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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: J.G.

ODR #17816 / 15-16 AS
#18091/16-17 AS

Date of Birth:
[redacted]

Dates of Hearing:
September 13, 2016
September 21, 2016
October 19, 2016

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Pro Se

Parent[s]

Pro Se

Delaware County Intermediate Unit
200 Yale Avenue
Morton, PA 19070

Gabrielle Sereni, Esquire
Raffaele & Puppio
19 W. Third Street
Media, PA 19063

Date of Decision:

November 19, 2016

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

The Child¹ is a preschool-aged child residing within the boundaries of the Delaware County Intermediate Unit (IU) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the classification of Autism. As such, the Child is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The Parents² requested this hearing³ because they believe that the program and placement the IU offered for the Child is inappropriate, and that in order to receive a free appropriate public education (FAPE) the Child requires a placement in a specific private program (Private Program) for autistic children. The IU maintains that its offer of a reverse mainstreaming program and placement offer (IU Placement) is appropriate. The Parents are asking for the IU to fund the Private Placement they have selected, to reimburse them for the tuition to the private classroom (Classroom) in which the Child is currently enrolled, and to reimburse them for an independent educational evaluation (IEE) they obtained, the report of which was not received until early in September 2016 shortly before the first hearing session.⁴

Based upon the preponderance of the evidence before me I find in favor of the Intermediate Unit.

Issues

1. Is the IEP the IU offered to the Child via a NOREP on July 27, 2016 appropriate?
2. Is the placement the IU offered appropriate?
3. Must the IU reimburse the Parents for the tuition they paid to the current Classroom?
4. Must the IU reimburse the Parents for an Independent Educational Evaluation they obtained for the Child?

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.

² Both Parents were present at the due process hearing sessions. As primarily the Child's mother conducted communication with the IU and represented the Parents at the hearing the term "Parent" is used in the body of this decision to designate the mother, with the understanding that she was acting on her behalf and that of the Child's father.

³ The Parents filed their first complaint on May 26, 2016 and filed a second complaint on identical issues following the IU's issuance of its last IEP and NOREP. The complaints were consolidated. Originally the Parents were represented by experienced counsel but by the time of the hearing they were acting pro se.

⁴ The hearing was initially scheduled within the mandated timelines; the Parents asked for rescheduling and an extension of the Decision Due Date in order for the IEE to be completed. [NT 215-216]

Findings of Fact⁵

The Child

1. The Child is [early pre-school-aged] and resides within the region served by the IU. The Child is eligible for special education services under the classification of autism. [S-20]
2. The Child received 20 hours per week of one-to-one Early Intervention (EI) Infant Toddler services, including 15 hours of Applied Behavior Analysis (ABA) under an Individual Family Service Plan (IFSP). These services were provided by a private agency contracted through the IU. [NT 39-40]
3. Because the Parents have not approved the IU's Notice of Recommended Educational Placement (NOREP) offered in July 2016 EI services are being continued under the pendent IFSP. The IU has taken over provision of these services. [S-10]
4. The Parents have supplemented the pendent EI program through their insurance with additional hours of speech therapy and ABA therapy, as well as providing structured recreational activities (gymnastics, art, music) with neurotypical peers. [NT 39-40, 258, 438-439]
5. The Parents have also enrolled the Child in a small language enriched private preschool program two days per week pending the outcome of the due process hearing. [NT 198-200]
6. In April 2016⁶ as the IU was evaluating the Child in preparation for the transition to Preschool services, a Board Certified Behavior Analyst (BCBA) made observations using the VB-MAPP⁷ over three days totaling about five hours. The Child was [less than three years of age] at the time. [NT 41-42, 343-344; S-14, P-36]
7. The BCBA notes that for a child on the autistic spectrum, not yet three years old at the time the VB-MAPP profile was "pretty strong". [NT 92, 349-351; S-14]
8. When the VB-MAPP was completed in April 2016 the Child had emergent academic skills including mathematic understanding of numbers and letter identification. [NT 353]

⁵ The IU's exhibits are marked as "S" followed by the exhibit number; the Parents' exhibits are marked as "P" followed by the exhibit number.

⁶ The transcript at page 343 incorrectly states 2015 rather than 2016. Based on the Child's birthdate and age at the time of the VB-MAPP analysis 2016 has to be correct.

