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

DECISION

DUE PROCESS HEARING

Name of Child: J.H.
ODR #01271/09-10 KE

Date of Birth:
[redacted]

Date of Hearing:
None Held

CLOSED HEARING

Parties to the Hearing: Parent[s]	Representative: Stephen Jacobson, Esquire Connolly, Jacobson and John 188 North Main Street Doylestown, Pennsylvania 18901
Bucks County IU 22 EI Program 705 Shady Retreat Road Doylestown, Pennsylvania 18901	Andrew Faust, Esquire Sweet, Stevens, Katz and Williams 331 Butler Avenue PO Box 5069 New Britain, Pennsylvania 18901
Date Record Closed:	December 5, 2010
Date of Decision:	December 13, 2010
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

The parties' having previously settled all other issues in this matter, the sole issue remaining in dispute concerns the Parents' assertion that by law, as part of their child's early intervention program, they are entitled to reimbursement of past and prospective tuition costs they have incurred to place their child in a typical preschool where the child currently receives special education services from the BCIU.

The parties through counsel requested and received permission to submit Joint Stipulated Facts and briefs supporting their positions in lieu of holding an in-person hearing. For the reasons set forth below I find in favor of the Intermediate Unit.

Issue

The parties presented the hearing officer with the following Stipulated Issue:

> Whether the "free appropriate public education" mandate of the IDEA, as defined in subparagraph 1412(a)(1)(A), and as limited by subparagraph 1412(a)(1)(B)(i), of that statute ever requires, under any circumstances, state and local educational agencies in Pennsylvania to provide children with disabilities aged 3 through 5, at no cost to their parents, typical preschool placements where typical, free preschool programming is not provided to similarly-situated nondisabled peers.

However, this hearing officer believes that ruling on the Stipulated Issue as crafted by the parties exceeds her authority, which she believes is limited to addressing issues with regard to individual children, and that the Stipulated Issue as stated is properly before the District Court or Commonwealth Court. Therefore the Issue that will be addressed is as follows:

> Whether the "free appropriate public education" mandate of the IDEA, as defined in subparagraph 1412(a)(1)(A), and as limited by subparagraph 1412(a)(1)(B)(i), of that statute requires the Bucks County Intermediate Unit to provide [the Child], a preschool child with a disability, at no cost to the parents, a typical preschool placement where typical, free preschool programming is not provided to similarly-situated nondisabled peers.

Joint Stipulated Facts

The following comprise the factual stipulations of the parties:

1. [Child] was born on [redacted].

2. The Bucks County Schools Intermediate Unit No. 22 ["BCIU"] is the local educational agency that serves the geographical region where [Child] resides with [Child's] parents.

3. [Child] is eligible for special education services, and is currently identified as a child with autism.

4. Although [the] IU agrees that it is obligated to provide "[s]ervices…in a typical preschool program with noneligible young children," in accordance with 22 Pa. Code §14.155(b)(1) ("early childhood environment"), and that it is obligated to provide those services at no cost to the parents, it disagrees that it is obligated to pay for the typical preschool itself. [The] IU agrees that it must provide, at no cost to parents, services in and placement at early childhood special education environments or other specialized environments as described in 22 Pa. Code §14.155(b).

5. In the event that the Hearing Officer answers the stipulated issue in the affirmative, the IU agrees that it is obligated to pay for the typical preschool placement in which it is implementing special education and related services for [Child], and that it must reimburse the costs the Parents have incurred for [Redacted] Academy [hereafter Academy] tuition from February 4, 2009 through the date of the order and into the future until such time as the parties either agree to a change in placement or such change is upheld by a final order. The IU's obligation to pay tuition as described in this paragraph is subject to its right to appeal the Hearing Officer's order, although Academy would be considered [Child]'s "then current placement" pending such appeal. [1]

Discussion and Conclusions of Law

The Individuals with Disabilities Education Act ("IDEA") ensures that all children with disabilities have available to them a free appropriate public education ("FAPE"). 20 U.S.C. § 1401(d)(1)(A); 34 C.F.R. § 300.1. See also *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982); *M.C. v. Central Regional School*, 81 F.3d 389 (3d Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988); *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986).

The obligation to provide FAPE is met by providing, in accord with an IEP, individualized instruction and supportive services that are necessary to allow the child to derive educational benefit. 20 U.S.C. § 1402(9) and (14). *See also Rowley.* The IEP must be likely to produce progress, not regression or trivial educational advancement. *See Diamond*. The IEP must afford the child with special needs an education that would confer meaningful benefit.

