<sup>8</sup> 22 PA Code §14.153(2).

Once the ER has been issued, “a group of qualified professionals and the parent(s)” meets to determine whether the child qualifies for special education.<sup>9</sup>

In terms of the IEP for a child, ‘meaningful benefit’ means that a student’s program affords the student the opportunity for significant learning in light of his or her unique needs (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (Endrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).<sup>10</sup>

Here, it is easiest to conceive of how the IU denied FAPE to the child not by a minute dissection of the IEPs but by how the broad themes of denial-of-FAPE, present over almost the entire course of the child’s programming.

First, the “intake” process was flawed and laid the shoddy foundation upon which the first IEP was built and, thereafter, subsequent IEPs were crafted. Most glaring is how the IU “intake” evaluation members relied solely on one assessment measure, for the most part, in their area of expertise. Aligned with this is the fact that none of the team observed the child in the educational setting where the child was being educated prior to the IU—their observations came only from working with the child during testing.

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<sup>9</sup> 34 C.F.R. §300.306(a); 22 PA Code §14.153(3).

<sup>10</sup> While in some parts of the United States the U.S. Supreme Court decision in Endrew F. presented a new and higher standard to gauge the appropriateness of special education programming, the standard laid out in Endrew F. has been, largely, the longstanding standard enunciated by the Third Circuit Court of Appeals and, for decades, has been the applicable standard to judge the appropriateness of special education programming in Pennsylvania.

The student clearly has PT needs, evident even in the summer of 2017 and noted in detail by the independent PT evaluator, yet the “intake” PT evaluator indicated that the child had no need for any level of PT service. And until this hearing officer issued the interim ruling in January 2018 making PT goals and services part of the IEP, the child went without PT.

This flawed “intake” evaluation led to an initial IEP that is almost wholly dis-connected in many places from the child who came to the IU in January 2015. There is no indication that the child would be almost wholly unavailable for instruction due to lack of attentiveness and behaviors that interfere with instruction, yet the student’s behavior is not noted as interfering with learning and there was no functional behavior assessment (until, it must be noted, nineteen months later, in the August 2016 IEP). In the initial January 2016 IEP, the specially designed instruction is obviously geared to the data-intensive and trial-oriented instruction entailed in VB and ITT, but the child entered a classroom where the teacher was not trained in the instructional model or the data-collection. Indeed, the child did not have even a rudimentary picture exchange system.

From this starting point is the most fundamental denial of FAPE for the child—the IU was continually playing ‘catch-up’ with the child’s needs and lack of progress. Gradually, IEP by IEP, the child began to spend more time in the classroom (from a half-day program, two days per week, ultimately to a full-day program, four days per week—one of the very few students at the IU to require such intensive programming). Gradually, IEP by IEP, services were increased.

The reader may not have counted, but this hearing officer has— in two and a half years from January 2015 through July 2017, the child’s current program, the child had eight IEPs.

And regardless of the number of IEPs, the child’s goals are constantly in flux across the IEPs. Indeed, it is impossible to map the course of the child’s progress, as goals appear in one IEP then disappear in a subsequent IEP, or are revised so significantly that even where two goals might address similar matters, comparing progress is impossible. But except for the April 2017 IEP, where goal-consistency and straightforward progress-monitoring is reported for the period November 2016 – March 2017, the IEPs lack any consistent progress monitoring.<sup>11</sup>

The programming provided to the child through each IEP, too, is inappropriate. First, for a child with such significant needs, there is a shocking lack of direct instruction. The ‘integrated’ model—generalizing skills and interventions and therapies across environments in the school day—has value. Here, though, the child’s programming was largely ‘integrated’ when significant direct instruction, whether 1:1 or in small group, was required and lacking.

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<sup>11</sup> Almost every IU witness testified to the importance of data—collecting it, analyzing it, using it as the basis for decision-making. And there is a large amount of data in the record (J-12, P-6, P-11, HO-14). First, given this child’s needs and the VB and ITT instructional models, and the child’s behavior and communication needs, as much data as is present, it is not nearly enough. Second, and more importantly, the guardian, or an outside educator, or anyone interested in quickly and concisely accessing the student’s progress does not sit down to dissect data-collection sheets. Accessible, straightforward progress monitoring is the means for anyone to gauge how the student is progressing, or not, and to react accordingly. Accessible, straightforward progress monitoring is present in only one IEP—April 2017 at J-30—and almost wholly absent from this record as a whole.

Second, it is clear that the child was serviced by S&L and OT providers on their administrative schedule, not based on the child's unique needs. Over and over, those providers' answers to questions about their role in the child's education was, in effect, 'that's the day I'm in the classroom', or 'I'm there on Tuesday and Thursday'. This is no fault of the providers, but this record clearly establishes that the IU has determined the weekly schedules of those providers and, as a matter of administrative convenience, there is no deviation in those schedules. In short, the equation seems to be services-based-on-schedule rather than child's-need-determines-provider-schedule.