⁷ The VB-MAPP is a criterion-referenced evaluation. The developer looked at typically-developing children, asked experts in the field about what they thought a child at a certain age should be doing, and then created the VB-MAPP chart and its age-scaffolded list of discrete skills. [NT 422-424]

9. The April 2016 VB-MAPP reflected that the Child had all the basic repertoires in place but needed more emphasis on the more complex verbal functional skills such as answering questions, being able to socialize with peers, and expanding descriptive language. [NT 352]
10. The speech/language portion of the transition evaluation identified that for age the Child's language was not very complex, there was difficulty answering W-H questions, utterances were short and there were not a lot of modifiers or adverbs, adjectives or pronouns used. Also, yes/no questions were not yet consistent. [NT 497-498]
11. Since the Child does have an imitative repertoire and an echoic repertoire there are all the pieces to enable the Child to start naturally imitating typical peers' more complex verbal behaviors.⁸ [NT 354-355, 377]
12. The Parent's stated goal is to have the Child on level with peers in all aspects of development, ideally by age five, although she realizes this may not be realistic. [NT 110, 115, 191-192; S-8, S-10]
13. At the time of the transition evaluation the Parent's stated goal was for the Child to be in a typical classroom with support. [S-37]

Transition Evaluation

14. A member of the IU team responsible for the Child's transition from the Birth to Three program to the Preschool program met with the Parent in January 2016 and collected verbal and written Parent input. [NT 609-612, 642-643; S-7, S-8, S-9]
15. Prior to conducting its transition evaluation, the IU had not worked with the Child, as EI services were being delivered by a private agency. The Parent did not grant the IU evaluators' requests for written permission to speak with the Child's EI providers during the time the evaluation was being conducted and delayed providing the IU with some relevant documents in her possession. The Parent was concerned that at the IEP meeting the IU would not correctly convey information obtained from the private EI providers, and because she felt the IU was not listening to her she wanted her own documentation. Although she acknowledged that EI information would be helpful to an IEP team when drafting the IEP, the Parent questioned the need for the EI data since the IU would be collecting data during its own evaluation. [NT 121-128, 185, 187-188, 253-254; S-15]

⁸ Although the final program/placement offer is being judged based on the IU's knowledge at the time it was created, it is noted that the private ABA therapist who still works with the Child recorded data on the VB-MAPP in August 2016 that showed an overall increase in skills (86.5 points out of 140) over the data set in April 2016 (71.5 points out of 140), indicating that, as could be expected, at the time of the hearing the child was functioning at a higher level than when the transition evaluation was completed and when the July 2016 IEP was completed. [NT 342-343, 359-360; P-50]

16. Eventually the Parent did sign the release which the IU had originally sent on March 18, 2016. She delivered it to a receptionist at the IU on April 22nd which was the day before spring break; the IU special education department noted having received it on April 28th, the day before the IU's evaluation report was issued. [NT 181-184, 187-188; S-15, S-19, S-20]
17. The Parent did give the BCBA permission to speak with the EI ABA therapist who is now providing private ABA services to the Child. [NT 410-411]
18. The IU conducted a full team evaluation of the Child for transition to preschool age services. The evaluation was completed on March 16, 2016. [NT 609; S-20]
19. The IU's evaluation included direct administration and/or review of assessments, rating scales and available records in the following developmental areas: cognitive ability, fine and gross motor skills, speech/language skills, adaptive/self-help skills, and autism spectrum indicators. [NT 612-624; S-20]
20. The IU's evaluation identified the Child as having autism. [NT 612]
21. The Parent believes that because the Child's behaviors interfere with learning, an FBA should have been done as part of the IU's evaluation. An FBA had been performed by the former EI/now private ABA therapist because the Child had been exhibiting interfering behaviors in the home during sessions around interactions with the Parent. The private ABA therapist did not mention to the BCBA that behaviors were interfering with the Child's learning. [NT 77, 80, 456]
22. Having seen hundreds of children on the autistic spectrum, the BCBA finds that the Child's behavior was not out of the realm of average for a [child of Child's age] on the spectrum who has never been to school, and who has had no exposure to group settings in a systematic way. Before she would conclude that the Child's behavior is interfering with learning such that an FBA and a behavior plan are needed she wants to see how the Child would look in a classroom with a good special education teacher embedding all the technologies and techniques available to help the Child who would be new to school and struggling with language. [NT 403-404]
23. The BCBA concluded that based on skills acquisition in the time period from the April 2016 VB-MAPP data which she collected to the August 2016 VB-MAPP data which the private ABA therapist reportedly collected, the Child is "learning at a phenomenally fast rate" such that behaviors are not interfering with learning. [NT 404; S-14, P-50]
24. The utility of an FBA done in the home during the transition evaluation to be used to construct a behavior plan to be implemented in a preschool setting several months later would have been questionable. [NT 405]

