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Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 13129-1213 KE

Child's Name: G.K.

Date of Birth: [redacted]

Dates of Hearing: 12/17/12, 2/7/13, 2/13/13, 2/15/13
3/1/13, 3/4/13, 3/19/13, 3/26/13

CLOSED HEARING

Parties to the Hearing:

Parents

Parents

LEA

Montgomery County IU 23 EI Program
1605 West Main Street
Norristown, PA 19403

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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April 16, 2013

May 8, 2013

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INTRODUCTION AND PROCEDURAL HISTORY

This case concerns a [preschool-aged] eligible young child residing within the Intermediate Unit, which has been responsible for providing early intervention services from the date of the Child's 3rd birthday, less than two years ago. Despite the length of the hearing, which spanned eight sessions, and the number of documents presented by the parties, including admission of over 800 pages of e-mails in a single exhibit, the dispute between the parties involves a period of less than one year, from June 2012 through February 2013.

An earlier due process hearing between the same parties was resolved via a settlement agreement allowing, *inter alia*, for Parents' preferred provider of ABA therapy and behavior services to remain as service provider during a short period of transition to an IU contractor. Subsequently, Parents found fault with proposed providers and with two agencies the IU contracted to provide services, resulting in their withdrawals of two agencies after a short time. A new IU provider began delivering services to the Child in February 2013.

Parents request an order reimbursing/paying the costs of ABA therapy and behavior support services that they either paid to their preferred provider, or that remain unpaid, for services to the Child when there was no IU contractor providing services.

Parents' claims arising from the IU's choice of service providers are denied for several reasons: 1) the issues in this case arose primarily from Parents' efforts to control the type of services the Child received, as well as the details of implementation of services; 2) the IU took all reasonable steps to provide appropriate ABA therapy and behavior support services; 3) Parents cannot force the IU to accept their choice of a service provider, either directly or indirectly; 4) the Child made progress toward IEP/IFSP goals.

To the extent, however, that the IU has not paid for service hours specified in the Child's IEP/IFSP due to the absence of an IU provider, the IU will be required to fund those hours.

ISSUES¹

1. Did the Intermediate Unit offer and provide early intervention services that were appropriate for the Eligible Young Child in accordance with the Child's IEP and identified needs?
2. Has the Intermediate Unit selected appropriate service providers able to deliver sufficient and appropriate services to meet Child's needs?
3. If not, did Parents select an appropriate service provider to replace IU services?
4. Should the Intermediate Unit be directed to reimburse Parents/pay for expenses they incurred for the service providers they selected to replace the services that the IU did not provide, either because Parents rejected the services or because the IU providers withdrew from providing services?
5. Should the Intermediate Unit be required to engage a service provider selected by Parents due to the IU's inability to find a contractor to provide appropriate services?

FINDINGS OF FACT

1. Child, born [redacted] is [preschool-aged], resides within the boundaries of the County Intermediate (IU), and is eligible to receive early intervention (EI) services from the IU EI Program in accordance with 20 U.S.C. §1412(1)(1)(B); 34 C.F.R. §300.102(a)(1); 11 P.S. §875-103; 22 Pa. Code §§14.151—158. (Stipulation, N.T. pp. 15, 16)
2. Child has been identified as IDEA eligible in the Autism disability category, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 16)
3. Child has significant needs in most developmental areas, including speech/language, gross and fine motor skills (physical development), social skills and self-help skills. Child also has sensory issues, engages in self-stimulating and self-injurious behaviors and exhibits attention, focus and behavior needs. (N.T. pp. 40, 41, 46, 47; P-1 pp. 2—7, 10, 11, P-24 p. 2)

¹ The issues were identified on the record at pp. 34—36 of the transcript before testimony began. Both parties, through counsel, agreed to the statement of issues with the clarification by Parents' counsel that in addition to reimbursement for payments by Parents to a provider they obtained, they were requesting payment of expenses for which there are outstanding bills that they were unable to pay. There was no other request for compensatory education at the due process hearing. *See* Parents' opening statement, N.T. pp. 18—28. To the extent that the request for compensatory education identified in Parents' closing argument was intended as a request for anything more than reimbursement/payment of expenses included in the issues after opening statements, compensatory education would not have been considered because it was not identified as an issue either implicitly or explicitly during opening statements. Denial of Parents' claims concerning the appropriateness of IU services, however, renders a request for compensatory education moot.