One of the most disheartening notions when confronted with this record, more so than in the record for this child's sibling at 19182-1617AS, is that the intermediate units in this Commonwealth exist to provide the resources and expertise which individual school district might lack. As an educational service agency that pools resources for its geographic region of the state, the intermediate unit is the local education agency to whom other local education agencies—the school districts— look to when specialized services, or specialized classrooms, or expert approaches, or infrequent occurrences in programming are necessary. All of those things were necessary here for this child, and the IU was found wanting.

The IU denied the child FAPE over nearly the entire course of the child's enrollment in early intervention services. Accordingly, an award of compensatory education will follow.

## Compensatory Education

Where an IU has denied FAPE to a child under the terms of IDEIA, compensatory education is an equitable remedy that is available to the child. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). An award of compensatory education may be calculated to reflect the period of time of that is the focus of the denial of FAPE, excluding the time that might have been reasonably required for an IU to correct the deficiency. (Ridgewood; M.C.). This is sometimes known as a quantitative, or “hour-for-hour”, calculation of compensatory education and is normally a matter of evidence based on IEPs or other documentary evidence that provides insight into the quantitative nature of the proven denial of FAPE. Alternatively, an award of compensatory education may be calculated “to restore the child to the educational path he or she would have traveled” absent the denial of FAPE. G.L. v. Ligonier Valley School District Authority, 802 F.3d 601, 625 (3d Cir. 2015). This is sometimes known as a qualitative, or “make whole”, calculation of compensatory education and normally requires testimony from someone with expertise to provide evidence as to where the student might have been, or should have been, educationally but for the denial of FAPE.

In this case, a precise calculation of compensatory education under either the quantitative/hour-for-hour approach or the qualitative/make-whole approach is not possible. The quantitative/hour-for-hour approach does not account for the deep deprivation of basic skills that the IU ignored, or

deficiently programmed for, in its denial of FAPE for the child. Yet there is no evidence in the record to allow for the quantitative/make-whole approach to be employed. Indeed, the quantitative/make-whole approach might arguably be impossible given the tragic—it is a powerful word, yet apt—lack of services and attentiveness by the IU at the critical early stages of this child’s development.

Compensatory education, however, is always an equitable remedy. Therefore, as a matter of equity, the student will be awarded 1,000 hours of compensatory education, roughly one hour of additional, independent, weekly services until the child turns twenty-five.<sup>12</sup>

As for the nature of the compensatory education award, the guardian may decide in her sole discretion how the hours should be utilized so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the child’s current or future IEPs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the child and the family. Given the significant nature of the child’s disability profile, and the deprivation having occurred as to the most basic skills at the critical early stages of the

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<sup>12</sup> This is not a requirement or directive that the guardian must utilize the compensatory education hours for weekly services but merely an illustration of how the totality of the compensatory education award might be logically conceptualized in terms of an attempt to remedy the IU’s denial of FAPE. One might just as easily conceive of it as approximately 15 minutes per school day over the ensuing years, or approximately 50 hours per year in the ensuing years, or significant blocks of hundreds of hours as the guardian might choose to utilize those blocks of hours in the ensuing years. Regardless, it is not merely a number plucked from the ether.

child's development, the compensatory education hours shall be available to the child until the child's (then young adult's) 25<sup>th</sup> birthday. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

#### Status of Child's IEP

It is likely that the parties have contemplated, or already begun, the process for transitioning the child to the child's school district of residence, or to some other educational entity. On [date redacted], [this] constitutes the end of the child's qualifying for early intervention services as of the upcoming 2018-2019 school year. As applicable here, "children shall be exited...from early intervention based on...(t)he child (having) reached the age of beginners and is therefore no longer eligible for early intervention services"<sup>13</sup> beginning in the 2018-2019 school year, the age of beginners in any school district being no "more than 6 years, no months, before the first day of the school term of the district".<sup>14</sup> Therefore, the order will address the status of the child's IEP in light of this impending transition in approximately [redacted] time.

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<sup>13</sup> 22 PA Code §14.157(a)(1).

<sup>14</sup> 22 PA Code §11.15.

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the Intermediate Unit (“IU”) denied the child a free appropriate public education throughout the child’s enrollment in the early intervention program at the IU. In light of this deprivation, and again as set forth above, the student is equitably awarded 1000 hours of compensatory education.

As of the date of this order, the student’s IEP shall be the IEP currently being implemented for the child, incorporating all of the hearing officer amendments and additions to the IEP as ordered in the January 2018 interim ruling and hereby made a permanent part of the child’s IEP.

Nothing in this decision and order shall be read to interfere with the parties’ ability to modify any provision of this decision and order to the extent the parties explicitly agree thereto in writing.

Any claim not specifically addressed in this decision and order is denied.

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

April 6, 2018