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: T.L.

ODR #13561/12-13KE

Date of Birth:
[redacted]

Dates of Hearing:
April 15, 2013
May 8, 2013

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Dean Beer, Esquire McAndrews Law Offices 30 Cassatt Avenue Berwyn, PA 19312
Delaware County IU/EI Program 200 Yale Avenue Morton, PA 19070	Gabrielle Sereni, Esquire Raffaele & Puppio 19 W. Third Street Media, PA 19063

Date Record Closed:	May 25, 2013
Date of Decision:	June 6, 2013
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

The Child[1] who is the subject of this decision is a preschooler who is eligible for special education pursuant to the Individuals with Disabilities Education Act [hereinafter IDEA] and PA Chapter 14 under the current classification of hearing impairment, and is consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504] and PA Chapter 15, as well as the federal and state regulations implementing those statutes.

This matter concerns a due process request from the Parents who are seeking tuition reimbursement for their Child's unilateral private preschool placement at the [Redacted] School [hereinafter CS]. The Delaware County Intermediate Unit [hereinafter IU] maintains that it has offered the Child a free appropriate public education [hereinafter FAPE] and that tuition reimbursement should be denied.

Issue

Should the IU be required to reimburse the Parents for their Child's tuition at the CS for the 2011-12 and the 2012-13 school years?

> Specifically, did the IU fail to offer the Child a free appropriate public education [FAPE] for the 2011-2012 and/or the 2012-2013 school terms?
>
> If the IU failed to offer the Child FAPE, is the CS placement unilaterally selected by the Parents appropriate?
>
> If the IU failed to offer the Child FAPE, and the CS placement unilaterally selected by the Parents is appropriate, are there equitable considerations that would remove or reduce the IU's responsibility for tuition reimbursement?

Findings of Fact

1. Child is a preschooler who lives with the Parents in the area served by the IU. [S-1]

2. Following a screening at birth, the Child was diagnosed with bilateral sensorineural severe to profound hearing loss. In simple terms, the hairs in the inner ear of the Child's cochlea are not functioning and they do not regenerate. [NT 249, 429]

3. The Child uses cochlear implants on both ears, having received the first implant at 13 months of age and the second at about 30 months of age. [NT 240, 430]

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[1] This decision is written without further reference to the Child's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

4. The Child is a deaf child and will always remain deaf. The cochlear implants help the Child to access sound. [NT 306]

5. In the United States cochlear implants are not approved for use earlier than one year of age. Therefore, when there is a severe to profound hearing loss, the baby has hearing aids for the first year of life to keep the neural pathways open, so that when the cochlear implant is done the nerve is able to start to make sense of the impulses from the implant. Hearing aids are also used to amplify any residual hearing in any frequency from which the baby may benefit. [NT 240-241]

6. The Child received hearing aids at the age of 3 months and wore them on a daily basis. [S-6]

7. Individuals with cochlear implants access sound differently than hearing individuals.[2] [NT 247-250]

8. By the time the Child received the first implant the Child was more than a year behind hearing children in the area of speech/language[3] communication. For a very young child the lost time of one year in speech/language development is significant; when the Child received implants, the Child's brain had to begin to learn to make sense of the sounds in the environment. [NT 318, 325, 425-426]

9. The Child's current speech/language therapist testified that while the Child's strengths are being friendly and outgoing, currently there are "holes" in areas of the Child's language and academic abilities. The area of grammatical verb-object formulation in sentences is a struggle, there is difficulty comprehending questions and language aside from basic labeling of items, and there is difficulty with auditory memory. The Child's auditory attention is an area of difficulty and the Child requires a lot of repetitions. The Child has difficulty with maintaining conversational topics or taking conversational turns. [NT 244-246]
10. In order to catch up with hearing children the Child requires education which provides access to hearing, access to environment and access to curriculum. [NT 423]
11. The Child first began receiving services at CS through [Redacted] County where the family originally resided. When the family moved to [the current] County, the

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[2] Hearing persons access sound through acoustical energy, which is turned into mechanical energy, which is turned into electrical impulses which transmit the information to the eighth cranial nerve which transmits to the brain. The Child, having cochlear implants, has an electrical signal of sound as the only signal of sound which transmits to the brain. The Child has two magnets in the skull and two magnets outside the head as well as two processors on the ears. The magnets are attached to an electrode array and the electrode array is coiled around the Child's cochlea. Sound goes into a microphone to the magnet and is then interpreted through the processor which sends those impulses through the electrical array which sends the information to the brain.
[3] "Speech" refers to production of sounds to form words, i.e. articulation. "Language" when spoken or written refers to such things as grammatical structures, vocabulary, content and comprehension.

County Office of Early Intervention continued to fund the services at CS. [NT 431-433]

12. As the IU hearing department is a provider for the County's Infant-Toddler program under the Office of Early Intervention, under a contractual arrangement with the County an IU employee began providing speech therapy to Child in December 2010, six months prior to Child's third birthday. [NT 38-39]

13. To prepare for the transition from Infant-Toddler to Preschool Early Intervention programming, the Parents and IU staff met on February 3, 2011; the Parents also shared information about their Child in writing through completing a Family Questionnaire, a Health History Survey, and an Ages and Stages Questionnaire. Additionally, the Parents completed an M-CHAT Questionnaire [screening for social skills]. [NT 40-45; S-4]

14. CS provided written input via a Teacher Questionnaire and an accompanying explanatory document dated February 26, 2011. [S-4]

15. Initial paperwork also included a copy of the Home Visit Summary/Family Assessment that had been completed on September 7, 2010. [S-4]