4. According to the results of an IEE completed in September 2012, Child has demonstrated age appropriate cognitive/intellectual skills and the ability to engage in academic tasks, although Child avoids tasks with high verbal content. (N.T. p. 47; P-1 pp. 2—7, 10, 11, P-24 p. 2)
5. Child began receiving home-based EI services at approximately age 20 months, after a medical diagnosis of autism. (N.T. pp. 37, 39; P-1 p. 3)
6. At Parents' request, Child began receiving home-based ABA therapy and supportive behavior services from Lovaas Institute through the age 0-3 EI provider in January 2011. Parents found the ABA therapy Child received from Lovaas to be very effective and responsible for significant progress. (N.T. pp. 53—56, 397, 819, 852)
7. The IU became responsible for providing services when Child reached age 3 in the fall of 2011. (N.T. pp. 52)
8. The IU contracts with private providers for some of the services it delivers through the EI program. (N.T. pp. 1123, 1124)
9. Parents were informed by the IU prior to Student's transition to IU EI services that Lovaas could not continue as the provider of ABA therapy and behavior support services to Child because a contract between the IU and the provider is necessary. (N.T. pp. 53, 59, 60, 1126)
10. Lovaas was not an IU service provider at the time Child transitioned to IU services and Lovaas was unwilling to accept the terms of contracts offered by the IU from time to time, including contracts to provide services to Child. (N.T. pp. 1127, 1139, 1140)
11. Pursuant to an April 4, 2012 agreement to settle claims concerning Child's placement and the provider of ABA therapy/behavior support services that Parents had asserted in a prior due process complaint, the IU agreed to fund Child's placement in a private pre-school with typical peers for 4 hours/day, 5 days/week with behavior support, and to provide ABA therapy delivered on a 1:1 basis at the pre-school after the ½ day typical pre-school program ended. (N.T. pp. 44; IU-21 p. 2, IU-23 p. 2)
12. The settlement also included the IU's agreement to engage Clarity Services Group, which had been suggested by Parents, to provide behavior services and ABA therapy. The IU also agreed to continue funding Lovaas services during a transition period to Clarity. (N.T. pp. 58—60, 411, 1134, 1135; IU-23 pp. 5, 6)
13. The settlement agreement provided that the transition between providers would be completed by June 1, 2012. (IU-23 p. 7)
14. The IU found Clarity to be flexible in facilitating the transition plan with Lovaas and willing to assume additional administrative expenses for more highly trained staff than

ordinarily assigned to a single case in order to assure a successful beginning to its relationship to the IU and the family. (N.T. pp. 1137, 1138)

15. By agreement between Parents and the pre-school staff, Child's transition to the typical pre-school setting was intended to be slow. Because of significant food allergies, Child initially arrived at the pre-school after snack time to avoid inadvertent contact with substances that might have caused a dangerous reaction. Because of many unplanned absences at first due to illnesses, Child's transition to full, 5 day/week participation in the pre-school program went more slowly than expected. (N.T. pp. 327, 331-333, 346—353, 374, 375; IU-47)
16. As the transition from Lovaas began, Parents expressed concerns about Clarity's fulfillment of commitments Parents believed were included in the settlement agreement, particularly with respect to data collection and staff training. (N.T. pp. 62—65, 1142)
17. The IU took responsibility for some early problems because it had not clearly delineated, from the outset, the expectations for each agency during the transition from Lovaas to Clarity. (N.T. pp. 1142, 1143)
18. After a meeting in early May 2012 to discuss the problems that had developed, Clarity's general manager sent Parent a list of 16 points that Clarity would implement to address Parents' concerns. Child's Mother agreed to "back-off" from her oversight of data collection and agreed not continue attempts to "micromanage" the provision of services to Child by Clarity staff. The IU believed that the issues had been effectively addressed through the action plan developed at the meeting and the initial problems had been resolved. (N.T. pp. 67, 76, 1143, 1144, 1158—1160 P-14 pp. 1, 2)
19. After the May meeting, Parents continued to express concerns about the levels of Clarity staff training and of supervision of lower level staff by a BCBA, as well as Clarity's methods and procedures, including anomalies Parents perceived in documentation of the time Clarity staff spent providing services to Child, data collection, including missing or altered daily data sheets and forms Parents insisted on reviewing concerning ongoing assessments of Clarity staff compliance with ABA techniques. (N.T. pp. 68, 69, 74, 75, 77—79, 82, 83, 85—89, 1145, 1151, 157)
20. The specific staff members who provide various aspects of ABA-based therapy and behavior support fulfill different functions, and the necessary level of training varies in accordance with function. Personal care assistants (PCAs)/therapists generally work directly with the child and collect data. PCA/therapists are trained and supervised by a Board Certified Behavior Analyst (BCBA). The supervising BCBA monitors teaching procedures to assure fidelity to the methodology, and monitors progress through both observation of the child and his/her response to instruction and through evaluation of the data, which is an essential component of all ABA-based programs. (N.T. pp. 617—621, 803, 1629—1632, 1863, 1864)

