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**Pennsylvania Special Education Hearing Officer**  
**Final Decision and Order**

**OPEN HEARING**

**ODR File Number:** 19952-1718

**Child's Name:** V.S.                      **Date of Birth:** [redacted]

**Dates of Hearing:**  
2/1/2018 and 3/27/2018

**Parent:**  
[redacted]

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**Hearing Officer:** William Culleton Esq.

**Date of Decision:** 4/16/2018

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Child)<sup>1</sup> is enrolled currently in an Early Intervention program provided by the Intermediate Unit (IU) named in this matter. The IU is the Child's local education agency (LEA) as defined in the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Child is classified under the IDEA as a child with Autism and Speech or Language Impairment.

The Child's parents (Parents) requested due process, asserting that the IU has failed to offer and provide Child with a free appropriate public education (FAPE) pursuant to the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>2</sup> and their implementing regulations. Parent states that the IU failed to provide additional speech and language interventions when it became apparent in March 2017 that Child had made no significant progress in that area of need, failed to provide appropriate assistive technology, failed to place Child appropriately and failed to provide an appropriate Individualized Education Program (IEP) to Child. Parent seeks an order for compensatory education for Child. The IU denies Parent's allegations and seeks dismissal of the complaint.

The hearing was completed in two sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the IU did not fail to offer and provide a FAPE to Child, and I deny Parents' requests for relief.

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<sup>1</sup> Child, Parent and the respondent IU are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Child's confidentiality. "Parent" in the singular refers to Child's Father, who conducted most of the relevant transactions with the IU.

<sup>2</sup> There is no question that Child is otherwise qualified within the meaning of section 504 and that the IU receives federal funds.

## ISSUES

1. Has the IU offered and provided Child with a FAPE in compliance with the IDEA and section 504 during all or any part of the relevant period from March 27, 2017 to February 1, 2018?
2. Should the hearing officer order the IU to provide Child with compensatory education services on account of all or any part of the relevant period?

## FINDINGS OF FACT

### HISTORY

1. Child is of early intervention age but not of school age. Child is diagnosed with Autism Spectrum Disorder. From age two to enrollment in the IU early intervention program at age three, Child exhibited significant delays in most measured areas of development, including cognitive functioning; receptive and expressive language; adaptive behavior; fine motor ability and social behavior. Child also demonstrated atypical sensory needs. Child displayed minimal interest in skills and difficulty sustaining attention. (NT 377; S 2.)
2. Child received wrap-around home services from two years of age, including specialized instruction, speech and language services and occupational therapy. These services were interrupted while child was in the IU's early intervention program, in or about March or April 2017, except for private speech and occupational therapy, and restarted prior to September 2017. (NT 330-334; S 2.)
3. From November 2015 to August 2016, Child made little progress in the home services treatment plan for reduction of self-injurious behavior, improvement of play skills, and development of social interaction with other children. (NT 292, 465; S 36.)
4. Prior to enrolling in the IU preschool program, Child was receiving services in the home, two hours per day, five days per week. Parents sought to provide a preschool program in addition to the home based services. (NT 285-286; S 2.)
5. By June 2016, at age 2 years and eight months, Child was not using language functionally, although Child had developed some idiosyncratic gestures to obtaining things that Child wanted. (NT 289-291; S 2.)
6. By August 2016, Child had developed difficult behaviors at home, including some self-injurious behaviors. (NT 85, 287.)
7. The IU provided an evaluation report to Parents on August 3, 2016. The report classified Child with Autism and Speech or Language Disorder. It recognized needs in receptive and expressive language, adaptive behavior, fine motor skills, social skills and sensory regulation. It recommended specific activities to address these needs, as well as speech therapy, occupational therapy and specialized preschool instruction. (S 2.)

## CIRCUMSTANCES AND IU SERVICES

8. On September 1, 2016, the IU convened an IEP team meeting and discussed the Parents' desires for service and the IU's offer of services. The IU offered 2 ½ hours per day, four days per week of specialized instruction in its early childhood special education environment; 45 minutes of speech therapy per week; 45 minutes of occupational therapy per week and transportation. Speech therapy was delivered in the classroom, either individually or with one other child. (NT 51-52; S 5.)
9. The September 2016 IEP offered seven goals, addressing attention to task; expressive and receptive language (making one word requests and following single step directions); fine motor skills (grasping a marker to imitate horizontal strokes); developmental skills (eating from a spoon and putting on a garment); and social skills (parallel play). (S 5.)
10. There was no goal addressing sensory needs, but modifications addressed sensory needs. (S 5.)
11. Parents approved the offered services on September 19, 2016, and services began in October 2016. (S 6.)
12. Parents selected the early intervention classroom provided by the IU because at the time they believed that it was instructing children with disabilities along with typically developing children; they did not want a non-inclusive setting, and the IU program was closer to their home than the alternative being considered. (NT 286.)
13. When Child started at the IU early intervention classroom, it was the first time child received instruction outside the home. Child exhibited self-injurious behaviors, including hitting self and throwing the head back to strike the back of the chair, or trying to strike the head or face on the floor or on objects. Child also resisted demands, but this resistance behavior was under control in the classroom with prompting. Child's cognitive activities consisted of putting things into containers. Child had almost no communicative ability except to misbehave or vocalize, or to utilize a few gestures or signs to convey wants with regard to Child's bottle and a very few other objects. Child's attention was extremely limited; it was up to five minutes only for desirable objects or activities. (NT 45-48, 57-58, 149; S 5.)
14. Child's behavior was in part a reaction to being instructed outside the home in a classroom environment for the first time in life. (NT 475-476.)
15. Child's teacher utilized blocking for dangerous self-injurious behaviors. (NT 47-48.)
16. The teacher utilized a great deal of hand-over-hand prompting to guide Child in performing tasks required in the classroom. (NT 59-61.)
17. The class day permitted Child to receive both individual supports and supported group activities. (NT 50-51.)
18. Speech therapy was delivered in the classroom, not in a separate room. Therapy was both individual and in a group setting within the classroom, sometimes with only one other