The Proposed IEP

25. On May 16, 2013, before the Child turned three, the IU issued its first IEP and accompanying NOREP to transition the Child from Birth to Three services to Preschool services. [S-46⁹]
26. The IEP team met four times from May 2016 through July 2016 and numerous changes were made to the IEP goals and the specially designed instruction at the Parent's request. The Parent also discussed her concerns about the IEP at the Resolution meeting while she was still represented by counsel.¹⁰ The final NOREP the IU offered after these five reportedly rather lengthy meetings is dated July 27, 2016. This is the IEP referenced in the rejected NOREP and is the IEP under consideration in this decision. [NT 233-236, 240-241, 251; S-47]
27. The IEP provides educational goals to address the Child's needs in the areas of problem-solving and reasoning, and verbal concepts. [NT 623-624; S-46]
28. Although it is very difficult at age three for a child to demonstrate problem solving skills in a clear manner, sorting and matching are some of the primary skills that preschoolers use to develop and demonstrate their problem solving. The IEP carries a goal addressing making decisions about comparisons of materials. Lifelong education involves comparing and contrasting, and in preschool sorting and matching is a foundational skill for math and reading. [NT 617-618, 622]
29. In the transition evaluation the Child showed a strength in some of the rote skills of knowledge of colors, letters, and numbers, but when that information was presented in a different manner or the Child was asked to make decisions about the materials the Child did not demonstrate that higher level of skill. This was consistent with the VB-MAPP data at the time and with information from the EI educator. [NT 618-620]
30. In the evaluation the Child showed a need in understanding and expressing primary cognitive and verbal concepts such as big/little and same/different that engage early preschool learners. These concepts involve foundational decision-making that young children use to gather information to build a fund of knowledge and make judgments. This foundational skill is also important for letter discrimination and reading words. [NT 623-624]
31. The IEP carries goals in the area of applied behavior analysis directed toward expanding the Child's language repertoire in part to reduce the Child's using interfering behaviors to express wants and needs, and toward expanding the Child's socialization and developmentally appropriate play skills. [NT 372-376, 379-381; S-46]

⁹ The Parent created P-47, a condensed document that just listed the July 2016 IEP goals. However the actual IEP at S-46 is the document that will be referenced throughout this decision.

¹⁰ Specifics about the Resolution Meeting were not discussed at the hearing.

32. To prevent elopement or interfering behavior the IEP provides support for the Child when it is necessary to transition from a preferred activity to a non-preferred activity through visual and other non-verbal cues, errorless teaching and differential reinforcement. [NT 383-385; S-46]
33. At the Parent's request goals were added to the IEP to address the Child's need to learn to follow functional two-step directions. [NT 395-397]
34. The IEP provides for an Applied Behavior Analysis (ABA)-trained one-to-one aide to be with the Child at all times during the school day at the IU Placement, and to provide an additional 6 hours of individual ABA therapy weekly after the completion of the school day. The one-to-one ABA assistant was added to the IEP on the BCBA's recommendation so that this individual could minimize distractions and provide support, and also to address Parent's concerns about class size. [NT 390-391, 396-397, 629; S-46]
35. Due to the Parent's concerns that the Child would be anxious and because the Child had not attended preschool before, the IEP team agreed that the assigned ABA-trained aide would go to the Child's home twice before the Child was introduced into the reverse mainstreaming environment so that the Child would associate that person with home and so that the pairing process could begin. [NT 390, 402-403; P-46]
36. The IEP provides that a Behavior Specialist Consultant (BSC) would spend ten hours per week providing supervision and support to the one-to-one ABA-trained aide and to the IEP team that's implementing the IEP to make sure the programming is running smoothly and the Child is making progress. [NT 394-395]
37. Given the Parent's stated desire that the Child receive services 52 weeks a year, the IEP team addressed services over breaks at the first IEP meeting. The IEP provides that the Child would receive 2.5 hours per week of ABA services during any scheduled IU Program break that lasts more than a week. In addition the IU planned to look at the Child's functioning before and after breaks (regression/recoupment) to see if any additional services were needed during breaks. [NT 210-211, 401-402; S-47]
38. The IEP provides for the Child to receive speech therapy, occupational therapy, and physical therapy, as well as the aforementioned ABA therapy to address the Child's needs as identified by the evaluation. [S-20, S-46]
39. The speech/language therapist on the IEP team worked with the team's input and the Parent's concerns about development of goals and teaching strategies to address the deficits the Child displayed during the transition evaluation. [NT 498-503, 508, 511-516]