16. When the IU became the Child's LEA when the Child turned three, the Child had an Individualized Family Service Plan [IFSP] in place from [the previous] County. The IFSP targeted speech and language skills, focusing on both expressive language and articulation. At the time of transition the Child was receiving center-based instruction at CS twice a week from 9 am until noon, educational support for hearing 1½ hours per week and home-based speech/language therapy 1 hour per month. [NT 39, 4851-52; S-1, S-6]

17. The Supervisor of the IU's speech and hearing programs first met with the Child on May 23, 2011. Upon reviewing the available information at the time of the meeting, the IU's Supervisor gathered that the Child was functioning appropriately in all areas except communication and that speech articulation was a concern of the Parents and CS. [NT 39, 46-47]

18. The Parents signed a Permission to Evaluate on May 23, 2011. The IU's evaluation report [ER] was completed on May 27, 2011. [S-5, S-6]

19. Standardized testing in the area of understanding and using language using the Preschool Language Scale-3 yielded the following standard scores: Auditory Comprehension 81, Expressive Communication 82, Total Language Score 80, with average standard scores falling between 85 and 115. [S-6]

20. Standardized testing in the area of understanding single words [receptive language] using the Peabody Picture Vocabulary Test-4 yielded a standard score of 76, with average scores falling between 85 and 115. [S-6]

21. Standardized testing in the area of expressive vocabulary and word retrieval [expressive language] using the Expressive Vocabulary Test yielded a standard score of 86, with average standard scores falling between 85 and 115. [S-6]

22. Standardized testing in the area of sound production at the beginning and end of words, and of consonant clusters [articulation] using the Clinical Assessment of Articulation and Phonology yielded a standard score of 79, with average scores falling between 85 and 115. [S-6]

23. The Child's teacher at CS reported that there were no concerns in any of the domains of learning other than communication. [S-6]

24. Descriptive information in the ER regarding areas of deficit[4] in Receptive Language at age 2 years 11 months are as follows: Language delays can impact ability to understand directions and verbal responses at times; cannot point to the body parts of eyes, hands and tummy; understanding of quantity concepts is inconsistent; does not consistently understand the pronouns 'my, yours, me, he, she, his, her'; seems challenged by the concept of part-while relationships [e.g. wheel of the car]; and understanding negatives [e.g. show me the baby who is not crying]; understands the category of the word but not the specific word [e,g, chooses a zipper picture when asked to show a belt]. [S-6]

25. Descriptive information in the ER regarding areas of deficit in Expressive Language at age 2 years 11 months are as follows: Not consistently using plural "s" endings; not able to use words to explain how an object is used while being able to perform a physical action to show knowledge of the use of the object. [S-6]

26. Descriptive information in the ER regarding areas of deficit in Articulation at age 2 years 11 months are as follows: Multiple inconsistent substitutions and distortions of consonant sounds that negatively impact intelligibility in conversational speech; sometimes deletes final consonant in words; sometimes sounds in two-consonant clusters are produced in error [e.g. smake for snake]; does not always produce all syllables in multisyllabic words [e.g. dinosaur becomes di-saur]; intelligibility is 'fair' to an unfamiliar listener in a known context. [S-6]

27. Descriptive information in the ER regarding areas of deficit in Social and Emotional Development at age 2 years 11 months are as follows: Still has difficulty separating from parents but recovers quickly; language delays impact social emotional development when interacting with peers in more language-based activities. [S-6]

28. Audiological assessment noted that monitoring of acoustic environment, encouraging flexible preferential seating and daily amplification checks will help ensure that the Child receives the best signal possible. [S-6]

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[4] The Child's ER notes many areas of overall competence for age and in some domains above age expectations; there were also some areas of communication competence noted. The deficits only are recounted here as they relate to the Child's educational needs; the reader is referred to the entire ER, all of which was considered by the hearing officer. [S-6]

29. The ER notes that "[the Child] needs a preschool class for children with hearing loss. Because [the Child] is still learning to listen and talk, [the Child] needs to be enrolled in an auditory-oral class for children with hearing loss taught by teachers who understand the unique needs of a child with hearing loss. [The Child] needs direct instruction of the less emphasized or smaller units of language development that [the Child] has not learned due to [the Child's] hearing loss. [The Child] needs to improve [the Child's] speech intelligibility so that [the Child] can be more easily understood by peers and adults. Additionally, [the Child] needs to learn to listen to and interact with peers appropriately and to practice early developing advocacy skills in order to participate in preschool curriculum." [S-6]

30. On June 6, 2011 the Parents, IU staff and representatives from CS met for an IEP meeting. [S-8]

31. The June 6th IEP proposed five Goals as follows: 1) During the classroom day the Child will care for the cochlear implants by replacing the headpieces if they fall off and alerting an adult if the implant is not working in 4 out of 5 opportunities, measured monthly for three months; 2) When conversing with peers and adults the Child will use grammatically correct sentences of at least 4-5 words including a variety of verbs, nouns and describing words in order to comment, ask, and answer questions in 4 out of 5 opportunities measured monthly for three months; 3) During structured and unstructured activities the Child will demonstrate an understanding of prepositions, pronouns and descriptive concepts by following directions containing 3 steps or 3 critical elements in 4 out of 5 opportunities as measured monthly for 3 months; 4) During structured and unstructured therapy activities the Child will consistently use the p, b, m, w, h, k, g and f sounds[5] in all positions of words in 4 out of 5 opportunities measured monthly for three months; 5) During structured and unstructured therapy activities the Child will include final sounds in words, including grammatical markers [-ing, -ed, -s] in 4 out of 5 opportunities measured monthly for three months. [S-8]

32. The IU offered the following Early Intervention Services in the June 6, 2011 IEP: Hearing Impaired Classroom for 3 days per week for 2 hours and 45 minutes per day; Auditory-Verbal Therapy [Parents included with Child] once a week for one hour; Individual Speech Therapy once a week for 30 minutes; Group Speech Therapy three times a week for 15 minutes; Equipment Checks 3 times per week [when in attendance at preschool class]. [NT 79-80, 83, 440, 445, S-8]

33. The Supervisor of the IU program testified that the Child needed speech/language therapy "to target articulation and intelligibility". [NT 70]

34. The IU teacher testified that individual speech/language services are strictly for articulation and that the "language piece in our program takes place in the classroom". [NT 535]

[5] These sounds are age-appropriate and age-expected for hearing children.

