

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

Student's Name: P.A.

Date of Birth: [redacted]

ODR Nos. 14380-13-14-KE

OPEN HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Montgomery County Intermediate Unit
1605 West Main Street
Norristown PA 19403-3290

Timothy E. Gilsbach, Esquire
Fox Rothschild, L.L.P.
10 Sentry Parkway, Suite 200
P.O. Box 3001
Blue Bell, PA 19422-3001

Dates of Hearing:

December 11, 2013; December 12, 2013; December 19, 2013; January 2, 2014

Record Closed:

January 10, 2014

Date of Decision:

January 23, 2014

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the Intermediate Unit named in the title page of this decision (IU) and was an eligible resident of the IU during the period of time relevant to this decision.¹ (NT 19-21.) Student is identified with Autism pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and is receiving Early Intervention (EI) services. (NT 18, 21.)

Parent requested due process under the IDEA, alleging² that the IU failed to provide the Student with a free appropriate public education (FAPE), by placing Student inappropriately; failed to supervise and provide the hours of behavioral consultant services offered in the Student's Individualized Education Program (IEP); inappropriately photographed Student; failed to assign a one to one teacher or educational assistant; prevented parental participation in educational decision making; failed to provide extended school year services; inappropriately photographed Student and released a copy of the photograph to a third party without parental consent; and retaliated against Parent by excluding Student from school photographs.

The hearing was completed in four sessions, and the record closed upon receipt of written summations. I conclude that the IU did not deprive Student of a FAPE, and that no relief is warranted.

¹ Parent challenged IU actions and omissions for the period from October 14, 2011 to the date of the first hearing in this matter, December 11, 2013. (NT 42-43.) I refer to this as the relevant period.

² Parent's allegations are set forth in two complaints requesting due process. Parent filed a complaint on October 14, 2013, which was assigned an Office for Dispute Resolution (ODR) number of 14380-13-14-KE. (IU 1.) Subsequently, on October 18, 2013, Parent filed another complaint with additional allegations, assigned ODR number 14397-13-14-KE. (IU 2.) The within decision is filed under both numbers and in final decision of both complaints.

ISSUES

1. Did the IU fail to offer and provide Student with a free appropriate public education during the period from October 14, 2011 to December 11, 2013?
2. Did the IU fail to offer and provide Student with an appropriate placement during the period from October 14, 2011 to December 11, 2013?
3. Did the IU fail to supervise and provide Student with the hours of behavioral consultant services offered in the Student's IEP during the period from October 14, 2011 to December 11, 2013?
4. Did the IU fail inappropriately to provide Student with a one to one teacher or educational assistant for school hours during the period from October 14, 2011 to December 11, 2013?
5. Did the IU fail to permit full parental participation in the IEP team, by altering or withholding documents that Parent was entitled to receive according to law, during the period from October 14, 2011 to December 11, 2013?
6. Did the IU fail to provide extended school year programming for the summer of 2014?
7. Did the IU inappropriately photograph Student without parental consent or release a photograph of Student to a third party inappropriately?
8. Did the IU retaliate against Parent by excluding Student from school photographs?
9. Should the hearing officer order the IU to provide compensatory education to Student for all or any part of the period from October 14, 2011 to December 11, 2013; placement in an approved private school or other placement; an additional year of EI services; a one-to-one attendant; or an apology from the IU?

FINDINGS OF FACT

1. Student is in Early Intervention, identified with Autism. Student is diagnosed with Pervasive Developmental Disorder. Student's pace of learning can be expected to be gradual. (NT 18; P 7.)
2. Student has some history of possible physical abuse prior to Student's present residence with Student's grandmother and guardian (Parent); Student does not have a known history of sexual abuse. (NT 18, 21; P 7.)