21. Clarity requires its PCAs to have a college degree and additional training in accordance with Pennsylvania standards for a highly qualified paraprofessional, but PCAs do not develop lesson plans or teach. Clarity ABA therapists are required to have a degree in special education, psychology or behavior analysis, as well as a year's experience working with children as a therapist and 40 hours of additional, intensive ABA training and spend an additional 10 hours demonstrating competency in teaching and data collection. Clarity supervisors must have a Master's degree in an education/behavior-related field, as well as BCBA certification, five years experience working in an ABA program and supervision training. (N.T. pp. 1629—1633)
22. In an attempt to address Parents' concerns, the IU agreed to extend the transition period for an additional four weeks, to the end of June 2012. The IU did not, however agree with Parents' concerns about the sufficiency of staff training, noting that the behavior analyst was well-trained and capable, but became anxious in the face of a lot of questions. (N.T. pp. 62, 63, 1158, 1160)
23. Parents' dissatisfaction with Clarity's delivery of services continued, however, and increased through the summer, from mid-June through early August. Clarity and IU staff believed Parents resisted any deviation from the methods used by Lovaas in providing ABA therapy and behavior services. Clarity often expressed frustration to the IU concerning its inability to provide services satisfactory to Parents. (N.T. pp. 1146, 1154, 1708, 1709)
24. Child's frequent illnesses and often sporadic attendance at the pre-school contributed to the tension between Parents and Clarity when Mother sometimes notified Clarity that Child would not attend pre-school on a particular day and later changed her mind, only to find that child's therapist or aide had accepted other work and was no longer available to provide services to Child. (N.T. p. 1150; P-20)
25. Because Child's pre-school attendance was intermittent at first, the IU agreed to guarantee Clarity payment of a minimum number of hours each week because it was difficult for Clarity to recruit and retain staff willing to accept a variable income arising from inconsistent hours, including some weeks when no hours were available due to Child's absence from school. (N.T. pp. 130, 131, 1148, 1149, 1155)
26. Parents noted setbacks in Child's functioning in the home setting, including sleep disturbances and loss of language. Parents were told that the regression they were observing was a natural reaction to the change in service providers, as the Lovaas staff familiar to Child became less involved and eventually no longer involved in providing services. Parents attributed the regression to lack of sufficient ABA training of the personal care assistant (PCA) that Clarity assigned to work with Student and insufficient supervision. (N.T. pp. 68, 69, 71—73)
27. Parents' conviction that Child was not receiving appropriate services and their belief that Mother needed to increase her oversight of Clarity's delivery of services intensified even more after another meeting in late July. During the following week, Mother attended

school with Child and took her own data. Parents also asked Lovaas to return to provide additional support for/oversight of Clarity staff, using compensatory education funds to partially pay for Lovaas services. (N.T. pp. 73, 120, 122, 123, 127, 128, 425)