35. The classroom the IU offered would have up to 11 children ages 3 to 5[6]. Some children come 2 days a week, others 3 days a week and still others 5 days a week. The classroom teacher is a speech/language pathologist and a teacher of the deaf. She had previously provided the Child with the in-home speech/language therapy under the County contract. The home-based Auditory-Verbal Therapy would be provided by this individual as well. [NT 86-88, 205, 441, 507, 525]

36. The IU teacher/speech-language pathologist testified that starting the Child with three days a week "made sense to us" based on standard scores, progress in the Birth to Three program in articulation [as opposed to language], having two cochlear implants and having supportive parents. [NT 530-531, 544-545]

37. The focus of the IU classroom is instruction in listening and language throughout the hours the children attend. [NT 507-508]

38. The IEP notes that the Child will not participate with typically developing children when receiving services in the specialized education classroom as the Child has the opportunity to participate with typically developing children at home and in the community. [S-8]

39. In May 2011 the Parents had visited the identified classroom where the Child's IEP was to be implemented. They were concerned that two different lessons were occurring at the same time near each other. They observed an aide who was working on a cutting project with one student, basically completing the project for the child and not narrating to the child as the work was being done. [NT 97, 449-451]

40. The individual who would be the Child's teacher in the IU classroom in 2011-2012[7] testified that there are two separate group lessons being taught in the classroom simultaneously, separated only by a room divider "that cuts down some of the noise". [NT 518]

41. The Child's bus ride to the IU program would be 45 minutes, and no aide would be provided on the bus. There was at least one middle school child to be on the bus with the Child. [NT 454-455]

42. The Parents did not approve the June 6, 2011 NOREP because they believed the services offered were insufficient to meet the Child's needs. The IU members of the IEP team did not consider placement in the CS program as an option because they believed the program being offered by the IU was appropriate. [NT 212, 439; S-9]

43. The Parents asked for a meeting with the IU to discuss the proposed services; the meeting occurred on July 14, 2011. At the meeting the Parents asked the IU for

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[6] The numbers have not gone up to 11. This year there are 9 children in the M-W-F group and 6 in the T-Th group. [NT 529]

[7] Another teacher was hired for 2012-2013 and the witness then served as the speech pathologist for the class. [NT 520] This second teacher is in her first of three years being mentored to become Listening and Spoken Language Auditory-Verbal certified. [NT 520]

additional services, as they were trying to create a program they believed was appropriate given that the IU had rejected a placement at CS. [NT 455, 457-458]

44. At the hearing the IU stipulated that the NOREP presented to the Parents on July 14, 2011 was a reissued NOREP for the same June 6, 2011 IEP that the Parents had already rejected. [NT 223-224, 463; S-12]

45. The Parents continued to believe that the June 6, 2011 IEP was not appropriate, and when rejecting the July 14, 2011 NOREP requested mediation. The mediation resulted in the IU's requesting, and the Parents approving, another evaluation of the Child. [NT 99-100]

46. As part of the Child's reevaluation, CS submitted a Child Progress and Planning Report dated December 1, 2011. The report, among other information, contained the Child's CS Goals and Objectives Plan [CS Plan][8] with progress noted for each. The Objectives attached to each goal were very detailed and specific. [S-17]

47. The CS Plan as of December 1, 2011 carried Receptive and Expressive Language Goals as follows: 1) During structured therapy sessions the Child will answer simple WH questions in 9 out of 10 trials over 3 consecutive data collection periods; 2) During structured therapy sessions the Child will demonstrate understanding of beginning positional words by pointing to a picture or manipulating objects in 9 out of 10 trials over 3 consecutive data collection points; 3) During structured therapy sessions the Child will use positional words in response to Where questions in 9 out of 10 trials over 3 consecutive data collection points; 4) the Child will increase mean length of utterance to 3-4 morphemes during spontaneous conversation over 3 sampled lessons; 5) During structured therapy sessions the Child will use a variety of pronouns when describing a picture or in response to a question in 9 out of 10 trials over 3 consecutive data collection points; 6) During structured therapy sessions the Child will use the present progressive verb tense [verb+ing] in response to "what doing" questions in 9 out of 10 trials over 3 consecutive data collection points. [S-18]

48. The December 1, 2011 CS Plan carried the following Auditory Goals: 1) the Child will identify all Ling and Estabrook sounds at a distance up to 12 feet with 100% accuracy over 3 consecutive data collection points; 2) during structured therapy sessions the Child will independently follow directions increasing in complexity in 9 out of 10 trials over 3 consecutive data collection points; 3) During structured therapy sessions the Child will answer who, what, when, where

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[8] In its closing argument the IU made considerable mention that CS did not offer the Child an IEP. However, it is noted that the CS Plan references the goals and objectives as an IEP, and on the record the IU's counsel referenced them as IEP goals and objectives as well. [NT 110-111] I have referenced the extensive set of Goals and Objectives presented by CS a "Plan", and certainly deem it a very clear roadmap for instructing the Child.