child. The speech therapist collected data and reported some but not all data to Parents. Through consultation with and modeling by the speech therapist, the teacher continued and reinforced the speech language therapy during the rest of the week and during weeks in which Child missed speech sessions because of absence from school. (NT 57, 101-102, 149-155, 159-167, 186-187.)

19. Between October 2016 and March 2017, Child's behavior at home was significant, and Parents considered it to be of greater concern than Child's behavior at school; consequently, Parents began to consider increasing Child's preschool hours as a way to reduce Child's overall negative behaviors. (NT 287-289, 292-293, 337-338.)
20. Between October 2016 and March 2017, Child missed a significant number of days of school, and consequently received significantly fewer speech therapy sessions than had been offered, and missed the opportunities to generalize communication skills from speech therapy to the classroom. Because preschool is not mandatory, the IU did not make up sessions missed due to absence. Thus, Child missed significant classroom-based speech therapy and repetition and review time. (NT 167, 473-474; S 35.)
21. Prior to March 28, 2017, there was no pattern to Child's absences. Child had missed multiple days on each [] of Child's preschool week[s]; despite slight differences in the numbers of absences on the different days of Child's preschool week, the differences did not establish a pattern permitting the IU to predict that Child would miss more Mondays than other days. (S 35.)
22. In February 2017, the family moved to a new home, increasing the stressors affecting Child. (NT 300.)
23. From August 2016 to April 2017, Child made little progress in the home services treatment plan for reduction of self-injurious behavior, improvement of play skills, and development of social interaction with other children. (NT 296-7, 331-334, 337, 465; S 36.)
24. Parents began exploring options for providing Child with a longer school day in October 2016. By March 2017, Parents had found and visited one provider that offered one-to-one intensive, structured instruction in the Verbal Behavior method. (NT 294-295.)

#### OFFER OF SERVICES FROM MARCH 2017 TO AUGUST 2017

25. On March 28, 2017, the IU convened an IEP team meeting to review Child's progress. Teachers reported that Child had made significant progress in adapting to classroom routine and working, with prompting, on classroom tasks and activities. Child also made slow progress on the goal addressing fine motor skills (fisted grasp of writing instrument). Child reportedly made slow or no progress in goals addressing attention to task; expressive language (making one word requests using words orally); receptive language (responding to single step directions) adaptive skills (eating from a spoon and putting on a garment); and social skills (parallel play). (NT 91-95, 97, 115, 167, 311, 379; S 2, 7.)

26. Teachers reported that Child was exhibiting refusal and self-injurious behaviors in the classroom. Teachers were confining Child in a specialized chair with a protected back and a tray for instruction activities, as an antecedent measure to prevent self-injury. (NT 124-131, 145-146; S 7, 30.)
27. At this time and subsequently, Child developed difficulties with sleep at home. These difficulties impacted Child's classroom performance and participation negatively. (NT 95, 296-298.)
28. Child's lack of progress in speech therapy was in part due to missing significant numbers of sessions due to absence, and in part due to Child's behaviors that interfered with learning. (NT 167, 195-196, 471-472.)
29. Child's teachers and related services providers addressed Child's behaviors by utilizing the same techniques that they apply to any refusing or task-escaping behavior in the specialized IU classroom, based upon their experience and upon their training, including training in the principles of applied behavior analysis. (NT 44, 46-48, 60-61, 64-67, 71-73, 75-80, 87-91, 94-99, 114, 138, 145-146; S 22.)
30. At the March 2017 IEP team meeting, the IEP team determined that it would be appropriate to provide Child with a different program and placement as the current placement did not provide a sufficient amount of specialized instruction to enable Child to master Child's IEP goals within the IEP year. (NT 61-63, 234, 294-296, 311, 427-429; S 9, 13, 32.)
31. The IEP team did not change Child's IEP or related services as a result of the March 2017 progress report. Team members believed that Child's significant absences and classroom behaviors were significant reasons for minimal progress in speech and language, and slow progress in other areas. Team members judged that Child's improvement of classroom behavior over time, coupled with improved attendance, would lead to improved progress in the second half of the IEP year. (NT 62, 115, 184-185, 311.)
32. At or about the time of the March IEP meeting, IU staff referred Parent to a program with two locations that offered longer hours (five hours per day, five days per week). Parent visited that program and concluded that the placement was inappropriate because the children there were more severely disabled than Child, and were not appropriate role models for Child because some were not verbal and some were struggling with multiple disabilities and in wheelchairs. (NT 307-309, 409-420, 422-425, 432-433; S 9, 10, 11.)
33. IU staff referred Parent to two other placement options that offered more hours of service than the Child's current program, including up to full day preschool. However, the Parents rejected one option because of the severe needs of the children in the program, as well as Parents' desire for a less restrictive setting. One program decided not to accept Child due to its inability to meet Child's specific needs. (NT 304-305, 307-309, 348, 364, 367, 409-420, 422-425; S 12, 13, 14, 17, 18, 20.)
34. In March and again in May 2017, Parents requested placement at a particular program that offered more one-to-one training, but had no more than two preschool children in its group. The IU refused to offer that program and sent a NOREP reflecting refusal. The IU refused because it does not have a contract with that provider, and because the provider's services

do not include a classroom experience with a group of children. The program had only two children at one location, and no preschool children at its other location; it appeared to be more of a therapy program than a preschool program in the view of the IU program's director. (NT 345, 420-422, 455-456, 466-468, 493-503; S 11, 12, 13, 20.)