28. Parents began questioning the personal and professional integrity and qualifications of Clarity's staff in e-mails that suggested a basis for disciplinary action by certifying organizations. Clarity staff considered Parents' implicit suggestions that they had reason to initiate complaints with oversight organizations to be hostile and threatening behavior. (N.T. pp.124—126 1149, 1150, 1182, 1710—1712, 1726—1728; P-14 pp. 3, 4, 7, P 18 pp. 1, 2, IU-1 pp. 1480, 1481)
29. As the issues between Parents and Clarity worsened through the summer, the IU realized that although it considered all of the problems resolvable, the situation between Parents and Clarity staff had deteriorated to the point that a new provider was necessary. Clarity informed the IU in early August that it was unable to continue providing services, but was willing to remain through a transition period to a new provider, and the IU notified Parents. (N.T. pp. 1162, 1163, 1169, 1172; IU-1 pp. 156, 5267)
30. The IU began searching for a new provider and planning a smooth transition (N.T. pp. 1163, 1164)
31. Mother initiated a meeting at the pre-school with Clarity staff after Clarity announced its intention to withdraw and recorded it without the knowledge or consent of the staff members. After Clarity management learned of the incident, and Mother's subsequent insistence that the staff members sign statements that Mother presented to them concerning how Child's program was to be implemented, Clarity informed the IU that it would no longer provide services to Child as of that date, August 15. (N.T. pp. 1172, 1173, 1718—1725; IU-1 pp. 1212, 1213, 1461)
32. Parents described Clarity's departure as a voluntary withdrawal from the case based upon its recognition that it was incapable of providing Child with an appropriate ABA program. (N.T. pp.119, 120)
33. Although Parents asserted that later information established the truth of their accusations against Clarity, and the IU did agree with the accuracy of some of Parents' concerns with respect to data, the IU supervisor attributed many of the issues Parents identified to mistrust of any deviation from Lovaas methods and to lack of communication. (N.T. pp. 130, 131, 1146, 1157, 1158, 1162, 1163)
34. The IU agreed to replace hours that were not provided to Child due to Clarity cancellation of services. (N.T. pp. 1174—1176; P-13, P-20)
35. In light of the worsening relationship between Parents and Clarity, the IU contacted Keppley Behavioral Consulting to replace Clarity as the service provider. Keppley expected to begin in September 2012, when additional staff would become available, but

- began providing services to Child in August after Clarity discontinued its involvement. (N.T. pp. 622, 1183—1185)
36. The transition to Keppley did not proceed as smoothly as the IU hoped due to unanticipated delays, including delays with obtaining staff clearances. Parents also began questioning Keppley staff credentials almost immediately, and differences quickly arose over the type of ABA program Parents wanted and the Verbal Behavior-based (VB) program Keppley was providing. (N.T. pp. 616, 617, 1185—1188, 1191)
 37. During its tenure, Keppley supplied three therapists to work with Child. At first, one therapist was expected to be scheduled for 3 days/week, with another covering the other two days, but Parents requested that only one therapist be assigned. Although that is not generally Keppley's preference or the standard procedure, because of better generalization with more than one therapist providing services, Keppley acceded to Parents' request. (N.T. pp. 676, 677, 808, 809)
 38. Under Keppley's staffing procedures, a therapist working with a child is evaluated after training to assess his/her ability to properly teach skills in accordance with ABA principles. Different providers have different standards for determining when a PCA can work independently, without a supervising BCBA present at all times. (N.T. pp. 644, 645)
 39. All therapists employed by Keppley have at least an associate's degree, but most have bachelor's degrees in education, psychology or another field related to behavioral science. Supervisors have master's degrees in special education and are BCBAs or BCABAs (Board Certified Associate Behavior Analysts). The therapists assigned to work with Child had master's degrees in special education. The supervisor had a master's degree in Applied Behavior Analysis and had previously worked for Keppley as a therapist for six years. In terms of assessing a therapist's competency to work without supervision, Keppley requires its therapists to develop critical skills, not to achieve a specific overall competency score (N.T. pp. 689, 690, 806)
 40. Keppley ultimately served as the IU service provider for only 5—6 weeks, withdrawing when the remaining therapist assigned to work with Child became ill and could not continue. (N.T. pp. 1192, 1197)
 41. Keppley had difficulty finding staff willing to work with Child without supervision due to discomfort with Mother, who had raised questions about staff training and Child's safety under the care of Keppley staff due to several incidents, including an allergic reaction and allegations of a bump on the head. (N.T. pp. 678—680, 684—686, 1190, 1194—1196, 1857—1861)
 42. Parent also had a confrontation with a Keppley therapist over the use of an i-Pad as a reinforcement for Child. Parent objected to use of the i-Pad, generally, and accused the therapist of incorrect and/or overuse as a reinforcement. A Keppley behavior specialist consultant, who had recently begun providing Child with services as a PCA, witnessed

the incident over the i-Pad, and on the same day had been involved in the incident concerning the alleged head bump injury, immediately resigned from the case. (N.T. pp. 1853—1857, 1861 1869—1882; IU-1 pp. 116, 117; IU-49)