40. Using information from the transition evaluation, information from a private provider and input from the Parent the occupational therapist developed IEP goals and strategies to address the Child's needs in accomplishing fine motor tasks in the preschool setting. [NT 578-585]
41. The Parent believes the IEP is not appropriate because the wording of some of the goals is not specific and/or that the criterion for achieving the goal is set too low. [NT 59-60, 71, 76-78, 80-81, 83-84, 89-90, 229-233]
42. The Parent also asserts that many of the IEP goals are not appropriate, because she and/or the private behavioral analyst or speech therapist have observed the Child already use the language or perform the activities to which the goals are directed.¹¹ [NT 62-64, 66, 68-69, 71-75, 78-79, 85-89, 237-239, 431, 650-651; P-48]
43. As reported in a list the Parent compiled starting in July 2016 the Child has demonstrated a number of verbalizations in the home. The private speech/language therapist also created a list of verbalizations she heard. However, sometimes children say things at home or display skills at home that are not heard in therapy or in evaluation sessions at an office. [NT 262-263, 269, 400-401, 452, 620-621; P-48, P-51]
44. At times children who have been taught skills in a one-to-one ABA setting at home have difficulty generalizing those same skills to a classroom setting. [NT 453-454, 508, 516-517]
45. Some of the Child's language is rote and the Child has more difficulty applying it functionally. [NT 297]
46. At the present time the private ABA therapist notes that the Child has gaps in requesting, labeling, responding to commands, following directions and socialization. [NT 706]
47. The private ABA therapist currently working with the Child noted that some of the July 27, 2016 IEP goals that the Parent believes are inappropriate because they were already mastered instead are still "being accomplished" or "not mastered ... [the Child] is in the process" or are "a definite area of need" or "recently mastered" or the Child "can do in a structured (one-to-one) teaching session with no distractions". The current ABA therapist was shown the Parent's list of the Child's verbalizations and responded that she could not "testify to everything on this list". [NT 685, 687-688, 690, 697-699]

¹¹ The due process hearing was held in September and October 2016. While there is no doubt that the Child may have and should have acquired more skills since the final IEP was offered at the end of July 2016, that IEP is being judged as of the time it was written in light of what the IU knew at the time. *See for example NT 447-448.*

48. In looking at the speech/language goals in the IEP the private speech therapist noted that although the Child was working on some of the same words and goals, the Child had not achieved mastery, so including them in the IEP was not inappropriate although targets might have to be raised in a few months. [NT 265-268, 270-271]
49. The BCBA did a thorough evaluation, and ascertained from the current private ABA provider that the skills that she was targeting in the IEP goals were appropriate, were in line with VB-MAPP data, and had not already been accomplished as of the time the IEP was offered. [NT 400, 411, 430, 491-493]
50. If the Child has mastered a goal since the July 2016 IEP was offered, or masters a goal once the IEP is implemented, the IEP revision process is very simple and can be accomplished by holding an IEP meeting or through a phone call with the Parent. [NT 388-389, 510, 517]

Placement Considerations

51. The April 2016 VB-MAPP profile indicated that the Child needed access to a typical preschool curriculum with typical peers for socialization and modeling of their language throughout the day, but since there had been no previous exposure to a learning group the Child needed to be wrapped up “in a lot of support” to be successful. [NT 353, 355-357, 396-397]
52. The BCBA noted that the Child’s educational experience up to the time the April 2016 VB-MAPP was completed was comprised of “hours and hours per week of adults giving [the Child] targets and [the Child] spitting them back” and that this situation was “very contrived and [tended] not to lead to very naturally developing language”. The BCBA pointed out that “the best thing you can do” with a child like this “is put them in an environment and support them in an environment where they see kids their own age using this language and these operants in a natural way”. [NT 354]
53. In order for the Child to be able to access the general education curriculum and function in a typical classroom with support when entering a school-age program, the Child needs a more typical pace of instruction and requires consistent access to typical peers in an educational setting. [NT 627-628]