35. The IU program director offered a new option, a program with a full time classroom that had a longstanding and positive relationship to the IU program. Parents rejected this proposal because of the program's distance from their home. (NT 454-458.)
36. The IU indicated willingness to provide Child with transportation to the program that was at a distance, to provide a one-to-one aide to attend Child, and to provide accommodated seating to meet Child's needs while being transported. (NT 478-479.)
37. The IU NOREP did not explicitly offer a placement as an alternative to the Child's current placement, but it reflected the referrals to four other programs for purposes of placement. (NT 312, 457-458; S 13.)
38. On May 9, Parents indicated that they rejected the NOREP and would request mediation. They returned the signed NOREP with request for mediation on May 15. After mediation was unsuccessful on May 19, Parents requested due process. (S 13, 17, 20.)
39. On June 29, 2017, the IU offered to re-evaluate Child, offering to conduct a Functional Behavioral Assessment (FBA) of Child's almost daily self-injurious behaviors, an occupational therapy evaluation (in response to Child's teacher's request due to observed gross motor delays) and a sensory profile. Parents consented to the re-evaluation on the same date. (NT 63; S 21.)
40. The IU performed an FBA of Child's most concerning behaviors on June 29, based upon a classroom observation of Child. (S 22.)
41. In July 2017, Parents informed IU personnel that they did not want Child placed in another program for the Fall of 2016, because they anticipated a change of placement to a more appropriate, but as yet unnamed, setting and did not want Child to endure two changes of placement. (S 19, 20.)

#### RE-EVALUATION AND REVISED ANNUAL IEP

42. On July 27, 2017, the IU provided its re-evaluation report to Parents. The re-evaluation found that Child continued to be eligible for special education services under the category of Autism. It found substantial delays (more than two standard deviations) in cognitive ability, receptive and expressive language, fine motor skills, adaptive skills and social skills. It found sensory and gross motor needs. It recommended special education preschool instruction; speech and occupational therapy; sensory modifications; and a behavior support plan. (S 22.)

43. The report of the FBA hypothesized that self-injurious behavior was due to inability to protest verbally any unwanted classroom demands, items or activities. (S 28.)
44. The IU convened an IEP team meeting on August 2, 2017 and offered a revised annual IEP of the same date. The IEP offered the same amount of specialized preschool class time and occupational therapy; the team did not recommend increasing these. It added 15 minutes per week of speech therapy, divided into two sessions. It altered or substituted goals for attention to task and social behavior that were more challenging. Parents approved the revised IEP. (NT 97-101, 108, 388-389; S 28, 29.)
45. The IU did not increase Child's speech therapy more than 15 minutes per week because of limited staff availability. (NT 318-320.)
46. The August 2017 IEP present levels noted significant progress in classroom engagement, attention to preferred activities, especially with sensory breaks; compliance with classroom routine; pre-academic activities; self-care skills; and social skills, with some increase in parallel play and some tolerance for peers' parallel play. (NT 97-105, 108, 115; S 28.)
47. The August 2017 IEP present levels noted some progress in receptive and expressive language. (NT 105-106, 110-112, 175; S 28.)
48. The August 2017 IEP eliminated the parallel play social skills goal and substituted a goal for reciprocal play. The goal had no baseline but was measurable on the assumption of starting from zero. (S 28.)
49. The August 2017 IEP did not offer the goals for attention to task or eating from a spoon from the previous IEP. As to the latter, it was determined that the goal was not useful to Child because Child did not utilize a spoon when eating at home. (S 28.)
50. The August 2017 IEP offered a changed goal to measure Child's independent use of pictures and signs in addition to words for the purpose of requesting. There was no baseline for the goal. This goal was less challenging than the previous goal, and was substituted because Child's requesting behavior was at such a low level that the previous goal may have been unrealistic. (NT 175-181; S 28.)
51. The August 2017 IEP continued the goals for following one step directions, putting on a garment, and gripping a marker to imitate a horizontal line. With no progress data and no baseline, the gripping goal was not measurable. (S 28.)
52. The August 2017 IEP offered an additional goal for snipping with scissors. With a baseline of zero, the snipping goal was measurable. (S 28.)
53. The August 2017 IEP added goals for sorting by color, reducing negative behaviors, and gross motor actions. (S 28.)
54. On August 7, 2017, Parents requested due process. (S 37.)

