

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

Final Decision and Order
CLOSED HEARING
ODR File Number 19183-1617

Child's Name: K. G.

Date of Birth: [redacted]

Dates of Hearing:¹

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, 12/13/17, 1/10/18

Guardian:

[redacted]

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Hearing Officer: Michael J. McElligott

Date of Decision: 4/6/2018

¹ This matter involves a complaint filed contemporaneously with another complaint regarding this child's sibling, at ODR file #19182-1617. Although the two matters were not formally consolidated, the two cases were handled as affiliated cases, as twelve of the eighteen 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.

INTRODUCTION

Student (“student”)² is a [kindergarten-aged], significantly-involved child who received 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”)³ 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?

² 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.

³ 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 significant language deficits), and anxiety disorder, and attention deficit hyperactivity disorder. (Joint Exhibit ["J"]-6).
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. (J-5).
3. Before entering the IU, the student was receiving birth-to-3 services in a day care environment with goals in decreasing the need for constant movement, expressive communication, fine motor skills with objects, 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-8).
5. The child had limited skill development in the area of cognitive development compared to same-age peers. (J-8).
6. The child had significant communication delay in expressive/receptive language and pragmatic language. (J-8)
7. The child had significant delays in social/emotional development. (J-8).

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-8; LEA-4).
9. The child had significant delays in the areas of self-help/self-care. (J-8).
10. The child exhibited the need for significant sensory input, especially through movement. (J-8).
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 prepare the initial individualized education program ("IEP"). (J-8; Notes of Testimony ["NT"] at 226-287, 288-346, 557-615, 689-760, 763-801).
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-8; NT at 226-287, 288-346, 557-615, 689-760, 763-801).

Spring 2015

13. In late January 2015, the child's IEP team developed the IEP. (J-9).
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-9; NT at 288-346).
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-9).
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 direction-following, and developing fine-motor skills/imitation and engaging in adult-directed activities. (J-9).
17. The child was in a half-day program, two days per week. (J-9).
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.

S&L

19. 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-9; NT at 827-995, 979-1094, 1368-1465, 1470-1593, 1734-1843).

OT

20. The January 2015 IEP provided for 2 hours of ‘integrated’ occupational therapy services (“OT”), once per week. (J-9).

Summer 2015

21. The child received services over school breaks, as well as in the summers. (NT at 618-658).

Fall 2015 – Spring 2016

22. In December 2015, the child’s IEP team met again. (J-11).
23. The December 2015 IEP contained updated information on the child’s levels of performance submitted by the classroom teacher, from the S&L therapist, and the occupational therapist. (J-11).
24. Three of the four goals in the January 2015 IEP changed in the December 2015 IEP. The goal in developing fine-motor skills/imitation and engaging in adult-directed activities remained. The three new goals were in functional communication, following directions, and functional play. (J-9, J-11).

25. 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-11).
26. The December 2015 IEP indicated that the child was utilizing a picture-exchange communication system. (J-11).
27. The December 2015 IEP increased the services for the child, with half-days four days per week. (J-11).
28. In March 2016, the child's IEP tem met. (J-12).
29. 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-12).
30. The March 2016 IEP contained the same goals as the December 2015 IEP. (J-11, J-12).

V-B

31. In the December 2015 IEP, the child's VB assessment is noted in general terms but there is no relating the child's assessment to the level of achievement (0-18 months, etc.). Accumulated points on the VB assessment is not reported in the December 2015 IEP but later score reporting in a July 2017 IEP shows that in June 2015 the child scored 6.5 points out of a possible 170 and in October 2015 the child scored 8 points out of a possible 170. (J-11, J-33 at page 62).
32. The VB-Barriers assessment score was 72, indicating significant barriers with significant absence of skills, both interfering with the child acquiring new skills.
33. VB assessments and data were not updated in the March 2016 IEP. (J-14).

S&L

34. In the December 2015 IEP, the child was exhibiting progress in expressive and receptive language. (J-11; NT at 1734-1843).
35. The December 2015 IEP maintained the amount of S&L services, 2 hours per week of 'integrated' S&L services. (J-11).

36. 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. The child received this direct S&L instruction in conjunction with the child's sibling. (J-12).
37. In June 2016, an assistive technology ("AT") needs assessment was completed in the context of expressive communication. The student was utilizing picture exchange as a functional communication system. (J-34).

OT

38. In the December 2015 IEP, the child exhibited improved fine motor skills and attention to task. The child had not exhibited rudimentary self-help skills and still sought sensory input from excessive movement. (J-11).
39. The December 2015 IEP provided for the same level of OT services, 2 hours of 'integrated' occupational therapy services ("OT"), once per week. (J-11).
40. The March 2016 IEP continued the same level of OT services, 2 hours of 'integrated' occupational therapy, once per week. (J-12).