43. It was apparent from the outset of the relationship that Parents and Keppley had serious “philosophical differences” over Keppley’s provision of a program based on VB principles, with which Parents do not agree. There were specific issues concerning use of reinforcement and various teaching procedures and methods that differed from the Lovaas methods. (N.T. pp. 679—681, 717—719, 754, 761—763, , 811, 1190; IU-1 pp. 804—807, 1470)
44. Parents do not believe that ABA therapy delivered in accordance with VB principles is based on scientific research, although a VB program uses elements common to all ABA programs such as reinforcement to encourage desirable behaviors and is used extensively in Pennsylvania public schools. Keppley’s owner is one of the statewide consultants to the Pennsylvania Autism Initiative (N.T. pp. 191, 633, 639, 648, 649, 688, 799)
45. Both Verbal Behavior (VB) and the program delivered by Lovaas are based on ABA principles derived from the research of B.F. Skinner, but differ in terms of which skills and behavior responses are particularly emphasized or targeted. VB places particular emphasis on language development and communication skills. ABA principles, in general, as well as VB emphasize teaching acceptable replacement behaviors at the same time negative behaviors are targeted for extinction. Lovaas emphasizes classic discrete trial training (DTT) over other teaching methods. In VB, DTT is termed intensive teaching. VB instruction also uses errorless teaching and mixing/varying, which are not part of Lovaas methods. (N.T. pp. 692—696, 796—801, 1614—1622)
46. From March through September 2012, Child’s developmental skills and progress toward goals were described in the March 2012 IEP/IFSP, the September 2012 IEP/IFSP, October and November 2012 progress reports on goals from Lovaas, and the report of the IEE the IU funded pursuant to the April 2012 settlement agreement. (P-1 pp. 5—13, P-10, pp. 2—7, P-11 pp. 2—7, IU-22 pp. 5—46, IU-23 p. 3)
47. Almost all goals in the March 2012 and September 2012 IEP/IFSPs were originally developed in September 2011, and according to the October and November 2012 Lovaas progress reports, 10 of the goals in included in one or both of the IEP/IFSPs were implemented by the Lovaas staff at a time when Lovaas was the sole provider of ABA and behavior support services. Lovaas reported little progress on the goals by March 2012, but considerably more progress by October. The progress reported by March 2012 in the Lovaas report was consistent with the progress reported in the March IEP/IFSP, as was the progress reported and in the September IEP/IFSP. (N.T. p. 430, P-10, IU-22, IU 34)

DISCUSSION AND CONCLUSIONS OF LAW

FAPE Standards for Eligible Young Children—ages 3—5

For children aged 3—5 years, the IDEA statute and regulations include an exception to the broad FAPE requirements applicable to school age Childs, providing that the responsible public agency’s obligation to provide services to eligible young children is determined by state law. 20 U.S.C. §1412(a)(1)(B); 34 C.F.R. §300.102(a)(1). The relevant Pennsylvania statute and regulations, therefore, provide the standards for eligibility, early intervention services, evaluation requirements, IEPs and the range of early intervention services available—in general provide the parameters of the IU’s responsibility to the Child in this case. *See* 11 P.S. §875-103; 22 Pa. Code §§14.152—14.155.

Moreover, as repeatedly stated in court decisions describing the parameters of an appropriate education, public educational agencies are responsible for providing only “appropriate” services. Under that standard, an eligible young child is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) that is “reasonably calculated to yield meaningful educational or early intervention benefit and Child or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009). “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). An LEA is not required to provide an eligible Child with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, at 25; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995). An LEA, therefore, is not required to provide services that although desirable and likely

to be beneficial, are not necessary in order to meet a school age child's educational needs or an eligible young child's early intervention needs.

Finally, even where particular services are necessary, the LEA has significant discretion to choose the means and method of providing them. In fact, although particular services requested by parents may be equally appropriate or better than a public agency's proposal, the LEA is permitted to deny parents' preference and select its own program and services, as long as the LEA's selections appropriately meet the child's needs. *See, e.g., J.E. v. Boyertown ASD*, 2011 WL 476537 (E.D. Pa. 2011); *J.C. v. New Fairfield Bd. of Educ.* 2011 WL 1322563 at *16 (D.Conn. 2011); *D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F.Supp.2d 435 (N.D.N.Y. 2010); *Rosinsky v. Green Bay Area School Dist.*, 667 F.Supp.2d 964, 984 (E.D.Wis. 2009).

Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the U.S. Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, a component of the burden of proof, which also includes the burden of production or going forward with the evidence. The burden of persuasion is the more important of the two burden of proof elements, since it determines which party bears the risk of failing to convince the finder of fact that the party has produced sufficient evidence to obtain a favorable decision.