[1] The Parents' Brief explains, "Among other reasons, Stipulated Fact No. 5 was developed to allow this Hearing Officer to decide the matter without having to consider the prongs of a tuition reimbursement analysis".

The question presented to this hearing officer for resolution here is whether local educational agencies ("LEAs") responsible for *providing free appropriate public education services* (special education) to a preschool-aged child also have the obligation to provide a free typical preschool setting *in which to provide the services*, when the parents of similarly-situated nondisabled peers would have to pay for such preschools privately.

The IU's brief points out, "Pennsylvania does not provide universal preschool programming, a reality that has led courts to limit Section 504-based discrimination claims in the preschool context, on the ground that preschool services cannot be provided unequally to children with disabilities when they are not provided at all to same-aged children without disabilities. *See Andrew M. v. Delaware County Office of Mental Health and Mental Retardation*, 490 F.3d 397, 350 (3rd Cir. 2007)(failure to provide FAPE, under Part C of the IDEA, cannot constitute discrimination on the basis of disability when the only children of same age entitled to FAPE are those with disabilities); *Allyson B. v. Montgomery County Intermediate Unit*, 2010 WL 1255925 (E.D. Pa. Mar. 31, 2010)(same, but in preschool context under IDEA Part B)."

There is no dispute that as an eligible child served by the IU, the child who is the subject of this hearing is entitled to receive special education services *delivered* in the parentally-chosen typical preschool program, and that these special education services be provided at no cost to the Parents. The dispute, however, concerns whether the LEA must *pay for that typical preschool environment* for the child. In this matter, the Parents argue that the child requires the availability of non-disabled peers for the provision of FAPE, and believe that the IU must fund the child's typical preschool environment because that environment is a necessary component of and precondition to providing the services required by an appropriate IEP. The IU disagrees, arguing that FAPE (program) and LRE (placement) are two related but distinct factors and that an LEA does not have to purchase the LRE in order to provide FAPE.

The Parents suggest that, admittedly "arguably", the question before this hearing officer has already been answered in the affirmative. They point to the U.S. Department of Education's Comments accompanying the current implementing regulations of the IDEA:

> *Comment:* Many commenters suggested requiring a public agency to pay all costs associated with providing FAPE for a child in a private preschool, including paying for tuition, transportation and such special education, related services and supplementary aids and services as the child needs, if an inclusive preschool is the appropriate placement for a child, and there is no inclusive public preschool that can provide all the appropriate services and supports.
>
> *Discussion:* The LRE requirements in §§ 300.114 through 300.118 apply to all children with disabilities, including preschool children who are entitled to FAPE. Public agencies that do not operate programs for preschool children without disabilities are not required to initiate those programs solely to satisfy

> the LRE requirements of the Act. Public agencies that do not have an inclusive public preschool that can provide all the appropriate services and supports must explore alternative methods to ensure that the LRE requirements are met. Examples of such alternative methods might include placement options in private preschool programs or other community-based settings. Paying for the placement of qualified preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to public agencies to meet the LRE requirements. We believe the regulations should allow public agencies to choose an appropriate option to meet the LRE requirements. However, if a public agency determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent of the child.
> *Changes:* None.
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> Vol. 71, No. 156, 2006, Fed. Reg. 46540 at 46589 (regarding Placements § 300.116)

The guidance offered by the U.S. Department of Education regarding an IDEA regulation, however, is not a regulation itself and therefore is not binding. Even if the guidance were elevated to the level of a policy, it still would not be binding. In *Chevron U.S.S., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984) the court held that:

> A regulation is a governmental agency's exercise of a delegated legislative power to create a mandatory standard of behavior…A regulation is binding on a reviewing court if it conforms to the grant of delegated power, is issued in accordance with proper procedures, and is reasonable. In contrast, a statement of policy is a governmental agency's statutory interpretation, which a court may accept or reject depending upon how accurately the agency's interpretation affects the meaning of the statute.