and how many questions from a story without any visual information in 9 out of 10 trials over 3 consecutive data collection points; 4) During structured therapy sessions the Child will discriminate words differing by one feature [manner, place, voicing, etc.] in 9 out of 10 trials over 3 consecutive data collection points'

49. The December 1, 2011 CS Plan carried the following Speech Goals 1) During structured therapy sessions the Child will spontaneously use bilabial sounds [p, b, m] in all positions of words in 9 out of 10 trials over 3 consecutive data collection points; 2) During structured therapy sessions the Child will spontaneously use alveolar sounds [t, d, n] in all positions of words in 9 out of 10 trials over 3 consecutive data collection points; 3) During structured therapy sessions the Child will spontaneously use /k/ in all positions of words in 9 out of 10 trials over 3 consecutive data collection points. [S-18]

50. The IU completed the agreed-upon re-evaluation [RR] on January 6, 2012. In all areas tested the Child's scores improved over the seven months between evaluations while the Child was served at CS. [NT 111, S-18]

51. According to the December 2011 RR, standardized testing in the area of understanding and using language using the Preschool Language Scale-3 yielded the following standard scores: Auditory Comprehension 90, Expressive Communication 83. A Total Language Score was not provided. [S-18]

52. Standardized testing in the area of understanding single words [receptive language] using the Peabody Picture Vocabulary Test-4 yielded a standard score of 96 [S-18]

53. Standardized testing in the area of expressive vocabulary and word retrieval [expressive language] using the Expressive Vocabulary Test yielded a standard score of 93. [S-18]

54. Standardized testing in the area of sound production at the beginning and end of words, and of consonant clusters [articulation] using the Clinical Assessment of Articulation and Phonology yielded a standard score of 87. [S-18]

55. The IU administered the Batelle Development Inventory, 2nd Edition. The Child's domain standard scores were as follows: Adaptive 116, Personal-Social 109, Motor 109, Cognitive 115, Total Score 115. The average range for scores is 85-115. [S-18]

56. The Supervisor of the IU's hearing and language programs testified that while the Child had made progress at CS, and receptive and expressive language skills had increased, the Child was still inconsistent with the ability to answer questions and receptive language skills needed to be targeted. [NT 110-114, 119-120; S-18]

57. The recommendations in the RR were identical to the prior recommendations made by the IU in its original ER. [NT 123; S-18]

58. The IEP team produced another IEP on February 3, 2012. Two new Goals were added to the previous IEP offered by the IU: 1) During the program day the Child will maintain a conversational topic for 3 exchanges, first with an adult, then with a peer in 4 out of 5 opportunities measured monthly for 3 months; 2) During structured and unstructured activities the Child will demonstrate improved auditory memory skills by following auditory directions containing 3 steps or 3 critical elements in 4 out of 5 opportunities measured monthly for 3 months. [S-21]

59. Services offered to the Child as per the February 3, 2012 IEP were as follows: Hearing Impaired Classroom for 3 days per week for 2 hours and 15 minutes per day [a reduction of 30 minutes per day or 90 minutes per week from the previous offered service in order to provide an inclusion opportunity]; Inclusion in a Typical Preschool Environment 3 days per week for 30 minutes per day, with 1:1 support from special education teacher; Consultation between the special education teacher and the regular education teacher once per month for 15 minutes; Auditory-Verbal Therapy [Parents included with Child] once a week for one hour; Group Speech Therapy once a week for 30 minutes; Equipment Checks 3 times per week [when in attendance at preschool class]. [S-21]

60. The Individual Speech Therapy that had been proposed once a week for 30 minutes in the June 2011 IEP was eliminated in the February 2012 IEP. The teacher of the Child's proposed class testified that speech language therapy was eliminated because the Child was an "intelligible speaker" and that "too much therapy can cause some problems sometimes". [NT 534, 538-540; S-21, S-39]

61. Although the IU evaluation suggested that certain areas of language were not progressing, the IU teacher/speech-language pathologist testified that these needs could be handled in the classroom. She testified to the program's belief that peer interaction and practicing would address the language needs of the Child. She did not elaborate on the obstacles when the class is composed entirely of children with language difficulties. [NT 543-544]

62. The Child's mother mistakenly marked the box on the NOREP indicating approval of the February 3, 2012 IEP. She testified credibly and in detail that this was an unintended error as the Parents did not approve the services offered. [NT 494-497; S-22]

63. In June 2012 the parties again discussed the Child's placement. Attached to a letter dated June 22, 2012 the IU issued a NOREP re-offering the same February 3, 2012 IEP. The Parents did not approve this NOREP. [NT 138, 140-141, 465, 469; S-25, S-26]

64. On July 18, 2012 the IU and the Parents met again regarding the Child's placement. At this meeting the DCIU suggested yet another re-evaluation and again the Parents gave their consent. [NT 144, 471; S-28, S-30]