The burden of proof analysis is the deciding factor in the outcome of a due process hearing, however, only in that rare situation when the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). When the evidence on one side has greater weight, it is preponderant in favor of that party, which prevails. When the evidence is equally

balanced, the party with the burden of persuasion has produced insufficient persuasive evidence to meet its obligation and, therefore, cannot obtain a favorable decision. In that event, the opposing party prevails. Here, Parents did not prove their claims by a preponderance of the evidence, and the applicable legal principles do not support Parents' claims.

Nature of the Dispute

This case centers on the understandable tension between the IDEA-imposed obligation on an LEA to provide appropriate services, and the natural desire of loving parents to assure that their children receive the services they believe to be the best. Since eligible children are entitled only to the services required to assure an appropriate education, parents are financially responsible for services they may consider necessary, but nevertheless rise above the floor which the IDEA statute and regulations mandate. Determining what lies on the floor and, therefore, must be provided by a public agency, and what rises above that level is often, as it was here, the subject of a due process hearing.

Parent Participation/Control and Demeanor

This case includes familiar issues that sometimes arise at the time eligible young children transition either from home-based EI services to services provided by the local intermediate unit or from pre-school to school age services. Often the disputes that arise at those transition points can be attributed, at least in part, to the substantial differences between the service models, which parents may not fully understand at first, or that they find less satisfactory than the nature and manner of delivery of services the child previously received. Although the issues in this case did not arise at the point of transition between infant/toddler and pre-school EI services, this case is substantively a continuation and resurgence of the issues that were resolved in the due process complaint Parents filed at that time.

With respect to EI services, the younger the child the more closely parents may be involved in the selection and delivery of services. From birth to age three, early intervention services are provided in the home and centered on the child's overall physical and mental development. Close parental involvement, including selection of service providers, is a natural result of that service model since those who provide services must necessarily be welcomed into the family home, and since parents are the caregivers who implement the program and monitor progress most of the time.

As an eligible young child moves into the next stage of services, provided by the IU beginning at age three, services often move to other locations, outside the home as the focus of EI services begins to shift toward fostering age-appropriate developmental skills, such as language, adaptive/self-help skills, social skills, and the appropriate behaviors in order to succeed in more structured settings outside the home. Although parents remain essential participants in developing an appropriate program, responsibility for selecting services and service providers and for monitoring progress becomes the responsibility of the IU. Parents still retain important rights to permit or deny evaluations, as well as to participate in developing an appropriate IFSP/IEP and approving/agreeing to placement, but they do not have direct oversight and involvement in the day to day delivery of such services.

Although Parents maintained the position that they have only sought appropriate services appropriately provided by competent service providers, the record discloses that they sought to exercise much greater control of the nature of the program Child received, the service provider and the details of how services are delivered than permitted by IDEA. (FF 18, 19, 23, 27, 28, 36, 37, 42, 43, 44) Moreover, although Parents may not have intended to interfere with the implementation of the services provided through Child's IEP, that was the effect of their over-

involvement in the details of day to day provision of IEP services and their efforts to assure that service providers under contract with the IU implement the practices and procedures of their preferred ABA/behavior support service provider. The gaps in Child's services that occurred in the summer of 2012 through the beginning of February 2013 resulted directly from Parents' insistence on close involvement in the delivery of services, including attempts to mold the provision of services to their preference and to direct the IU providers in the details of means and methods for implementing Child's IEP.

The IU in this case fulfills its obligation to provide supportive services to Child and other similarly situated children who need ABA therapy and supportive behavior services through contracts with private agencies. The BCBA's and others who actually provide the services are not, therefore under the direct control of the IU, as they would be if they were IU employees. Consequently, both the agencies and the individual therapists, aides, etc. can "vote with their feet" and withdraw from providing services in a particular case, or decline a contract with the IU. That, indeed, is what happened with Lovaas—the IU and the private agency could not come to mutually agreeable terms, resulting in no current contract and, therefore, Lovaas cannot be the IU service provider for Child. (FF 9, 10) Parents cannot force the IU to enter into a contract with a particular provider, any more than they could force the IU to pay a particular employee, such as a teacher, more than other employees in order to induce him or her to remain an employee and available to teach a child. An order of that nature would put one provider in a preferential position, able to gain greater access to public funds than other providers which accept the IU terms, since the IU would presumably be required to meet any contract demands in order to assure that Child receives services from Parents' preferred provider.

There was much discussion during the testimony at the due process hearing concerning the reasonableness of Parents' actions with respect to various providers. To some extent, that was irrelevant due to the independent contractor status of the individuals and agencies. As noted above, neither private agencies nor individuals can be forced into accepting or maintaining contractual relationships with the IU. Consequently, the objective reasonableness of Parents words and actions in various situations, or whether some individuals were exceptionally sensitive to conduct that others might not mind makes no difference.