55. Prior to September 2017, Parents obtained renewed private speech and occupational therapy for Child as part of a home based program. (S 22.)
56. Child's school based occupational therapist worked with Child for 45 minutes per week individually, and also worked with Child and consulted with teachers regarding Child's occupational therapy needs in the classroom additionally when the therapist was present. The therapist worked on a variety of adaptive skills, not just those set forth in Child's IEP goals. (NT 381-383; S 34 p. 2.)
57. By September, 2017, child had attained sufficient classroom and pre-academic skills to be able to learn to utilize assistive technology for communication purposes. (NT 191-193, 397.)
58. On September 7, 2017, the IEP team met to select assistive technology for trial with Child. The team decided to trial communication devices and a timer for scheduling. The classroom teacher was trained and implemented the trials. (NT 108-110, 191; S 31, 33.)
59. On September 13, 2017, Parents withdrew their due process complaint. (S 38.)
60. Regarding placement, the IU indicated willingness to provide Child with support in a non-specialized community preschool setting for half of a school day, and enrollment in one of its specialized preschool settings for the other half of the day. (NT 481-484.)
61. The IU did not indicate a willingness to alter the structure of its program to enroll Child in two of its preschools, one meeting in the morning and one meeting in the afternoon. (NT 480-484.)
62. These conversations were not embodied in a prior written notice or NOREP. (NT 484.)
63. From September 2017 to December 2017, Child missed some days of preschool. This resulted in missed occupational therapy sessions and slowed Child's progress in the skills being addressed. On the other hand, Child's attendance was significantly better in this period than previously, which led to improved progress. (NT 112-113, 394-396, 401, 471-472; S 35.)
64. From March 2017 to December 2017, the classroom teacher took data on Child's progress on the goals that the teacher was implementing. The data was not conveyed to Parents consistently or completely. (NT 135, 137-138, 144, 321-322.)
65. From March 2017 to December 2017, the speech and occupational therapists took data on Child's progress on the goals that the therapist was implementing. The data was not conveyed to Parents consistently or completely. (NT 163-164, 166, 175-180, 386-387.)
66. By December 1, 2017, Child had made significant measured progress in sorting by color, and fine motor activities including use of scissors. Child was able to attend to four tasks per day to completion with sensory breaks. Child was able to transition from one activity to another with a timer. Child had learned to request assistance using gestures or a single-utterance communication device. Child was engaging in reciprocal play and imitating

motor actions at a significant rate. Child was aware of peers in school, observing them and trying to imitate them. (NT 117-118, 389-393; S 30, 34.)

67. By December 1, 2017, self-injurious behavior was significantly decreased, and protest behaviors also decreased, so that Child was able to participate increasingly in classroom activities without being confined in the previously used specialized chair. (NT 90-91, 128, 131, 189-190, 237-238, 322, 383-384; S 30, 34.)
68. By December 1, 2017, Child had made progress in putting on clothing and other fine motor and gross motor activities. Child continued to need significant prompting for these activities. (NT 118-121, 399-400; S 34.)
69. By December 1, 2017, Child had made significant, measured progress in requesting and following directions using pictures and words. Child was beginning to label items. (NT 185-189; S 34.)
70. Child's Parents sent Child overseas for a visit to relatives in December 2017; Child was expected to return to school in April 2018. (NT 113.)

#### CREDIBILITY AND RELIABILITY

71. Parents' private evaluator is an educator and behavior specialist. (NT 207-209; P 19.)
72. Parents' private evaluator's evaluation was limited to administration of a specific behavior based language assessment for Child. (NT 209-211, 283-284.)
73. Parents' private evaluator did not contact IU educators providing services to Child or attempt to observe Child in Child's early education classroom. (NT 260-262, 267-269.)
74. Parents' private evaluator did not review Child's educational records until after writing the report, and reviewed only a few records in preparation for the hearing. (NT 264-265.)
75. Parents' private evaluator did not evaluate any of Child's skills for the behavior based language assessment that were grouped in the categories of social behavior, classroom behavior and transitions. (NT 272-273, 277; S 32.)
76. Parents assessed placements to which the IU referred them primarily based upon their own observations of the classrooms and Parent's research on driving times from home. (NT 304-308, 309-310, 345-346, 363-364, 367-368.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>3</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>4</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

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<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>4</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

Parents raise a legal issue pertaining to how I may weigh the evidence of record. They contend that the only evidence that may be given any weight is that contained in the documents provided to the Parents during the relevant period. Thus, I may consider what is written in the IEP or NOREP, but not what witnesses say they were prepared to provide to the Child. Parents cite the “four corners” approach of the second circuit court of appeals, and some cases in the Third Circuit which seem to adopt this view. I find this legal argument unconvincing.

The “four corners rule” has arisen primarily in tuition reimbursement cases. In fact, the Parents’ principal cited authority for the application of the “four corners” rule to this case, R.E. v. N.Y. City Dept. of Edu., 694 F.3d 167, 186 (2d Cir. 2012) was a tuition reimbursement case. The court in that case emphasized that the “four corners” rule is appropriate because it is unfair to expect parents to anticipate services not listed in the IEP before making a decision to expend substantial sums on a private placement. Id. at 186-187. Thus, this second circuit rule has persuasive effect only in the tuition reimbursement context, because of the compelling equitable considerations that require its application in those cases. The considerations underlying that doctrine do not apply in a case like this, where the entire tenor of the relationship was one of informal give and take, and Parents cannot be said on this record to have been misled or baited and switched by any of the IU’s efforts to satisfy them. I find nothing in the Parents’ citation of Third Circuit cases to contradict this view. In short, I will weigh the evidence in full, and I will consider, not just the formal written offers made, but also the informal give and take in which the IU sought to provide services to this Child that would satisfy the demanding criteria upon which the Parents relied for their rejection of multiple proposed placements.

## CREDIBILITY/RELIABILITY

It is the responsibility of the hearing officer to determine the credibility and reliability of witnesses' testimony. 22 Pa. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony in light of the documentary evidence, and I reach the following determinations.

I found all witnesses to be credible, based upon the substantial consistency of their testimony with the documentary and testimonial record, their demeanor under oath, and their ways of responding to various questions. However, I accorded reduced weight to the assertions of Parent as to the appropriateness of proposed programs that Parents rejected, and to the private evaluator's criticisms of the IU preschool program and the services that it provided.