65. The IU issued an RR on September 11, 2012. [NT 148; S-36]
66. According to the September 2012 RR, Standardized testing in the area of understanding and using language using the Preschool Language Scale-3 yielded the following standard scores: Auditory Comprehension 86, Expressive Communication 90. Total Communication 87. [S-36]
67. Standardized testing in the area of understanding single words [receptive language] using the Peabody Picture Vocabulary Test-4 yielded a standard score of 95 [S-36]
68. Standardized testing in the area of expressive vocabulary and word retrieval [expressive language] using the Expressive Vocabulary Test yielded a standard score of 109. [S-36]
69. Standardized testing in the area of production of sounds in the beginning, middle and end of words in addition to vowel and consonant clusters [articulation] using the Photo Articulation Test 3 yielded a standard score of 100. [S-36]
70. The IU issued another IEP and NOREP on October 3, 2012. This was the final IEP offered prior to the due process hearing. [S-39; S-40]
71. The October 3, 2012 IEP differed from the previous two IEPs only by slight alterations in previous Goals [e.g. adding the element that the Child would *independently* alert an adult about problems with the cochlear implants, increasing from five to six the number of words required in an utterance, and changing the task for auditory memory from following directions to retelling elements of a story presented auditorally]. [S-39]
72. Services offered to the Child as per the October 3, 2012 IEP were as follows: Hearing Impaired Classroom for 3 days per week for 2 hours and 45 minutes per day; Equipment Checks 3 times per week [when in attendance at preschool class]. [S-21]
73. The Inclusion in a Typical Preschool Environment 3 days per week for 30 minutes per day with 1:1 support from the special education teacher, as well as the contingent Consultation between the special education teacher and the regular education teacher once per month for 15 minutes, from the February 3, 2012 IEP were eliminated in the October 2012 IEP. [S-21, S-39]
74. The supervisor of the IU program testified that the Inclusion and Consultation services were withdrawn because some specific deficits that the Child should have been mastered had not improved during the past six months and before re-offering the Inclusion/Consultation services the IU wanted to have the Child in

the specialized classroom to "take data" on the Child's acquiring those skills.[9] [NT 152-154]

75. The supervisor of the IU program also noted that Auditory-Verbal Therapy once a week for one hour was eliminated because the team believed that service was not necessary for the Child to receive FAPE.[10] [NT 159-160]

76. It also appears[11] that the Group Speech Therapy once a week for 30 minutes was eliminated although this is likely to be a routine part of the IU class so the service may have been offered. [S-21, S-39]

77. Again the October 2012 IEP did not offer any individual speech/language therapy. [S-36]

78. The Parents did not approve the IEP and requested a due process hearing, choosing to continue the Child's unilateral placement at CS. [NT 476; S-39, S-40]

79. CS, which has been operating for 148 years in the area of teaching spoken language to the deaf, has been an Approved Private School since July 1, 2012. CS, in which the Child has been enrolled since age 4 months starting with the Infant Toddler program, focuses on providing a listening and spoken language program. The Child is now in the 3-5 year old program which serves 14 children. The children are grouped by age into 3, 4, and 5 year olds. [NT 325-326, 328-329, 332-333, 339, 391, 431]

80. There are 6 children in the Child's class, with a maximum capacity of 8 children. A small class size is important to allow the Child to access language. [NT 338, 342-343]

81. Every child in the Child's class has cochlear implants and some also have hearing aid[s]. [NT 422-423]

82. The Child's class has a teacher and a trained teacher's aide. CS teachers hold master's degrees as Teachers of the Deaf with Certification in Education of the Deaf (hereinafter referred to as CED) and are in the process of completing Listening and Spoken Language Specialist certification. [NT 341 347]

83. Background noise impacts the Child's access to language. Therefore, the building and rooms are acoustically treated according to specifications by an acoustical engineer, with acoustic tiles, cork floors, and softwood furniture. [NT344- 345; S-6]

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[9] It was not made clear in testimony why the data could not be taken over the other 2 hours and 15 minutes in a IU classroom day in order to keep the Inclusion/Consultation service for the Child.

[10] As in the footnote above, the testimony did not clarify the exact reasons for this change.

[11] The Services section of the IU was very difficult to read and understand.

84. The CS program is five days a week for 4 ½ hours per day. The entire day, including lunch and recess is geared toward language learning, listening and speaking. [NT 330, 374-375; P-2]

85. CS provides instruction through a theme-based curriculum based on Pennsylvania state standards. [NT 349,364-365; P-1, P-2]

86. CS teaches the children self-advocacy skills and an understanding of their disability. They learn the parts of the ear, the names for their technology, and how to seek help if their technology is not functioning properly. [NT 376]

87. At CS the Child currently receives daily 30 minute sessions of individual auditory verbal speech and language therapy in a therapy room. The Child also receives a weekly group auditory verbal speech and language therapy session in the classroom. [NT 250]

88. Auditory verbal therapy is a type of methodology to develop listening in spoken language, auditory/verbal focus on listening.[12] [NT 36-37]

89. For individuals who wear hearing aids, auditory verbal therapy would be geared toward amplifying the residual hearing and targeting listening skills right from the beginning. For someone who has received a cochlear implant, it is learning how to listen through that device, because it is not the same as the natural ear. The person must learn to take in the sound, make sense out of it and develop it into listening and talking. [NT 37]

90. The Child's CS speech/language therapist testified that the daily individual therapy with the Child includes informal conversation, a listening check of sounds across the frequency of the speech spectrum to see how each implant is functioning, data collection to see which sounds the Child is consistently missing in each ear individually. The session then continues with audition, receptive language, expressive language as well as articulation. The sessions are language-based, and far from addressing solely articulation. The therapist and the Child are working on language structures, turn-taking and language comprehension. [NT 252]

91. Articulation is just one aspect of the speech/language therapist's work with the Child. The individual therapist addresses the Child's needs in auditory memory – following auditory directions that are related directions, unrelated directions, directions with critical elements, attending to auditory stories and answering questions based on those stories. They work on learning vocabulary, and then the Child has to learn how to formulate that vocabulary into language in sentence structures, grammatical endings, tenses, and ideas such as spatial concepts. [NT 253-254]

[12] Auditory verbal therapy is on the continuum of options for development of communication skills for hearing impaired individuals. One end of the continuum is American Sign Language, and the opposite end of the continuum is listening and talking. [NT 36-37]

92. At CS the Child also receives 30 minutes of group therapy per week, set up as a collaboration of the teacher of the deaf with two speech pathologists who plan an activity based on the current classroom educational themes. [NT 260; P-1]