Providing further support for their position the Parents point to Office of Special Education Programs (OSEP) opinions:

> "that a preschooler's right to obtain FAPE includes, at no cost to parents, placement in a private preschool program if necessary for the provision of an appropriate program (reiterating its response in previous OSEP advisories found at 20 IDELR 181 and 22 IDELR 630, stating if a child must attend a private preschool to receive FAPE, the program must be provided at no cost to the parent). OSEP observed that if an LEA determines that a child must attend a private preschool to receive FAPE, the program must be provided at no cost to the parent. *See* 71 Fed. Reg. 46540 (2006). OSEP also noted that the LEA is responsible not only for tuition expenses, but also for transportation and any other related services a child might require to receive FAPE. *See Letter to Anonymous*, 50 IDELR 229 (OSEP 2008), citing *Letter to Neveldine*, 22 IDELR 630 (OSEP, 1995) and *Letter to Neveldine*, 20 IDELR 181 (OSEP, 1993).

In accord with *Chevron*, guidance regarding the weight which a hearing officer or court is required to give to OSEP positions is explained in straightforward language in The Complete OSEP Handbook[2], quoted as follows:

> "The relevant provisions pertaining to policy letters and statements issued from the Department of Education are located in the IDEA at 20 USC 1406. According to 20 USC 1406(d), the Secretary of Education may not issue policy letters or other statements regarding issues of national significance that: violate or contradict any provision of Part B; or establish a rule that is required for compliance with, and eligibility under, Part B without following the formal rulemaking requirements, applicable to government agencies found in Section 553 of Title 5, United States Code, that contains the Administrative Procedures Act.
>
> Any written response by the Secretary regarding a policy, question or interpretation under Part B of this Act must include an explanation in that written response stating that such response is provided as informal guidance and is not legally binding; when required , such response is issued in compliance with the requirements of Section 553 of Title 5; and such response represents the interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented. …The IDEA language above clarifies some of the confusion on this point, making clear that response to policy questions are not legally binding on recipients of IDEA funds and should be distinguished from regulations, which do create law."[3]

All eligible children must be educated (receive FAPE) in the "least restrictive environment" ("LRE"), that is, to the maximum extent appropriate, with their typical peers. *See* 20 U.S.C. § 1412(5). The Third Circuit early on recognized and applied the principle of LRE in *Oberti v. Bd. Of Educ. Of the Borough of Clementon Sch. Dist.,* 995 F. 2d 1204; 19 IDELR 908 (3d Cir. 1993). Federal and State law also provide that both concepts, FAPE and LRE, extend to preschool-aged eligible children. In addition to 20 U.S.C. § 1402(9) referenced above, the federal IDEA regulations pertaining to "placements" states in relevant part that "In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that . . . [t]he placement decision . . .[i]s made in conformity with the LRE provisions of this subpart . . . See 34 C.F.R. 300.116 Likewise, in Pennsylvania , "[e]arly intervention services" are defined at 11 P.S. Section 875-103 as, among other things, "…provided to eligible young children in compliance with the provisions of this act and Part B [of the IDEA] . . . [c]ompliance includes procedural

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[2] The Complete OSEP Handbook, 2nd Edition, LRP (2007) at Page 1:5.

[3] The Pennsylvania Department of Education is situated in the same position with regard to its own advisory BECs: a "BEC is not a regulation, and that, as a policy statement is advisory only and not enforceable as a legal obligation against a non-conforming school district." *Pennsylvania School Boards Assn. V. Commonwealth of Pennsylvania*, EHLR 559:104 (Pa. Commw. Ct. 1987)

safeguards and free appropriate public education, related services and IEPs…provided in the least restrictive environment appropriate to the child's needs". Pennsylvania's general and early intervention regulations provide that LEAs are required to provide access to "a full continuum of placement options". 22 Pa. Code Section 14.102 (a)(1)(iv). The purpose of early intervention services is to promote students' success in the general education environment. 22 Pa. Code Section 14.102(a)(vi). Early intervention IEP teams must also recommend that early intervention services be provided in the least restrictive environment with appropriate and necessary supplemental aids and services, and may elect to provide them in a typical preschool program with noneligible young children. 22 PA. Code Section 14.155 (b)(1).(*emphasis added)*

At 20 U.S.C. § 1401(9) Congress defined a FAPE independent of the place in which it is located:

> The term *free appropriate public education* means *special education* and *related services* that:
>
> > (A) have been provided at public expense, under public supervision and direction, and without charge;
> > (B) meet the standards of the State educational agency;
> > (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> > (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

When a regulation is unambiguous, the plain words of the regulation should control. *See Chevron.* This hearing officer agrees with the BCIU that the plain words of this definition mean that the "at public expense" and "without charge" requirements of the Act apply to "special education and related services," and not to the place in which such education and services are provided. The definition of the component term "special education," further emphasizes the independence of the "special education and related services" that are to be provided "without charge" from the setting in which those services are provided, to which no "free" condition is applied. Congress defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with disabilities, including … instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings," *id.* at 1401(29). Thus, the instruction and services that the IDEA requires be provided "free," or "at no cost to parents," or "without charge," are those that are "specially designed" to meet the "unique needs" of the disabled learner and are to be provided in the setting where the disabled learner is located.