A critical issue in this matter is whether or not the IU offered Parents appropriate placements in response to Child's minimal progress in speech and slow progress in other areas of preschool learning. The crux of Parents' argument is that the IU failed to offer appropriate alternatives to its specialized preschool program in which Child was enrolled. Yet, the IU proposed at least four different programs that met the Parents' and the IEP team's determination that Child should be provided more hours of preschool in order to improve Child's progress. Thus, I need to weigh the evidence as to whether or not these proposed placements were appropriate. Parents offered Parent's own judgment to the contrary, as well as the opinions of their private evaluator, who supported Parents' opinion.

While I found Parent to be sincere and thoughtful, without a hint of negative animus toward the IU or the Child's educators, I cannot accord weight to Parent's judgments about the various

placements offered, insofar as he concluded that they were not appropriate for Child. As far as this record reveals, Parent's judgments were based upon visits to various proposed programs, and his observations of the children being served at those programs – essentially how those children appeared to Parent. From that data, Parent concluded that those programs would not be appropriate for Child. Thus, in addition to Parent's admitted lack of knowledge, training and experience in education, Parent based these judgments upon an inadequate foundation of information.<sup>5</sup> I therefore give these judgments no weight as to the appropriateness of the programs that Parent observed and rejected.

The private evaluator, a very qualified and experienced behavior expert, was retained for the very limited purpose of administering a specialized verbal behavioral instrument to pinpoint the areas of skill in which Child was developmentally delayed, and relative areas of strength and weakness. This she did, and I give full weight to the results of her evaluation of Child. Yet in addition, and after she evaluated Child, she was asked to provide opinion testimony on a broad range of issues, particularly regarding the appropriateness of the IU program and services for Child, Child's progress in that program, and the superiority of the particular instructional methodology allegedly utilized in the single program that Parents desired for Child. In acceding to this request, the evaluator offered opinions that were bereft of any reasonable basis in fact.

The evaluator met with Child for a total of three hours, while administering the verbal behavior instrument. The evaluator had no contact with Child either before or after. The evaluator did not even try to observe Child in the IU's preschool classroom, nor did she seek any input from

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<sup>5</sup> Parent reported that more experienced people were with him for some of these observations and concurred with his judgments; however, there is no non-hearsay or corroborated hearsay evidence in this record as to what their judgments were or whether or not they had any more data about the offered programs to provide a more substantial basis for rejecting these placements. Consequently, I can give no weight to Parent's assertions that these more experienced people concurred that the placements were inappropriate for Child.

Child's teacher, speech therapist or occupational therapist. The evaluator issued her report without even reviewing salient educational records from the current program, such as the prevailing evaluation or re-evaluation, the current IEP, Child's attendance records and the NOREPs reflecting the placements that had been proposed; only later, in preparation for the hearing, did the evaluator review a few unspecified documents. Given the evaluator's limited exposure to Child, and limited review of records, I accord reduced weight to her opinions on the extent of services that Child needs. Due to her lack of factual underpinning for her criticisms of the Child's IU-provided program, I accord no weight to her criticisms.

#### FAILURE TO OFFER OR PROVIDE A FAPE UNDER THE IDEA

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is "special education and related services", at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an IEP. 20 U.S.C. §1401(9). Thus, local education agencies must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). As discussed above, the IEP must be tailored to meet the "unique" needs of each eligible child.

In addition, the IEP must be "reasonably calculated" to enable the child to receive appropriate services in light of the child's individual circumstances. Andrew F., 137 S. Ct. above at 999. The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with "meaningful educational benefits" in light of the Child's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853

F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, an LEA that meets this Third Circuit standard also can satisfy the Andrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

For a child not progressing smoothly from grade to grade an LEA must offer and provide educational services that are “appropriately ambitious” in light of the child’s circumstances. Andrew F., 137 S. Ct. above at 1000. The child must have a chance to meet “challenging objectives.” Ibid.

An LEA is not necessarily required to provide the best possible program to a child, or to maximize the child’s potential. Andrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that Parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544 (1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The program’s appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the LEA at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the IU offered to provide a FAPE to Child at all times. Child's circumstances provided the IU's educators with a difficult challenge, which they met with an initial program of services that is not under review in this proceeding. When, after only one half of the IEP year, it appeared that Child's progress was minimal in the areas of receptive and expressive language and slow in other areas, the Child's IEP team proposed to provide what it reasonably considered to be an appropriate intervention: a change in placement. In response, the IU proposed various alternative placements that were reasonably calculated to provide a FAPE, but which Parents' repeatedly rejected, because they had chosen the one alternative placement that the IU refused to support for appropriate reasons.

Meanwhile, Parents initiated dispute resolution procedures, including mediation and two requests for due process, thus fixing as pendent Child's current placement and IEP. The record is preponderant that Parents did not at any time evidence willingness to alter the IEP or change the services at Child's pendent placement; only now do they argue that the IU should have done so during this period of pendency. Indeed, the record shows that, by the beginning of the current school year, the IU reasonably believed that Child was making appropriate progress within the pendent placement and with the services in the pendent IEP. Therefore, I conclude that the IU did not fail to provide Child with a FAPE during this period of time or any part of the relevant period.

The current IEP was preceded by the first IEP provided to Child when Child transitioned to preschool from home-based early intervention services. That IEP provided Child with placement in a specialized preschool classroom, four days per week, 2 ½ hours per day, with 45 minutes weekly of speech therapy to address Child's extremely delayed communication skills, and the same amount of minutes of occupational therapy.