93. CS has a typical preschool program on-site and uses purposeful inclusion with hearing preschool children daily during recess and weekly during music class. The Child also goes into the typical preschool's "center time" a few days a week. The interaction with hearing peers allows the Child to practice listening/speaking with peer models rather than just with adults or hearing impaired peers. CS is carefully monitoring the Child's inclusion because it has been noted that the background noise and pace of the typical setting affects the Child's ability to follow directions and understand what is being asked. [NT 377-380, 417-420]

94. There is an open-door policy for parents at CS to allow parents to come and view their children either in the classroom or behind an observation mirror; parents can also observe the individual therapy sessions from behind an observation mirror. Parent involvement is important because of the need for the Child to transfer skills from the classroom to the family and the community. CS sees parent involvement as a primary factor for a child's success. [NT 259, 357-362]

95. Parent coaching is an important factor for success, and twice per year parents meet with CS administrators to discuss their child. [NT 258, 356]

96. The Child has an individualized Plan for progress containing detailed and personalized goals and objectives that are based on data collected in the classroom and in individual therapy. The Child is discussed among CS staff at length at least once per month. CS provides the Parents evaluations of the Child's progress on Goals and detailed Objectives three times a year. [NT 264, 269-270, 404-409; S-17, P-4, P-5, P-6]

97. Since the Child lost the crucial period of listening and verbalizing that hearing children have during their first 13 to 24 months of life, the Child needs intensive intervention during the current window of early brain neuroplasticity. [NT 336-337, 426]

98. Through looking at standardized evaluation results, but just as or more importantly, looking at data collected on functional skills within the classroom/therapy room by the teacher and the speech/language pathologist, the staff at CS have determined that the Child has "holes" in language that need to be filled in. The Child has enough holes that there are red flags indicating the Child needs to be in a program like CS for five days a week so that the Child can be front-loaded with information while the neuroplasticity of the brain is primed between birth and four before the window of neuroplasticity opportunity begins to close. If the holes are not filled the Child will experience struggles in literacy skill acquisition. [NT 335-336, 388, 426]

99. The front-loading of information for the Child and support for the Parents will help attain the goal of entrance into the community school for kindergarten. [NT 335-337]

100. As a child with cochlear implants the Child is always needing to "catch up". Without intensive assistance to catch up it is going to be much more difficult for the Child to develop listening and spoken language which are the sensory partners of reading and writing. [NT 426]

Discussion and Conclusions of Law

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweigh*s* the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

The Supervisor of the IU's hearing and language programs testified, being called jointly by both parties. Her position involves overseeing staff in both programs, and supervising a school age hearing impaired program as well as the IU's hearing impaired preschool classroom the Child would have attended if enrolled in the IU's program. She holds an undergraduate degree in communicative disorders and a master's degree in speech/language pathology. She is certified as a speech/language pathologist through the Pennsylvania Department of Education, has certification as a teacher of speech and language, and holds certification as a special education supervisor. She is a licensed speech/language pathologist in the State of Pennsylvania and she holds a certificate of clinical competence through the American Speech and Hearing Association. She also has the credential of being a Listening and Spoken Language specialist through the Alexander Graham Bell Association, an organization for individuals with hearing loss who choose to listen and speak. Finally, she is certified as an Auditory Verbal Therapist. Following other relevant employment, in April 2003

she came to the IU and worked as an auditory verbal therapist until last June when she assumed the position of supervisor of the IU's program. *This witness offered factual testimony about the transition process and the initial IU evaluation. Given that at age 3 years the Child was functioning below or at the lowest end of the broad average range in receptive and expressive language, it was surprising when she testified that the Child needed speech/language therapy "to target articulation and intelligibility". The witness explained in detail how each of the Child's goals would be implemented, but offered no credible explanation for why the IU was offering only three days of classroom participation weekly at fewer than three hours per day, saying only that the IU "did not want [the Child] to be in a restricted environment for any more time than [the Child] needed to be". However, the witness testified that the IU was not recommending a typical preschool for the other two days of the week and did not discuss other options for a lesser restrictive environment on other days with the Parents. [NT 220] Of even greater concern was that she did not explain why the offer of individual speech/language therapy was only once per week for 30 minutes given the Child's significant needs. Finally, her explanation of the IU's reasoning behind withdrawing the inclusion and consultation services because the Child had not mastered certain skills was not reasonable, given that there was not a concomitant increase in individual speech/language therapy; her explanation that data collection on the areas of deficit was needed and that the half-hour would allow for this again did not serve to clarify the IU's thinking process. I found the witness' testimony about concrete matters – the transition, the evaluations, the offered IEP, the meetings with the Parents useful and reliable. However, I could not credit her testimony with a great deal of weight with regard to the appropriateness of the IU program given her inability to articulate reasonable explanations for why certain services were assigned, and at what level, and why other services were withdrawn.*

The classroom teacher /speech-language pathologist from the IU testified. She would have been the classroom teacher for the Child in the IU program for the 2011-2012 term and the classroom speech/language pathologist for the 2012-2013 term. She has an undergraduate degree in communications, corporate media and public relations and a master's degree in communicative disorders/speech pathology. She has a certificate as a speech-language pathologist from the Pennsylvania Department of Education. She is also certified as a Teacher of the Hearing Impaired through PDE. She has Listening and Spoken Language Certification, Auditory-Verbal Educator Certification[13] and a Pennsylvania license as a speech-language pathologist. She has her Certificate of Clinical Competence from the American Speech and Hearing Association. She worked for one year in an elementary school as a speech/language therapist and then came to the IU where she has been for twelve years working as a speech pathologist with children with some degree of hearing loss as well as with children with no hearing loss but who have developmental delays. She has also worked with autistic support classrooms. She works with the Infant Toddler as a speech therapist