3. Student came to the IU early intervention preschool program from Infant and Toddler early intervention services in December 2010, at an approved private school. Student began attending a reverse mainstream class at that school. Parent obtained a diagnosis of autism privately, and thereupon Parent removed Student from that program. (NT 642-650, 779-781; IU 28, 103.)
4. In January 2012, Student was placed in an autistic support classroom at a different preschool provider. (NT 660-669; IU 35, 36.)
5. During the period from October 14, 2011 to December 11, 2012, Student was placed in an autistic support EI classroom. Student also was to receive behavior support services at home through a contracted EI agency. (NT 63-64, 73-78; IU 22, 43.)
6. From August 2012 to June 2013, Student was to receive the services of a Personal Care Assistant (PCA), five hours per week, who was assigned to Student by a local EI service agency. The PCA staff were supervised by a Behavior Specialist Consultant (BSC), three hours per week, who was a Board Certified Behavior Analyst. (NT 50-52, 62-63, 75-76, 145-146; P 3; IU 43.)
7. The EI program was providing Student with IEP services over any break in the EI schedule lasting for more than one week. (NT 46.)
8. The EI agency personnel who worked with Student documented sessions and provided reports to Parents. (NT 89-91, 395-400, 732; IU 92.)
9. Between January 10, 2012 and October 9, 2012, the contract providers of EI behavioral services failed to provide 42 hours of BSC services that the IU had offered to Student through Student's IEP. The Parent obtained a Complaint Investigation Report from the Office of Child Development and Early Intervention, dated September 18, 2012, ordering the IU to provide compensatory education. The IU issued a NOREP on October 9, 2012 providing for 42 hours of compensatory education in the form of BSC hours; the Parent approved these hours. Subsequently, the EI provider set up schedules to provide those compensatory education hours, and made up the hours specified in the NOREP. (NT 307-308, 690-694; P 9; IU 73.)
10. In August 2012, both BSC and PCA hours were owed by the EI program, and these were made up, or the IU offered to make them up, over the next few months by providing extra services in the home. (NT 65-70, 350-362; IU 100 p. 228.)
11. On October 9, 2012, the IU issued a re-evaluation report identifying Student as eligible for EI services with a classification of Autism. Parent did not raise concerns about the evaluation. (NT 303; IU 51.)
12. Parent filed a new complaint with the Commonwealth on October 9, 2012, alleging that the IU failed to implement the revised IEP dated January 10, 2012. On November 7, 2012, the Office of Child Development and Early Intervention issued a Complaint Investigation Report, finding that the IU failed to provide clear descriptions of when

periodic reports would be provided to Parent in the revised IEP, and ordering correction. (P 10.)

13. In November 2012, the IEP team, with Parent participating, decided to transfer Student from an EI autistic support classroom to a “reverse inclusion” preschool classroom at the same early intervention program, because the IU and the contracted provider decided that Student’s functioning was too high for the autistic support classroom and that Student would benefit from the typical preschool classroom. Student made the move pursuant to a transition plan in January. At that time, additional PCA hours were provided to Student, full time, in the classroom. (NT 63-64, 77-78, 136-142, 170-171, 297, 310, 392, 516 to 521, 679-689; IU 59, 62.)
14. The preschool classroom was provided by a contracting agency and the teacher was certified in early childhood. The classroom had about 13 to 15 students; about half of these students were typically developing and half had IEPs. The classroom followed the early childhood curriculum standards for teaching pre-academic skills, fine and gross motor skills, social skills and classroom readiness skills. It began with various signing-in activities, and shortly after 8:45 AM, the teacher began circle time, which usually lasted about 15 minutes. There were two periods of outdoor activity in which students participated in large motor and social activities. There was one small group period, in which students worked on IEP related instruction, a centers period, a quiet time period for quiet individual play, a period in which the teacher read stories to the class and a period for science and other activities. (NT 119-122, 133-136, 147-148, 788.)
15. There were times when the Student’s one to one PCA service was not provided. (NT 311.)
16. On January 4, 2013, Parent filed a complaint with the Commonwealth alleging various IU failures to comply with the IEP dated October 22, 2012, and failure to provide Parent with a copy of a NOREP signed at an October 22, 2012 IEP meeting. On February 22, 2013, the Office of Child Development and Early Intervention issued a Complaint Investigation Report, finding that the IU failed to include evaluation report data in two IEPs, failed to provide progress monitoring reports in accordance with the IEP, and failed to document an invitation to the November 2012 IEP meetings. The Office of Child Development and Early Intervention ordered the IU to provide the required monthly progress summaries, as well as other required documents, to Parent and the EI Advisor. (P 11.)
17. On April 4, 2013, Parent called the Student’s BSC to complain that Student had come home with a torn stocking and a bloody knee. The BSC reported the call to her supervisor at the early intervention agency, and the supervisor directed the BSC to photograph the injury. (NT 51.)
18. On the same day, the BSC interviewed the PCA behavioral staff about their observations on the day of the injury. The BSC went to the classroom and took Student into a bathroom near the classroom, where the BSC photographed the site of the injury. A PCA and a teacher’s aide (from the IU contracted educational agency providing educational

services to Student) were also present. In order to expose the knee area for the photograph, the BSC pulled Student's pants down, because the pants Student was wearing were tapered at the ankle, preventing the pants leg from being rolled up. (NT 50-51, 85-89, 99, 117; IU 74, 102.)