## CHILD'S CIRCUMSTANCES

It is undisputed that Child came to the IU with serious impediments to learning. Child was severely delayed in almost all areas of functioning, including communication, where Child was not even capable of requesting what Child wanted for anything other than Child's bottle and one or two other objects. Child had no ability to communicate the name or label of objects or actions of others that Child wanted. Child was severely self-absorbed, consistent with Child's diagnosis of Autism Spectrum Disorder, and did not show much awareness of Child's environment or other persons in it. While there was no data to classify Child's overall cognitive potential, all available information reasonably led to the conclusion that Child would need to begin learning the most basic things, like responding to others, communicating wants and needs, and co-existing with adults and peers in a classroom environment. It was also reasonable to anticipate that Child's progress in learning these things would be very slow, at least at first, regardless of Child's innate cognitive potential. Therefore, Child's severe developmental delays presented the IU special education preschool classroom with serious challenges.<sup>6</sup>

Child also presented with serious behavior problems that compounded the challenges presented by Child's developmental delays.<sup>7</sup> Essentially, Child engaged frequently in refusal and self-injurious behavior as a substitute for communication. These behaviors demanded educators' immediate attention due to the dangers that the behaviors created, and the potential disruption of the classroom environment. They also impeded Child's ability to begin to learn the basic skills needed to function in a classroom.

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<sup>6</sup> These challenges are in addition to those that most children present when transitioning from the known safety of the home to the unfamiliar atmosphere and demands of a classroom. The evidence shows that some acting out behavior and refusal is to be expected with all new learners.

<sup>7</sup> The evidence also shows that Child's behavioral problems were exacerbated by the family's move in February of 2017 to a new home, with the attendant stresses that any such move can create for the entire family.

The educators' challenges – Child's severe delays and severely impeding behaviors – were compounded by Child's poor attendance. The record shows preponderantly that Child missed up to forty percent of the days of school that were available to Child in the IU program.<sup>8</sup> In particular, Child missed school on a number of Mondays, and Monday was the day on which the speech therapist was in the classroom delivering related services; the therapist was scheduled to provide services to other children on the other days of the week. The record also is preponderant that absences and behavior were two prominent reasons why Child made very slow progress in the first six months of the IU preschool program.

#### MARCH 2017 PROGRESS AND OFFERED CHANGE OF PLACEMENT

As is routine in the program, the IU educators called an IEP team meeting after six months of programming to assess Child's progress or lack thereof and determine next steps. At that meeting, Child's team members reported some progress in the specialized classroom with learning and following classroom routines, as well as engaging in classroom activities. Child's behavior had improved slowly, and all acknowledged that Child's behavior was better controlled in school than at home. Child had developed the skill of grasping a marker, which could lead later to pre-writing skills.

Notwithstanding this progress, Child had not yet met Child's IEP goals (which the IEP had projected to be met in another six months) in the areas of language, social skills or self-care skills. Indeed, the record is preponderant that Child at that point had made only "minimal" progress in these areas, and that the IEP team decided that an appropriate intervention would be a change in

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<sup>8</sup> The record shows that these absences were related principally to Child's difficulties at home with severe behaviors, refusals and sleep difficulties. Parent frankly provided that Parents kept Child at home on days after severe disturbances of behavior or sleep, which were frequent despite the fact that Parents diligently had provided Child with home based services through the local behavior services providers.

placement to provide more hours of preschool services and more intensive, restrictive services in a smaller classroom environment.

While the Child's then-current placement could not provide additional hours of school, the IU referred Parents to several programs that could do so, most of which were nearly within the same travel radius that the then-current program offered to Parents in terms of logistics. The offered placements were, by a preponderance of the record, appropriate and reasonably calculated to provide Child with meaningful and appropriate progress in view of Child's circumstances, which I have detailed above.

While Parents rejected these offers, I conclude that their decisions did not impose upon the IU a legal duty to conform its offers to their preferences. Although Parents were undoubtedly within their rights to reject these offered services, and it is not within this hearing officer's purview to judge or criticize their decisions, the IDEA does not require the IU in this matter to conform its offers to Parents' preferences, as long as the IU offers were appropriate. It is well established in the law that agencies have the authority to select their own methodology. K.C. v. Nazareth Area Sch. Dist., 806 F.Supp.2d 806, 813-814 (E.D. Pa. 2012); see Leighty v. Laurel Sch. Dist., 457 F. Supp. 2d 546, (W.D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgment).

Here, the record is preponderant that (in addition to their concerns about appropriate peer role models and travel distances) one of the Parents' reasons for rejecting appropriate placement options was their preference for a more direct instructional method that would not be in a classroom setting with more than two or three children, emphasizing a drill and repeat methodology that is well recognized and research based. That this methodology is in general appropriate for children

identified with Autism does not compel the IU to select that method to the exclusion of the more eclectic methodologies that it chose to employ, as discussed above.

Indeed in this case, Parents' private evaluator, a proponent of Parents' preferred methodology, did not opine that the more restrictive methodology was necessary in all cases. Rather, when asked, she allowed that Applied Behavior Analysis methods and principles can be employed in a more group oriented classroom environment. Thus, there is no basis in fact or law on this record to conclude that the Child's needs could be met only through the Parents' preferred educational methodology.