[13] This certification is similar to the Auditory Verbal Therapist certificate held by the IU's supervisor.

through the IU. She has worked for other agencies outside the IU as well. She knows the Child from having observed in the CS prior to the transition from the Infant Toddler program and from monitoring the Child's progress once a month for six months. She was personally involved in the development of the first IU ER and in developing the IEPs for the Child. *This witness testified at length about the program schedule in the IU class and this was useful information. Her testimony consistently fell short however when she was asked to explain the reasons behind the decisions the IU portion of the Child's IEP team had made. Her answers to questions about the number of days per week the Child would attend, and the reason for limiting and then withdrawing individual speech-language therapy led to the impression that the Child was not being offered an individualized program but rather intervention designed to fit into the program in existence. Particularly troubling was her testimony that individual speech/language therapy in the IU program was reserved for speech articulation only and that the language remediation would take place in the classroom with peers, even though all the peers had language [as well as articulation] challenges. Given this witness' belief in the value of language practice with peers it was puzzling that the IU chose to remove the Inclusion/Consultation service from the last offered IEP. This witness' testimony could not be accorded significant weight and did not serve to counterbalance the testimony provided by her peer, the CS teacher/speech-language pathologist.*

CS's Lead Speech/Language Pathologist, who has been the Child's speech/language therapist at CS since September 2012 testified. She holds a bachelor's degree in speech/language pathology and audiology and a master's degree in speech/language pathology. She has a Listening and Spoken Language certificate as an Auditory Verbal Educator from Alexander Graham Bell Association[14]. She is certified as a speech/language pathologist for private schools in Pennsylvania, and is also certified in New Jersey; she holds a license to practice as a private speech/language pathologist in both states. In addition to her employment at CS she provides individual therapy privately to children age two through second grade, both hearing impaired and non-hearing impaired. *This witness described in detail exactly what she and the Child work on in individual therapy. Her testimony served to explain functional deficits that underlie the Child's testing results and to make clear how necessary intensive remediation is for the Child, given the loss of meaningful auditory opportunity for the first two years of life. I credited her testimony with a great deal of weight.*

The Director of CS testified. She holds an undergraduate degree in regular education with a minor in deaf education and a master's degree in deaf education. She holds Certification in Education of the Deaf, and the auditory verbal Certification of Listening and Spoken Language. She holds a supervisory certificate from the Pennsylvania Department of Education and is certified by the Department of Health as a licensed hearing-aid fitter. She is one of ten co-

[14] See above. This witness' clinical experience was accrued one-on-one with students, but not necessarily with their parents present during those sessions. An auditory verbal therapist accrues clinical hours with parents being present.

instructors across the county for a national program overseen by Children's Hospital of Philadelphia, Professional Preparation in Cochlear Implants, and works in conjunction with LaSalle University in this capacity. She also has a minimum of ten years experience in the public school system, having previously worked in another Intermediate Unit for three years and in the IU for seven years; in the IU she was a resource room teacher for the youngest age level. While employed by the IUs she was a member of a team performing evaluations, participating in IEP meetings and making placement recommendations. The Parents offered this witness as an expert in the area of auditory-verbal listening and spoken language; the witness was accepted as such. *This witness is familiar with the Child, having reviewed evaluation and progress reports, reviewed weekly lesson plans, and met with the Parents. Her expert testimony was accepted and was very helpful in understanding the severity of the consequences of the Child's early limited access to sound, the current gaps ["holes"] in the Child's language, and the reason why intensive intervention/remediation is crucial during the Child's window of neuroplasticity so as to place the Child in a good position to acquire further communication and literacy skills in a regular education school environment after specialized preschool.*

The Child's mother testified. She answered questions openly and without rancor, and her testimony helped clarify the Parents' position in the matter. I found her to be a credible and reliable witness.

FAPE: Having been found eligible for special education, Child is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq*. and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education [FAPE]. FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or student progress; and provided in conformity with an Individualized Educational Program (IEP). Services that a child requires to receive FAPE must be provided at no cost to parents. *Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516, 525 (2001) (quoting 20 U.S.C.) (29).

TUITION REIMBURSEMENT

Although parents have an absolute right to decide upon the program and placement that they believe will best meet their child's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court established a three part test to determine whether or not a Local Education Agency [LEA] is obligated to fund a private placement. *Burlington School Committee v. Department of Education of Massachusetts,* 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the LEA's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the LEA to pay? The second and third tests need be determined only if the first is resolved against the school district. *See also, Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

IU's and other LEAs provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the student to receive "meaningful educational benefit", a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000)* (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182, 184 (3d Cir. 1988*); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk)*; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.,* 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist*, WL 2682741 (E.D. PA. July 8, 2011).

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the student only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*. The Third Circuit explains that while an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" it "need not maximize the potential of a disabled student." *Ridgewood, 172 F.3d at 247 (3d Cir. 1999); Molly L v. Lower Merion School District, 194 F. Supp. 2d 422 (E.D.PA 2002).* An IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle,* Pennsylvania's federal court in the Eastern District noted, [LEAs] "need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist.,* 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit at the time it was created.