19. The BSC forwarded the photographs to her supervisor at the early intervention agency by attachment to email. (NT 53-54; P 3.)
20. The picture was emailed to relevant IU personnel, but not to anyone else. (NT 103, 610, 701; P3 p. 7.)
21. The BSC then called Parent to report on her investigation. (P 3.)
22. Neither the BSC nor the agency notified Parent beforehand regarding the plan to photograph the injury and Parent did not give consent to this action. (NT 51-52.)
23. The BSC notified the Parent more than one week after the photograph was taken, before a meeting at which the injury was to be discussed. (NT 52-53.)
24. From April 2013 through October 2013, the IU sought to place Student at more than one new preschool. The IU's case manager for Student took this action in response to Parent's requests to move Student to a new pre-school. None of the available approved private schools were appropriate for Student. (NT 276-292, 323-327, 329, 710-720; IU 81, 100 p. 4, 81, 282.)
25. In August 2013, the IU sought a behavior team that could teach Student pre-school academic skills. The plan was to utilize available hours for BSC or PCA staff in the home. The IU took this action in response to Parent's complaints that Student had learned sufficient pre-school academic skills. (NT 181-184; P 6 p. 12-13.)
26. The IU responded to Parent's concerns about Student's academic skill level by developing strategies for increased teaching of pre-school level academic skills in the classroom. (NT 135, 394.)
27. In September 2013, Student was evaluated by a behavioral health organization for behavioral health services, and was approved for BSC, mobile therapy and Therapeutic Support services. The treatment plan included teaching safety skills including address and phone number, and teaching emotional regulation and communication skills. (P 7.)
28. In September and October 2013, the IU became aware that the early intervention agency's BSC had failed to deliver the number of hours of on-site time that the IEP required for supervising the PCA staff in delivering pre-academic instruction to Student both at home and in the classroom. The IU immediately took steps to have the BSC staff person replaced and to provide make up hours of BSC services. (NT 368, 407-458; P 5; IU 100 p. 48-70, 401-417, 576, 583, 929-931.)
29. From July 2013 until October 31, 2013, Student missed substantial amounts of time in the circle time period, because Student's school bus often arrived after that period started.

The Student was not missing any hours required by the IEP, however. (NT 147-148, 199-205, 213-217, 461-462, 489, 722-730, 815-816; P 6, 16; IU 87.)

30. On October 7, 2013, at an IEP meeting, Student's teacher stated that Student was arriving late for circle time due to late bus arrivals. The IU moved on the same day to rectify the situation, and it was corrected within the month. (NT 213-217, 461-471, 815-816; P 6.)
31. On October 31, 2013, the principal of Student's preschool excluded Student from a class Halloween picture, and at about that time, a teacher covered Student's picture that was on the corridor wall with the pictures of other students. These actions were in consideration of an August 2013 release form indicating that Parent did not consent to class pictures being taken at the end of the year for distribution to other families, and did not consent to pictures taken of Student for other distribution purposes. Steps were taken to distract Student so that Student would not feel left out of the Halloween picture. (NT 207-213, 396, 773-776; P 14.)
32. In November 2013, the Student's preschool teacher covered Student's picture, which had been hanging in the hallway with the pictures of other students. These actions were in consideration of an August 2013 release form indicating that Parent did not consent to class pictures being taken at the end of the year for distribution to other families, and did not consent to pictures taken of Student for other distribution purposes. Student saw the covering of Student's picture in the hallway. (NT 207-213; 369, 371-372, 503-509.)
33. After these incidents, on November 5, 2013, Parent removed Student from the school program and asked the IU to refer Student to another program. The IU's case manager for Student thereupon sent out a referral to another preschool, in an approved private school, that offered a full time reverse mainstream program similar to the program that Student had been attending. At an IEP meeting on November 14, 2013, this was offered as an interim placement pending resolution of Parent's due process requests. (NT 217-231, 323, 330-331, 333-338, 740; P 1, 8.)
34. Parent refused the proposed placement and requested due process. At some point in time after the refusal of the NOREP, but not in the NOREP as returned, Parent provided three reasons for refusing the proposed interim placement: 1) the IEP provided fewer BSC and social work services; 2) Student had been enrolled previously in the proposed school, and had made insufficient progress; 3) the proposed placement would provide fewer days of service, because the proposed school operated on a calendar for approved private schools, which offered fewer school days than the calendar of the school from which Parent had removed Student, which operated on the IU calendar. (NT 217-231, 333-338, 750; P 1, 8.)
35. Parent misread the proposed IEP with regard to BSC hours; the proposed IEP offered the same number of BSC hours as the previous IEP, although the hours were broken down to show that half of the hours would be provided at school and half at home. (NT 217-231; P1, P 2 p. 7; IU 54.)