The record of this case establishes beyond question that Parents, particularly Child's Mother, believed that she had the right and perhaps even the duty to assure that her child received services that she believed were necessary and appropriate, as well as to control how Child's services were implemented. Parents' attempts to exercise control extended to confronting a therapist over use of a specific reinforcement for appropriate behavior or task compliance. (FF 42) Providing effective reinforcements is an integral part of ABA therapy, but the effectiveness of a particular reinforcement often varies, sometimes daily. Unless some reinforcements adversely affect a child's health, such as, *e.g.*, food or particular food items, precluding certain reinforcements, such as any use of the i-Pad, is an unwarranted intrusion into the delivery of services in accordance with the professional judgment of the staff implementing Child's IEP. Under the IDEA, parent participation rights do not extend to approving all implementation methods or removing reinforcers from a provider's available ABA repertoire based solely on parent preferences or beliefs. Moreover, although Parents may certainly express disagreement with particular methods and explain the reasons for requesting that some items either not be used as reinforcement or be limited, such conversations should occur with the case manager and the supervisor of the staff providing the services, involving the staff member

directly only if the supervisor and Child's case manager deem it necessary or advisable. Parents do not have the right to directly supervise staff providing services to Child, unless the Parent actually observes a situation in which the child is in imminent physical danger. Nothing in the record suggests that any such situation occurred in this case.

A natural consequence of Parents' attempts to control the details of how Child's program was delivered was the difficulty the IU had in finding either agencies or individuals willing to work with the Child. Testimony from both of the former IU service providers established that their employees felt harassed and intimidated by Parents' actions. As noted above, the reasonableness of those reactions might be subject to argument, but the results are beyond question. (FF 28, 41)

Appropriateness of the IU Service Providers/IU Efforts to Assure Appropriate Services

The record compiled through the due process hearing does not support the conclusion that the IU did not select appropriate providers and cannot do so in the future. Moreover the record establishes that the IU went well beyond what is required to provide appropriate services in an effort to assure stability in service providers, particularly with respect to the transition from Lovaas to Clarity. (FF 22, 25) Despite disagreeing, for the most part, with the legitimacy of Parents' complaints, the IU responded to Parents' concerns and was willing to assure that the Child received hours that were missed when Clarity canceled services, although that sometimes occurred because of last minute changes initiated by Parents. (FF 17, 22, 24, 29, 30, 33, 34)

IU contract providers likewise attempted not only to appropriately implement the Child's IFSP/IEP but to meet Parents' very exacting standards and preferences. Keppley, *e.g.*, acceded to Parents' request to assign the same therapist to provide all services to Child rather than two, despite its belief that assigning two therapists would ultimately be better. (FF 37) Although

Parents may believe that one direct service provider would be less disruptive to Child than pairing with several staff at the same time, the natural consequences of insisting on a single staff person is assignment of frequent substitutes due to illness, personal days off, vacations, or leaving employment for another position. Regardless of the initial difficulties Child may experience from receiving services from more than one therapist during the week, once those issues pass, temporary absences or permanent changes of staff are likely to be less disruptive, since there is more than one familiar person available to deliver services.

Parents' Role in Creating Service Gaps

Parents contend that they were willing to accept providers suggested by the IU and did not insist that only Lovaas could appropriately deliver Child's ABA therapy and supportive behavior services. Parents also contend that both Clarity and Keppley withdrew from providing services voluntarily, based on their own recognition that they could not provide appropriate services. (FF 32) Parents' contentions may be technically accurate, in terms of not explicitly insisting on Lovaas as the provider, and there is no doubt that the service providers did withdraw from their contracts. (FF 31, 32, 40) Parents' contentions, however, are seriously misleading in light of the overwhelming evidence in the record

After executing the settlement agreement ending a prior due process proceeding in April 2012, Parents dropped their prior demand that the IU maintain Lovass Institute as the provider of ABA therapy and behavior services for Child. Nevertheless, Parents continued to insist that all other providers follow Lovaas methods, staffing and staff training procedures to the letter, disagreed vehemently with any deviation from the Lovaas service model, and particularly disagreed with services delivered in accordance with VB principles. (FF 23, 43, 44) Consequently, although Parents did not insist upon Lovaas as the provider, they did insist that all

other providers exactly replicate Lovaas services. Moreover, Parents, specifically Mother, admittedly attempted to “micromanage” the provision of services by Clarity during the spring and summer of 2012, and it was because of Parents’ confrontational tactics that Clarity abruptly declined to provide services. (FF 18, 31)