The IEP for each student with a disability must include a statement of the student's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum and meeting the student's other educational needs that result from the student's disability; a statement of the special education and related services and supplementary aids and services to be provided to the student...and a statement of the program modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other students with disabilities and nondisabled students; an explanation of the extent, if any, to

which the student will not participate with nondisabled students in the regular class... CFR §300.347(a)(1) through (4)

The IDEA also requires that disabled students be placed in the least restrictive environment that will provide meaningful educational benefit. Congress has expressed a clear intent and preference that disabled children be placed in regular education classes, and that removal of a student from regular education classrooms is permissible "only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C.A. § 1412(a)(5)(A); 34 CFR §300.550. Pennsylvania State regulations adopted by reference from the IDEA state verbatim what an IEP shall contain. 22 Pa. Code § 14.131(b) and 22 Pa. Code § 14.102 (a)(2) adopt all federal regulatory requirements, including the requirement that a student be educated in the least restrictive environment.

Discussion

Taking all the evidence presented during this hearing into careful consideration, it is clear that the IU did not at any time offer an appropriate program/placement to the Child.

The Child lost the full first foundational year of listening to language and beginning to speak that hearing babies enjoy. Once the Child received cochlear implants it was necessary for the Child to learn how to access and interpret sound through the device[s], and to begin practicing using spoken language. Although this Child's cognitive skills are intact at or above the average range, the Child needs to expend a great deal of time and effort learning speech and language skills that even children with much lower cognitive functioning have learned instinctively from birth. In addition to learning information from a preschool curriculum and learning how to be a social person, the child has to learn how to use and practice using one of the primary senses to access those developmental requirements. The analogy that comes to mind is that the Child needs to straddle two horses in order to move toward understanding the environment and developing into a social being – one being the "curriculum/social skills horse" and the other being the "listening/speaking horse". Typically developing children need only manage the curriculum/social skills horse.

I am persuaded by credible testimony from the Parents' witnesses that the need for the Child to overcome the crucial lost early year of hearing speech sounds and acquiring/practicing language is urgent during these preschool years when the brain is most plastic. Although I deem the Goals of the IU's IEP to be appropriate and to satisfy IDEA's requirements, I do not find the IU's offer of a program and placement in which these goals would be implemented to be appropriate. This is the case in several respects. First, I am persuaded that the proposed attendance in a specialized classroom for three days per week, at only 2 ½ hours to 2 ¾ hours per day, is not sufficient to provide FAPE to the Child, and was presented with no persuasive evidence as to the basis for the IU's determination in this regard. Second, even more significant than the insufficient number of hours of classroom services, is the meager amount of individual speech-language

therapy the IU offered – first a mere 30 minutes a week, and then nothing. The IU's fixed focus on individual speech/language therapy as being needed only for articulation is puzzling. The Child has significant language needs, as well as speech needs, that must be addressed intensively. Notably, as with the calculation of classroom days/hours, neither the IU's Supervisor nor the IU's Teacher/Speech-Language Pathologist could offer a reasonable explanation for the calculations underlying the small amount of 30 minutes once per week [then decreased to zero] of individual speech-language therapy time proposed. I do not find the IU's explanation that language deficits can be addressed solely in the classroom, particularly when all members of the classroom are hearing/language impaired. Third, and also very difficult to comprehend, is the IU's withdrawal of an offer of Inclusion/Consultation for the Child; even more difficult to comprehend was the IU Supervisor's explanation for the elimination of this inclusion opportunity. Each of the IU IEP's was inappropriate in that each offered insufficient individualized instruction, and two of the three IEPs failed to offer the Child the opportunity for supported inclusion with typically developing hearing peers. The IU denied the Child FAPE.

As I have found that the IU denied the Child FAPE in not offering an appropriate program and placement, I now turn to the appropriateness under the Act of the CS unilateral program and placement. As reflected in the Findings of Fact above, CS offers exactly the kind of intensive preschool program that the Child needs to effectively learn how to hear and how to speak. Notably, since the Child was first tested in May 2011 and through the third and final evaluation in September 2012, the Child made considerable progress. Virtually all the Child's services were provided at CS. This program/placement, partnered with diligent and involved Parents, has been proven to have conferred meaningful educational benefit to the Child. There are still holes to fill in the area of communication, but there is every reason to believe that the Child will be a successful learner and communicator. In addition to the intensive small group classroom experience the intensive focused individual speech/language therapy, and effective partnering with the Parents, CS is providing the Child with a carefully monitored inclusion experience in a typical preschool setting, rounding out the IDEA's mandate of an appropriate program in the least restrictive environment.

Having found that the IU denied the Child FAPE by failing to offer an appropriate program and placement, and that the CS placement unilaterally chosen by the Parents is appropriate under the Act, I now turn to the equities. There is no action that the Parents took that would serve to remove or reduce the IU's responsibility for tuition reimbursement. They visited two proposed program locations. They permitted the IU to evaluate their Child three times in sixteen months. They asked for meetings with the IU when presented with NOREPs they did not believe were appropriate, even though on several occasions the NOREPs were duplicates of NOREPs they had already rejected. They participated in Mediation. They did not rush to demand a due process hearing, doing so only after it was clear that a hearing was the only option as the IU was reducing the services it was offering in each NOREP following each re-evaluation. These Parents were admirably patient and exceedingly cooperative. In this matter I find that the equities wholly favor the family.

Conclusion

The Parents have carried their burden of proof and prevail in this matter. An Order follows GRANTING the Parents' request for tuition reimbursement for the CS.

Order

It is hereby ordered that:

1. The IU denied the Child FAPE by failing to offer an appropriate program and placement for the 2011-2012 and the 2012-2013 terms, beginning in June 2011 and continuing into the present.

2. The CS placement unilaterally chosen by the Parents is appropriate under the Act.

3. The equities in this matter wholly favor the Parents.

4. The IU must reimburse the Parents for tuition and costs associated with the Child's placement in the CS for the 2011-2012 and the 2012-2013 terms.

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

June 6, 2013 *Linda M. Valentini, Psy.D., CHO*
Date

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