Parents also preferred a program that would not have children who appeared to Parent to be more disabled or differently (physically) disabled than their child. As noted above, while Parents are entitled to the latter preference, the IDEA does not require the IU to accede to it, at least on this record, where there is uncontroverted opinion evidence<sup>9</sup> that the alternative offers were appropriate. Moreover, the Parents' preference for a more structured sequential methodology and desire to place Child where there would be no children with greater levels of need were somewhat contradictory. On this record, it was not possible for the IU to harmonize these inherently conflicting desires, though they made every effort to work with Parents anyway.

#### PROVISION OF SERVICES FROM MARCH 2017 TO DECEMBER 2017

From March 2017 to December 2017, Parents and the IU continued to propose, discuss, negotiate and visit possible placements for Child. Meanwhile, Child remained in the original placement, the IU specialized preschool classroom. The prevailing IEP provided goals, modifications and related services as discussed above. Parents now assert that these services, even

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<sup>9</sup> I conclude that the evidence is uncontroverted because I give no weight to the Parent's opinions and the private evaluator's opinions to the contrary, as explained above.

when revised in an August 2017 annual IEP team meeting, were inappropriate. I conclude that Parents have failed to prove by a preponderance of the evidence that the IU deprived Child of a FAPE during this period.

The evidence is preponderant that Child's educators – the special education teacher and the related services providers in the specialized preschool classroom – demonstrated skill and experience in addressing Child's challenges and implementing Child's IEP. They identified motivators and preferred items, took into account Child's need for breaks and sensory input, and provided Child with positive behavior intervention. The speech therapist began Child at the beginning, with an attempt to teach Child to request items using a spoken word. The occupational therapist addressed pre-writing needs, again at the very beginning, by attempting to teach Child to hold a marker and make linear marks on a page. The teacher began by establishing the classroom routine, helping Child to learn to anticipate and participate in the changes naturally occurring in the classroom program – taking off coats, storing things in cubbies, circle time changing to centers, individual activities changing to group to table individually to whole group to snacks to dismissal. These professionals took some data, and adjusted their interventions in an attempt to maximize Child's learning in the time allotted, but they were working on the very beginning of the classroom and social skills that Child would need eventually to develop the ability to transition to kindergarten.

I conclude that the goals in Child's March and August 2017 IEPs were reasonably challenging and reasonably calculated to provide Child with progress that would be appropriate in view of Child's complex developmental and behavioral circumstances. On this record, Child's language goals, starting at the beginning, were consistent with appropriate speech therapy practice and were reasonably calculated to provide Child with skills that would lead to reduced negative

behaviors, since Child's behaviors were known to be a substitute for use of language to satisfy desires. Child's classroom behavior, social, occupational therapy and personal care goals were calculated to begin the process of classroom learning. Parent provided no evidence to contradict the IU's evidence that these goals were inappropriate

Meanwhile, Child remained in the same placement, the IU's specialized preschool classroom. During this period of time, Child's interfering behaviors continued, but Child's educators saw a significant increase in Child's engagement and compliance in the classroom, based on a preponderance of the evidence. I conclude by a preponderance also that they also observed a progressive decrease in Child's problematic behaviors and their intensity throughout this period of time, and an improvement in Child's attendance. I find that Child's ability to learn and progress on Child's goals improved slowly but significantly throughout this period as well. Therefore, it was not unreasonable for Child's educators to conclude by August 2017 that their interventions were working and were likely to lead to increased rate of learning in all areas of need by the end of the following IEP year. Consequently, their reliance upon the then-current interventions while the placement issue was being addressed was not a denial of a FAPE.

#### PARENTS' ARGUMENTS

By June 29, 2017, the IU decided to conduct an FBA as part of a re-evaluation report that it requested in order to prepare for Child's annual IEP. While Child's behaviors were improving, they continued to interfere with learning. Parents argue that the IU waited too long to implement an FBA. Indeed, an FBA was appropriate under Pennsylvania regulations implementing the IDEA. 22 Pa. Code §14.133(b)(behavior support plan defined); however, Chapter 14 requires an FBA and positive behavior support plan only when "eligible young children ... require specific

intervention to address behavior that interferes with learning.” Ibid. Parents have failed to prove by a preponderance that Child required specific intervention during the relevant period of time, because the evidence is preponderant that Child’s behavior was progressively diminishing due to the specialized classroom interventions being provided without a formal support plan. Therefore, I conclude that any delay in providing an FBA and Positive Behavior Support Plan did not violate Chapter 14.

Parents argue that the IU should have changed Child’s day of the week to receive speech therapy, due to Parent’s allegation that Child missed most days on Mondays, due Child’s higher intensity of problem behaviors at home and sleep loss, which could be attributed to being away from the structure of preschool classes over the weekends. While I do not doubt Parent’s sincere belief in this regard, his recollection conflicts with the documentary record, which shows that there was no significant difference in absences when counted by day of the week – at least not sufficient to compel a conclusion that changing the day of the week would have led to increased attendance for speech therapy sessions. As the team had no reason to anticipate that this would improve Child’s progress, there is no basis to fault them for not doing this.

Parents argue that the IU should have increased Child’s total amount of speech therapy in preschool immediately after the March 28, 2017, IEP team meeting in which the team concluded that Child was making inadequate progress in speech therapy. They point out that the overall speech therapy time was not increased until the August 2, 2017, annual IEP team meeting, a period of slightly over four months. I find this argument unpersuasive for four reasons.

First, as discussed above, Child was evidencing not only progress, but also that Child’s better attendance was leading to progress. This progress appropriately confirmed the educators’

judgment that their speech therapy services at then-current levels were reasonably calculated to provide Child with a FAPE.