36. The proposed IEP did eliminate social work hours, which had been provided at the school from which Parent had removed Student; the proposed preschool did not have social work services. (NT 217-231; P1; IU 54.)
37. The proposed placement offered three hours, forty five minutes more of classroom time per week than the previous placement from which Parent had removed Student. (P1; IU 54.)
38. On November 14, 2013, the IU clarified that the proposed IEP would not reduce the total number of BSC service hours. (NT 217-231; P 1; IU 54.)
39. The IU provided Student with summer programming and is obligated and pledged to do so for the coming summer. (NT 813-814.)
40. From October 2011 to November 2013, Student made substantial progress in a broad range of academic, fine motor, speech/language, behavioral and social/classroom skills. Student's pace of skill acquisition slowed in gross motor and behavior in 2013. The EI agency provided quarterly reports – and in 2013 monthly reports – to Parent with data and interpretations of the data on Student's progress. (NT 67-82, 142-144, 148-150,153, 381-384; IU 61-63, 100 p. 225-226, 230-233, 242-244, 328-336, 361-373, 393-395, 401-402, 418-421, 438-441, 480-484, 528-529, 576-580; P 6 p. 17.)
41. By October 2, 2013, Student did not know Student's address or telephone number, but learned those through intensive teaching by a new behavioral health service provider from October to December 2013. Student did not demonstrate complete knowledge of numbers and letters. (NT 242-243, 247-250; P 7; IU 100 p. 393-394, 418-421.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).³ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must

³ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

produce a preponderance of evidence⁴ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

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

In this matter, the Parent requested due process and the burden of proof is allocated to the Parent. The Parent bears the burden of persuasion that the IU failed to comply with its obligations under the IDEA, and that the hearing officer should order the relief that Parent requests. If the Parent fails to produce a preponderance of evidence in support of Parent’s claims, or if the evidence is in “equipoise”, then the Parent cannot prevail.

FREE APPROPRIATE PUBLIC EDUCATION – APPLICATION OF LEGAL STANDARD

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent.

⁴ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d 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, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged

prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

I conclude that the evidence is not preponderant in favor of Parent on the claim for compensatory education from October 14, 2011 to December 11, 2013. Parent did not provide preponderant evidence that the District offered an inappropriate placement or an inappropriate IEP. On the contrary, the evidence is preponderant that the IU offered an appropriate placement and program to Student during the relevant period, and that Student was able to make meaningful progress, despite some lapses in implementing the IEP, lapses that the IU corrected appropriately. Based upon these conclusions, there is no basis for an order for compensatory education.

PLACEMENT

Parent argues that the placement was inappropriate, because Student is identified with Autism and therefore should be in an autistic support classroom. Parent provided evidence that Student was delayed socially by over three chronological years. Parent also showed that parts of Student's academic learning were very limited in the IU placement, in that Student did not know numbers up to ten and did not know letters. This evidence was provided through a behavioral specialist assigned by the behavioral health agency to teach Student safety skills including home address and telephone number. This witness' testimony was consistent with the preschool progress reports for the summer of 2013, which showed that Student could respond receptively

to some numbers and letters, but had not yet learned to expressively demonstrate knowledge of numbers up to ten or letters. Thus, the record is preponderant that the Student had not mastered numbers and letters, although that skill was on the IEP, was addressed by the IU, and was to some extent increased from the level that Student had demonstrated in October 2011.