Parents then essentially repeated the same course of conduct with respect to Keppley—they did not refuse the agency’s assignment as Child’s service provider, but did refuse to accept methods of service delivery and staffing/staff training that deviated in any respect from Lovaas. (FF 36, 42, 43, 44) Parents’ questioning of the credentials of the staff employed by both agencies was likewise unreasonable. (FF 28, 36) Nothing in the record suggests anyone assigned to work with the Child was not well-qualified. (FF 20, 21, 22, 38, 39) Parents’ argument that the IU service providers who resigned were unable to deliver appropriate ABA services is inaccurate. The providers were unable to meet Parents’ standards, and unwilling to take direction from Parents, but the record does not support the conclusion that they were unable to deliver the appropriate services to which the Child is entitled.

As noted above, Parents have the right to participate in determining an appropriate program, placement and services for an eligible Child, but not the right to control every aspect of the delivery of services. Moreover, as also noted, Mother’s demeanor in making her disagreements and preference known to staff is, to a large extent, irrelevant. Whether Mother sought to exert control nicely or angrily, the problem with Parents’ position is that they have no right to control delivery of services at all. Where there is a conflict between a local education agency (LEA) based upon “philosophical” differences, LEA philosophy takes precedence until and unless it leads to inappropriate placement and/or services, based on evidence, not a parent’s

beliefs or preferences, even if adopting the parents' philosophy would lead to better services for the Child.

Progress

Parents contend that IU failed to assure appropriate progress through its service providers because the Child made no progress during the periods that providers other than Lovass delivered ABA therapy and behavior services. The evidence, however, does not support that contention. The Child's progress was clearly greater in the 6 months between March and September 2012, when other providers were involved in delivering services than when Lovaas alone was the provider, despite the Child transitioning from home-based services to a regular pre-school during that period, as well as several changes in the ABA/behavior support staff who worked directly with the Child. (FF 47) It simply does not make sense to conclude that Lovaas's re-involvement in providing services beginning in August 2012 was the primary factor in the Child's substantial progress by September and October 2012, with no progress and substantial regression having occurred between May and August 2012. The more logical conclusion is that after nearly two years of intensive ABA therapy, the Child began to demonstrate more consistent and stable gains by September 2012. Moreover, the increased progress reported in September and October 2012, despite difficult circumstances during the spring and summer of 2012 due to changes in the staff working with the Child support the conclusion that the specific service provider is not nearly as important as the techniques common to all ABA-based methods, which are clearly very effective for the Child. Although the changes in staff that occurred during the spring and summer were accompanied by increases in difficult behaviors at times and temporary regression, the Child nevertheless made overall progress

during that period. (FF 26) It is unrealistic and unreasonable to expect that progress for a Child with such significant needs will always be even and consistent.

Reimbursement

Because the gaps in services that occurred between the late summer of 2012 and February 2013 are attributable to parental interference and attempts to exercise control over the details of the delivery of services beyond the participation rights parents have under IDEA, Parents full costs for providing replacement services during that period will not be reimbursed.

Nevertheless, because the IU was still required to provide services at all times, and because Parents arranged for services to maintain the Child's ability to make progress, the IU will be required to reimburse Parents for any costs Parents have paid, or owe, up to the amount the IU would have paid its current service provider for the same number of hours that Parents replaced. The IU is not required to reimburse Parents for any day during any such period when Child was absent from school, or did not receive services for some other reason, regardless of Parents' obligation to pay for any such days. The IU is not required to pay for any hours that Parents' provider collected data or delivered services for any period when the IU had a provider under contract with staff available to provide services.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, is hereby **ORDERED** that Parents' claims related to the service providers selected by the Intermediate Unit are **DENIED**.

It is FURTHER ORDERED that to the extent there are hours of service required by the Child's IFSP/IEP that were not provided by the IU-EI program at such times as it did not have a contracted provider in place prior to February 8, 2013 regardless of the reason, and to the extent

there is no current agreement between the parties for payment of those hours, the IU shall reimburse Parents for the unpaid service hours in accordance with the payment terms specified in its contract with the current provider of ABA/behavior support services, notwithstanding Parents' costs to replace those services. Payment shall not be made for any hours the Child was absent from pre-school or otherwise did not receive services from a provider engaged by Parents.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

May 8, 2013