Progress

41. There is no progress monitoring reported for the four goals in the January 2015 IEP. Those four goals and the four goals in the December 2015 IEP are dissimilar such that assessing progress between the two documents is not possible. (J-9, J-11).
42. In the March 2016 IEP, there is no progress monitoring reported on the four IEP goals. (J-11, J-12).
43. There is no progress reporting in the March 2016 IEP. (J-12).

Re-Evaluation

44. In March 2016, the IU requested permission to re-evaluate the child. (J-14).
45. In June 2016, the IU issued its re-evaluation report ("RR"). (J-14).
46. 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).

47. 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).⁴

Summer 2016

48. The child received services over the summer of 2016. (NT at 618-658).
49. In July and early August 2016, the child's IEP team met and based on those meetings 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-16, J-17, J-18; NT at 362-543, 1844-1956).
50. 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 problematic behaviors: dropping to the floor, scratching others and/or pulling their hair, eloping from the instructional space/wandering. (J-18).
51. Three of the four goals in the March 2016 IEP remained in the August 2016 IEP: The goal in developing fine-motor skills/imitation and engaging in adult-directed activities (expanded to include sensory processing as well), functional communication, and functional play. The goal for following directions was removed and replaced with a goal based on the functional behavior assessment, geared to reducing challenging behaviors. (J-18).
52. A personal care assistant for the child was added in the August 2016 IEP. (J-18).
53. The August 2016 IEP continued the child's placement in the half-day program, four days per week. (J-18).

⁴ The decision is at ODR file # 18241-1617KE and speaks for itself. Because there were extensive findings of fact, the June 2016 RR is not covered extensively herein as a 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.

54. 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 362-543).
55. The August 2016 IEP indicated that the student would attend the CARE group on Friday. (J-18).

V-B

56. In the August 2016 IEP, the child was scored at the 0-18 months level across all sub-measures of the VB assessment. There was no reporting of accumulated points on the VB assessment in the August 2016 IEP, but in May 2016, the child scored 13.5 out of a possible 170 points. (J-18, J-33 at page 62).

S&L

57. 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-18).

OT

58. The August 2016 IEP continued the same level of OT services, 2 hours of 'integrated' occupational therapy, once per week. (J-18).

Progress

59. There is no progress reporting in the August 2016 IEP. (J-18).

Fall 2016 – Spring 2017

60. In September 2016, the child's IEP team met multiple times to continue to revise the child's IEP. (J-24, J-26).
61. 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-26).
62. The decision in the special education due process hearing related to the June 2016 RR was issued in January 2017. (HO-1).

63. In February 2017, the IU updated the AT needs assessment. (J-34).
64. In February 2017, the IEP team decided to move away from picture-exchange as the child's primary means of expressive communication and to explore signing. By March 2017, the guardian [was] interested in any and all functional communication interventions (picture-exchange, signing, voice-output devices). (J-34).
65. In April 2017, the child's IEP was revised. (J-29).
66. Except for the AT assessment and notations related to the community agency who would provide the personal care aide for the child, the April 2017 contained no updated data or progress in the present levels of performance (J-29).
67. 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-29).
68. 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-29).
69. The guardian approved the April 2017 IEP. (J-29a).

VB

70. The VB results were not updated in the April 2017 IEP. In October 2016, however, the child scored 13.5 points out of a possible 170. The VB-Barriers assessment had not been updated throughout the various iterations of the IEPs since that assessment was administered in 2015. (J-29, J-33 at page 62).

S&L

71. In the April 2017 IEP, from November 2016 – March 2017, the child was inconsistent in responding by name. (J-29).
72. The child was able to progress in following one-step directions. (J-29).
73. The child was inconsistent in requesting continuation of activities. (J-29).

OT

74. In light of the overarching OT goal and short-term objectives in the April 2017 IEP, the progress monitoring for OT is generalized and shows little progress. (J-29).

Progress

75. The April 2017 IEP shows little progress, from November 2016 – March 2017, in reduction of challenging behaviors. (J-29).
76. On the functional following directives/functional play goal in the April 2016 IEP, the child made progress on imitating tasks. The child did not make marked progress on imitating gross motor movements or imitating functional play. Instruction was not provided on two short-term objectives (discriminating between family members/pet and matching identical objects). (J-29).

Special Education Complaint

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

Summer 2017

78. The child received services over the summer of 2017. (NT at 618-658).
79. In July 2017, the IU proposed an IEP. (J-33).
80. The child's goals remained largely the same from the April 2017 IEP to the July 2017 IEP. (J-29, J-33).
81. 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-33).