The ultimate question for this hearing officer, however, is not whether or not Student knew numbers and letters, and it is not whether or not it would be preferable for Student to know them. Obviously, Parent desires that Student have these skills, and I do not make any judgment as to that. As discussed above, the issue before me under the IDEA is whether or not the IU failed to provide Student with an opportunity to make meaningful educational progress in the reverse mainstream preschool placement and the early intervention home program. I conclude that the IU provided such an opportunity, and that Student made meaningful educational progress in preschool during the relevant period of time.

The IU produced numerous IEPs and IEP revisions for Student, encompassing the relevant period of time. These IEPs addressed Student's educational needs for specialized instruction, speech and language therapy, occupational and physical therapy, and behavioral services. The IEPs provided these services in the classroom and in the home. The record shows that these services were provided by appropriately qualified professionals.

It is fundamental to my conclusion here that the purpose of preschool and early intervention services at the tender ages of four through six is not limited to teaching a child academic skills like numbers and letters. While such skills are part of the curriculum, the record shows preponderantly that early intervention and preschool educators are required to address many other skills, including academic skills like knowing how to use a calendar, colors and shapes; gross motor skills like jumping and playing on outdoor equipment; fine motor skills like

drawing, coloring and cutting with scissors; language skills like communicating wants and needs through words, learning to speak in sentences, and using adjectives; classroom readiness skills like sitting still for relatively short periods of time such as ten or fifteen minutes, following directions and conforming to a routine; social skills like sharing and communicating with peers; and behavioral skills like control of impulses and not taking aggressive action towards peers of teachers. Thus, progress in learning letters and numbers is not the only test – or even the most important test – of whether or not the IU has given Student an opportunity to make meaningful educational progress. Rather, I must review Student’s progress in all the above areas of education to reach a conclusion on whether or not the IU has provided Student with what the law requires.

I also keep in mind, based upon the credible testimony in this matter, that children do not all learn the same skills at the same ages. Various skills develop at various times in a young child’s development. Thus, the fact that Student has not mastered letters and numbers does not prove that the Student has not mastered any of the many other skills that children learn at the preschool level.

Finally, as explained above, the IDEA and the courts instruct me to measure whether a child’s progress is “meaningful” based in part upon whether or not the child’s intellectual ability allows the child to learn at a fast, moderate or slow pace. Here, the record shows that the Student’s developmental disorder will permit only “gradual” acquisition of skills. Thus, the evidence indicates that Student’s very slow learning of letters and numbers is consistent with Student’s intellectual ability. Parent did not produce preponderant evidence to the contrary, even considering some testimony (from a behavior specialist with no educational background⁵) that

⁵ I accord this witness some weight, but I accord less weight to her testimony than I accord to that of the IU’s professional educators, because she had little experience in education; did not have the training of a psychologist to

Student was able to memorize Student's address and phone number in a few weeks with supplementary training provided through the new behavioral health service that Parent obtained for Student.

A preponderance of the evidence in this record shows that Student learned gross and fine motor skills, classroom readiness skills, social skills and behavioral skills, at least in school. In addition, Student made substantial progress in other academic and pre-academic skills, despite very small progress in letters and numbers. In light of Student's intellectual abilities and preschool age, I conclude that the progress shown by the IU was meaningful for this child. Thus, Student was not deprived of a FAPE due to the placement assigned by the IU or the implementation of the IEP.

The evidence did show that the Student was not arriving at school in time to participate in "circle time" in the preschool classroom, from July 2013 to October 31, 2013. However, the evidence also showed that Student's arrival time and total hours of specialized education were consistent with the IEP; therefore, Student was not deprived of services defined by the IEP as a FAPE. Moreover, the record does not prove preponderantly that Student was deprived of a FAPE, as Student showed academic, classroom readiness and social progress during this time.

Even if a FAPE deprivation were shown by this record, the problem was corrected within a reasonable time accorded by the law for identification and remediation of inappropriate services, and no compensatory education is warranted for this situation. The IU changed the bus schedule for Student within a month of finding out that this was happening, and assured that Student would attend the full circle time.

opine on developmental questions; knew Student for only a few months; and had little opportunity to observe or discuss Student's previous school performance in the preschool setting. Her testimony about Student's acquisition of address and telephone number does not prove knowledge of letters and numbers in and of itself, since a child can learn to memorize letters and numbers without understanding their real meaning, and there was no evidence that Student had attained this level of understanding.