Second, with Parent's concurrence, the team had chosen to increase services through a change in placement, and this was the focus of all team members, including Parents, during this period of time. There is no reason to conclude that this approach was not appropriate. The belated criticism of it by one team member now is inconsistent with the team's apparently unanimous determination that the change in placement was an appropriate way to remedy the need for more services.

Third, the Child was still in the first year of the first IEP ever devised for Child, and this for Child's first ever months in a classroom atmosphere. It was reasonable during this period for the educators to allow some time to see if Child's growing comfort and familiarity with the preschool classroom, and improved attendance would lead to greater progress in language skills.

Fourth, the law provides that an education agency must be accorded a reasonable time within which to both recognize a flaw in its special education interventions, and remedy them. In this case, I consider any delay to have been reasonable. As discussed above, the educators had not identified the level of speech therapy as the flaw in their services. Instead, they were looking to the overall amount of classroom and related services time provided to Child; they were addressing this by seeking a change in placement. Moreover, the team determined to re-evaluate Child in view of the progress reports when they finally realized that Child's behavior, though improved, was not yet extinguished. Thus, a reasonable period must be accorded for the re-evaluation, and it is reasonable on this record to accord the IU approximately four months' time to remedy any flaw in the services being offered, especially in view of Child's increased progress in correlation with Child's increased attendance.

Parents argue that the amount of the ultimate increase in speech services – 15 minutes per week - was inadequate, and contributed to Child’s overall slow progress in communication and other skills. This argument ignores the full nature of the offered change. The August revised annual IEP also reconfigured the speech therapy times, providing that speech services would be provided on two days per week, rather than one. There was much testimony in this matter - including that of Parent and the Parents’ private evaluator - that Child regressed during breaks in service. This reconfiguration of speech services was calculated to enhance the impact of the related speech therapy services by increasing the number of days on which the services were delivered. Given my credibility finding regarding the Parents’ private evaluator, Parent has provided no evidence calling into question the likely efficacy of this approach. Given Child’s progress in the months that followed the August increase in services, the record does not support a conclusion that this change was inadequate as measured by the above-discussed standard for FAPE.

Parent testified that an unidentified member of the IEP team told him that the reason for refusing to increase speech services more than 15 minutes per week was a lack of staff – namely, that the existing therapist’s time was spoken for all but the extra 15 minutes. While I do not suggest that this alone is an appropriate reason to deny added services to a child who needs them, I conclude that this statement does not outweigh the other evidence of record that justifies the IU’s refusal to increase the services more than 15 minutes per week.

Parents suggest that the IU should have reconfigured its specialized preschool program to allow Child to attend one preschool group in the morning and a different one in the afternoon, or should have made some other change in the design of that program. I do not accept that there was any obligation to make the suggested changes. As noted above, an educational agency is allowed to select the method by which it addresses a child’s needs, as long as its choice provides a FAPE.

K.C., 806 F.Supp.2d above at 813-814; see Leighty, 457 F. Supp. 2d above. Here, the IU provides a variety of programs to meet children's needs. They offered several that would have done what the IEP team determined to be needed - increased preschool classroom hours for Child. Parents have failed to prove that this approach was inappropriate.

Parents challenge the assistive technology offered and provided to Child. Yet they provided no evidence to suggest that the Child was amenable to assistive technology trials before they were instituted in September 2017, nor that the trials selected or their implementation were flawed. I conclude that the record discloses no failure to provide FAPE due to delayed or failed provision of assistive technology.

Finally, Parents point out a number of procedural flaws in the IEPs that the IU proposed. There were some goals that were not measurable as written. Much more concerning, progress monitoring data was taken but not fully disclosed to Parents; rather than listing all data taken on goals, the teacher and related services providers provided a combination of some data and some subjective evaluation. Indeed, there seemed to be no data on the level of prompting for this child who was almost entirely dependent on prompting at the beginning, and remained significantly dependent even at the end of the relevant period, despite a substantial reduction of such dependence.

A hearing officer's decision must be based upon a substantive denial of FAPE. 34 C.F.R. §300.513(a)(1). Procedural violations can amount to a denial of FAPE only if they: 1) impeded the child's right to a FAPE; 2) impeded the parent's right to participate in decision making; or 3) caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2).

I strongly urge the IU program to review its compliance with the procedural requirements of the IDEA in the areas of goal writing and progress monitoring reporting to parents. Nevertheless,

I conclude that the procedural defects that the record reveals do not rise to the level of a denial of a FAPE, for the reasons discussed above. 34 C.F.R. §300.513. I find by a preponderance of the evidence that the procedural violations disclosed in this record did not cause any of the above-listed deprivations that amount to a denial of FAPE.

#### FAILURE TO PROVIDE A FAPE IN VIOLATION OF SECTION 504

Under section 504, federal regulations define the IU's obligation to provide a FAPE differently than provided under the IDEA. IUs must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of [persons with disabilities] as adequately as the needs of [non-disabled] persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of section 504. 34 C.F.R. §104.33(b)(1). The evidence is preponderant that the IU met these requirements. On this record, compliance with the IDEA is preponderant evidence that the IU also complied with section 504. Cf. 34 C.F.R. §104.33(b)(2).

#### **CONCLUSION**

I conclude that the IU did not fail to offer or provide Child with FAPE. Accordingly, Parents' complaint must be dismissed.

**ORDER**

In accordance with the following findings of fact and conclusions of law, the requests for relief are hereby **DENIED** and **DISMISSED**.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

DATED: April 16, 2018