VB

82. In the July 2017 IEP, there was no update to the VB scores in the IEP. The points on the VB assessment show that, in July 2017, the child scored 17.5 out of a possible 170 points. (J-33 at page 62).

83. In the July 2017 IEP, the VB-Barriers assessment was updated. The child scored 71 points, having last scored 72 points in May 2016. (J-33 at page 62).

S&L

84. The July 2017 IEP contained updated S&L levels, showing progress in the use of signing. (J-33).
85. The July 2017 IEP included updated progress monitoring from April 2017 and July 2017. (J-33).

OT

86. The July 2017 IEP contained updated OT levels. (J-33).
87. The child continued to engage in sensory-seeking behavior. (J-33).
88. The child was just beginning to refine self-help skills (clothing, toileting, drinking, eating utensils). (J-33).

Progress

89. Behavior data and progress monitoring in the July 2017 IEP supports the conclusion that the child was not significantly reducing problematic behaviors. (J-33).

Independent Evaluations

90. In July 2017, the independent PT evaluation ordered through the prior round of special education due process was issued. (Guardian's Exhibit ["P"]-7⁵; J-37).
91. The independent PT evaluator identified the child with significant gross motor needs, including balance, navigating stairs, toe-walking and body awareness, reciprocal gross-motor peer play (ball skills). The independent PT evaluator made multiple recommendations for physical therapy programming. (P-7, J-37; NT at 1235-1329).
92. In July 2017, the independent OT evaluation ordered through the prior round of special education due process was issued. (P-8).

⁵ Guardian's exhibits were marked with a "P", customary in these types of proceedings for "parent".

93. 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

94. 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 1632-1719).

August Hearing Sessions

95. 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).
96. 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

97. 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 827-995, 1368-1465, 1470-1593).
98. In September 2017, the independent AT evaluation ordered through the prior round of special education due process was issued. (P-9).
99. The independent AT evaluator confirmed the child’s significant delays in expressive and receptive language. (P-9).

100. The independent AT evaluator made recommendations for voice-output augmentative alternative communication device and the child demonstrated successful interactivity with a tablet computer based application, requesting preferred items/objects from a field of four images with 100% accuracy. (P-9).
101. 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).
102. 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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103. 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 827-995, 979-1094, 1368-1465, 1470-1593, 1734-1843).
104. 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 1368-1465, 1470-1593, 1734-1843).

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"⁶, 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

⁶ 34 C.F.R. §§300.122, 300.304(b)(c).

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."⁷ 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.⁸

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 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (Endrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).⁹

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 in certain aspects of the child's programming.

First, the "intake" process was flawed and laid the shoddy foundation upon which the first IEP was built and, whereafter, subsequent IEPs— at least until August 2016 when the IU conducted a functional behavior assessment— were crafted. Most glaring is how the IU "intake" evaluation members relied

⁷ 22 PA Code §14.153(2).

⁸ 34 C.F.R. §300.306(a); 22 PA Code §14.153(3).

⁹ 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.

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.

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 in January 2015 that was prejudicially deficient. There is no indication that the child’s instruction would be impacted by 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).

From this starting point, there is a creeping denial of FAPE for the child as 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, along with this child’s sibling, at the IU to require such intensive programming). Gradually, services were increased. There is the sense on this record that the IU was always a step behind where the child’s programming needed to be.

Early on in the child’s programming, there is an absolute lack of progress monitoring in the IEPs or on this record. Eventually, goal-consistency and straightforward progress-monitoring, as well as updated present levels of performance, were reported. But until the April 2017 IEP—over two years with the IU—the IEPs lack any consistent progress monitoring.¹⁰

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. 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

¹⁰ 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-10, J-13, J-19, P-6, P-10, LEA-2, 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 began only with the IEP of April 2017 at J-29.

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, although less so than in the record for this child's sibling in the affiliated case at 19182-1617AS, is that the intermediate units in this Commonwealth exist to provide the resources and expertise which an 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 here in too many regards.

The IU denied the child FAPE over the 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 600 hours of

compensatory education, roughly an hour and 15 minutes of additional, independent, weekly services until the child turns twenty-five.¹¹

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 child's development, the compensatory education hours shall be available to the child until the child's (then young adult's) 25th 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.

¹¹ 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 10 minutes per calendar day over the ensuing years, or approximately 20 minutes per school day over the ensuing years, or approximately 65 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.

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 [redacted], the child turned [redacted] years old. 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"¹² 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".¹³ 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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¹² 22 PA Code §14.157(a)(1).

¹³ 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 600 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