Parent attempted to prove that, when she removed Student from placement in November 2013, the IU offered an alternative, interim placement that would have reduced the amount of educational services that the Student would have received. The record does not support this argument preponderantly. Student's related services and behavior hours were not reduced. The placement would have been the same, reverse inclusion.⁶ The Parent argued that the alternative school offered by the IU would have been on a different school calendar and therefore the Student's specialized instruction time would have been reduced; however, the record suggests that the Student would not have received fewer instructional days, as any shortfall would have been made up by summer programming in combination with an increase in the number of daily school hours being offered. (NT 795.) Even if the Student would have received net fewer school days, there is no evidence that such a reduction would have been great enough to render the offered services inappropriate. And this offer was necessitated by Parent's removal of the Student from a placement that the IU was offering, so any reduced services were due to Parent's obstruction of the greater number of days of service that the IU was prepared to continue to provide.

ONE TO ONE EDUCATIONAL ASSISTANT

The evidence is preponderant that the Student did have a one to one educational assistant, staffed with a PCA from the early intervention agency. This was provided in the IEPs and witnesses testified to their knowledge that the assistant was present in the classroom and at home. Despite all of the issues between the parties, there is no record that Parent ever

⁶ As this offer was made after due process complaints were filed, this would have been Student's pendent placement.

complained about the PCA not being present. Parent did not introduce any evidence of a substantial⁷ failure of that agency to provide that assistance.

Parent understandably made much of the IU's failure to provide BSC hours as required by the IEP. These were on site consultative services by a board certified behavior analyst to the PCA staff who were delivering the instruction and supplemental aids and services both in school and at home. In short the BSC services were intended to provide both supervision and appropriate adjustment in the supportive and instructional strategies being employed by the PCA staff. Parent rightly points out that these services were necessary to make sure that the PCA services were delivered appropriately.

The record is preponderant that these services repeatedly were allowed to lapse by a succession of early intervention agencies that were charged with delivering these services under the supervision of the IU. In 2012, the Office of Child Development and Early Intervention issued a Complaint Investigation Report finding a failure to provide 42 hours of such services. The IU itself found additional hours not provided in 2012. In 2013, again, the BSC hours were not being provided.

However, the record is preponderant also that the IU, at least after receiving the state Complaint Investigation Report, made up the defaulted hours to Student. The case manager testified that the 42 hours were made up to her knowledge. The record shows that the IU responded and made up additional hours in default both later in 2012 and in 2013⁸. While the recurrence of this problem raised a red flag for IU administration, it does not prove that the

⁷ The IU's case manager did admit frankly that the attendance of PCAs was not perfect. There was no detail on this and Parent did not pursue it or provide evidence as to this admission. Without such further detail or corroboration, this admission does not prove by a preponderance of the evidence that the IU failed in a substantial way to comply with the PCA hours required by the IEP.

⁸ To the extent that BSC hours were not made up, the record shows that the IU through the contracted agency's staff offered make up hours, and Parent refused them, due to the pendency of the due process matters.

Student was deprived of educational services as a result. Parent failed to show any such deprivation. Thus, the record is not preponderant that the IU's difficulties with the administration of IEP required BSC hours caused the deprivation of a FAPE to Student.

Parent did elicit evidence that there was a change in the instructional approach to teaching Student letters and numbers when a new PCA was assigned in 2013. This in and of itself is insufficiently persuasive to prove by a preponderance that the entire instructional approach to Student was inappropriate. The witness, a behavior analyst, when asked whether or not this proved that the previous instruction had not been done properly, responded "I assume so." (NT 375, 405.) This response was equivocal, and was not a clear criticism of the previous instruction.

PARENTAL PARTICIPATION

The record is preponderant that the IU and its contracted agencies were highly responsive to Parent, whose efforts to advocate for Student reached levels of detail that intruded upon the professionals' appropriate sphere of expertise. While Parent attempted to show that there was lying and falsification of documents, the evidence did not bear this out.