This hearing officer agrees with the IU that the LRE, in contrast to FAPE, is not programs and services but rather a *setting that is common to all learners* of the same age or grade level. It is the "regular classes" in which "children who are not disabled" are educated from kindergarten on up and from which the child with disabilities cannot suffer "removal" to "special classes" or "separate schooling," unless his or her needs cannot be addressed "satisfactorily" therein. *Id.* at § 1412(a)(5)(A). *Oberti* established a "presumption in favor of mainstreaming". The child with a disability does not have to

establish a "need" for the LRE, and the appropriateness of the LRE does not hinge upon whether it is "specially designed" to address the child's "unique needs," although the child might be entitled, without cost to his or her parents, to "special education and related services"—in the form of "supplementary aids and services"—that would enable him or her to *access* the LRE. *Id.* The needs-based special education and related services, which expressly must be provided at no cost to the child or his or her parents, are thus distinct from the presumptive setting in which those services must be provided.

On point with the above analysis is the fact that neither the IDEA, nor Pennsylvania special education regulations, *prohibit* a disabled preschool-age child's parents from selecting the most restrictive environment, their own home, as the setting in which FAPE (special education and related services) is delivered. The range of settings (early childhood environments) in which typical preschoolers spend their time and in which disabled preschoolers receive FAPE is wide. As regards disabled preschoolers, a family may choose to have their preschool child's "special education and related services" delivered, among other possibilities alone or in combination, in places such as their own home, in a relative's or a neighbor's home, in a small private home-based daycare, in a private daycare center, or in a private preschool. Parents may decide to access these options for their typical or disabled preschoolers for a few hours a day a few days a week, up to daily full day placement including pre-care and after-care hours to accommodate their work schedules. The LRE is distinctly separate from FAPE; a preschool child is entitled to receive FAPE in a highly restrictive environment if the parents so choose, or in environment(s) of lesser restriction, but the LEA does not have to fund that environment itself. This hearing officer holds that if the parents of a preschooler freely choose a typical preschool environment, there is no statutory obligation on the part of the LEA to purchase that environment with public funds. The LEA's sole obligation is to provide FAPE in that environment.

This hearing officer cites the IU's arguments regarding the IDEA's Statutes' deriving their authority from the "spending clause" of the United States Constitution, *see* U.S. Const., art. I, § 8, cl. 1, ("contracts" between Congress and State or local recipients of federal funding that the recipients must enter into "voluntarily and knowingly" and that cannot impose responsibilities and liabilities that Congress has not clearly defined. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16-17, 101 S. Ct. 1531, 1539 (1981)) and incorporates that position into this decision by reference, but will neither repeat nor rephrase that well-crafted argument here.

This hearing officer holds that the IU has the obligation to provide publicly funded special education and related services to the disabled child who is the subject of this decision, and that it must provide the services in the environment that the Parents have chosen for their child. This hearing officer rejects the proposition that the IU must purchase the environment chosen by the Parents in addition to providing FAPE in that environment. By providing special education and related services to the child in the regular preschool setting that the Parents chose and paid for—as did the parents of the nondisabled peers with whom the child is educated—[the] IU fulfilled its responsibilities under the IDEA to the child.

Order

It is hereby ordered that:

The "free appropriate public education" mandate of the IDEA, as defined in subparagraph 1412(a)(1)(A), and as limited by subparagraph 1412(a)(1)(B)(i), of that statute does not require the BCIU to provide [Child], a preschool child with a disability, at no cost to the parents, a typical preschool placement where typical, free preschool programming is not provided to similarly-situated nondisabled peers.

The Parents' claim for payment of past and future tuition incurred by them for their child's placement at the Academy is denied.

Any claims not specifically addressed by this decision and order are denied and dismissed.

December 13, 2010
Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official