DISCLOSURE OF RECORDS

I conclude that the IU did attempt to provide documents to Parent when requested to do so. There were significant delays in getting documents to Parent, some of which were due to parent's actions, and others of which were due to the complex nature of the document requests from multiple providers under contract with the IU. There was no evidence that these delays interfered with Parent's ability to participate in the IEP team process or in the education of

Student. There was no evidence that these delays caused a deprivation of educational services or FAPE to Student.

EXTENDED SCHOOL YEAR

There was no evidence that the IU deprived Student of summer services to which Student was entitled. Services were provided during the summer months according to the IEP, except on breaks allowed by law, when behavior services were reinstated for breaks lasting more than one week.

PHOTOGRAPH AND DISCLOSURE TO THIRD PARTY

Parent was highly offended and displeased when a contracted early intervention agency took a picture of Student, and pulled Student's pants down (in a bathroom) to do it. All witnesses agreed that this incident should not have occurred. There was no evidence that the resulting picture was disseminated beyond the agency in question, the preschool and the IU. I find no evidence that this incident created a dangerous situation or otherwise caused a deprivation of a FAPE.

RETALIATION

I find no evidence of retaliation in the exclusion of Student from school photographs or the masking of Student's photograph on a corridor wall. The record shows that these actions were taken because Parent had withheld permission for photographs of Student being disseminated; this was done in a release that referred, not just to end of year slide show photographs, but to any photographs that would be disseminated to a third party. Parent asserted,

but provided no documentary corroboration, that there were releases for various kind of photographs; Parent nevertheless admitted that she expected to give prior permission for all photographs. Thus, Parent 's own admission showed that the IU contractor's staff correctly interpreted the written release form with permission withheld.

CREDIBILITY

Parent asserts that there have been documents that were inaccurate, and documents that were falsified. As a result, Parent argues that none of the documents can be trusted, and that Parent's observations of what the Student can do, which differ from the data reported in the documents, should be accepted to show that Student has not made progress. I do not accept this argument.

The District produced hundreds of pages of progress reports, dated contemporaneously with the events reported, and authored by a variety of teachers, behavior specialists and related services providers. I find it highly unlikely that all of these reporters would have conspired to create false reports of progress for Student. All provider witnesses vouched for and relied upon the data set forth in the documents.

Parent produced several instances of conflicts among the assertions in certain documents, showing that certain reports to Parent by a single teacher were filled out inaccurately. These were not progress monitoring documents, and were not based upon progress data.⁹ Parent failed to show by a preponderance of the evidence that documents were falsified. On the whole,

⁹ Parent produced one progress report by a BSC in October 2013, in which the reporter herself appears to have altered the report to contradict its original progress data regarding Student's recognition of letters. (P 5 p. 11.) Under the circumstances, this gives me pause, but does not impeach all of the progress reporting, either in and of itself, or when taken together with other discrepancies in the documents. I consider that the author of the document was the one who changed it, so that the effect of the change was to provide accurate information. Again, mistakes and discrepancies of this nature do not, without much more persuasive evidence, lead me to believe that the progress documents as a whole were false or unreliable.

Parent's evidence, while it cast some doubt upon the reliability of the IU's documentation, did not succeed in impeaching the accuracy of the vast majority of the progress reports in the record.

I found that Parent's testimony was contradicted by numerous credible witnesses, and that Parent, upon cross examination, was unable to defend many of the assertions that she had made, claiming a failure of memory. The record showed a number of instances in which Parent changed positions or came up with new charges in an apparent effort to create a record for this due process proceeding. I accept that Parent's overriding motive was to obtain more services for Student and to correct what Parent believed (erroneously) to be inappropriate services. Nevertheless, I must accord reduced weight to Parent's testimony on the record as a whole.

I found that the District's witnesses were credible. The case manager's memory was sometimes so limited as to raise concern, but on the whole I found her to be credible, based upon her testimony and upon corroboration by the documentary record.

CONCLUSION

In sum, I conclude that the evidence is not preponderant that any of the IU actions or events complained of deprived Student of a FAPE. None of the IU actions or events complained of interfered with Parent's ability to participate in the IEP team process or in the education of Student. Therefore, none of the requested relief will be ordered.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

AND NOW, this twenty-third day of January, 2014, for the reasons stated in this final decision, it is ORDERED that the IU has not deprived Student of a FAPE or interfered with Parent's participation in educational planning for Student, and that no relief is due.

William F. Culleton, Jr. Esq.

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

January 23, 2014