The IU Placement

54. The Parents rejected the last NOREP offering the IU Placement. [NT 212; S-47]
55. The IU is offering a “reverse mainstreaming” program at a community agency where typically developing peers are enrolled into a preschool classroom designed for disabled children. This community agency has a long history of conducting reverse mainstreaming programs at various locations. [NT 627]

56. At the Parent's request the location of the IU Placement's proposed classroom was changed from one of the community agency's centers to another. The Parent observed the proposed classroom in the second center. [NT 248-249, 251, 444-445, 631-632; S-5, P-34]
57. Although the proposed classroom has a capacity of 16 children, at the time of the second hearing session depending on the day of the week the classroom had 7 to 9 children and last year it had 7 to 12 children. [NT 546]
58. Over half of the children in the IU Placement are typically developing peers. [NT 547]
59. The IU Placement operates 180 days per year, four days a week for 2.75 hours each day. The Child would also receive an additional 6 hours per week (1.5 hours per day) of individual ABA therapy provided after the completion of the 2.75 hour school day. This would bring the Child's program to 4.25 hours per day, 4 days per week. [NT 206, 244; S-47]
60. The IU Placement classroom has a teacher who is certified in special and regular education, two assistants, and at times a personal care assistant for one child. All classroom staff are Safety Care trained. Speech/language, occupational and physical therapists provide services in and outside the classroom. A behavior specialist is available to the teacher as needed. [NT 545-549, 628-629]
61. The teacher in the IU placement has experience teaching children with Autism. She facilitates social skills throughout the school day based on individual IEP goals, and also uses social stories and a structured curriculum to assist in developing appropriate social skills. [NT 550-552]
62. The individual ABA therapy the IU Program includes for the Child would, among other things, address socialization and generalization of skills. [NT 245]
63. The BCBA has observed the IU Placement approximately 40 to 50 times over three years, with the most recent time being July 2016. She believes that it would be an excellent match for the Child. The teacher provides a very well-run classroom and, as a special education teacher, she naturally embeds the supports that the Child would need. The typically developing children are "so amenable to being a therapy partner" that it makes it so much easier to do the difficult work with a child who needs to have more complex verbal behavior put in place. [NT 397-399, 441-442]

The Private Program

64. The Parent first made application to the Private Program in April 2016 and the Child was accepted in May 2016. The IU did not issue its evaluation until the very end of April and the IEP team did not meet for the first time until the end of May. Given this timing the Parent had pre-selected the Child's placement at the

- Private Program prior to the IU's offer of a program/placement. [NT 165-166, 194-195]
65. The Private Program that the Parents are seeking is a Pennsylvania licensed private school for children with autism in preschool through 4th grade. The Private Program is currently in its fourth year of operation. [NT 136; P-38]
 66. When children are placed in the Private Program the IEP that was generated by the sending IU or school district is utilized. IU or District staff are invited to the Private Program for subsequent IEP meetings. [NT 164]
 67. The Private Program has 24 students currently enrolled, with 8 children in each of three classrooms. Each classroom has a teacher with dual regular education and special education certification and an assistant teacher with the same credentials. There are three instructional assistants who have at least three years' experience doing ABA therapy. If a child requires an instructional assistant assigned solely to him or her there is an extra tuition charge. [NT 136-137, 140]
 68. In the Private Program's preschool classroom the children's ages currently range from three through five, although some will turn six this year. There is one nonverbal child with apraxia, and the others are "beginning talkers, if not very verbal". [NT 146-147]¹²
 69. Based on a review of the EI Family Service Plan, a record review, and a two-hour visit by the Child, the Private Program also determined that the Child did not need an FBA or a dedicated one-to-one ABA therapist. [NT 164, 169]
 70. The Private Program's mission is to have the children leave for a less restrictive placement as soon as possible, often after three to six months. Frequently when children leave they move to another private program that has an arrangement with the Private Program. [NT 137, 161-163]
 71. The Private Program operates five days a week for four hours each day from 8:30 to 12:30. Of these 20 hours, up to 5 hours are with about 10 neurotypical peers who come into the Private Program's classrooms in a reverse mainstreaming model that would then have about 18 children present during that time. The preschool program runs for 173 days per year; breaks are at the typical times for Thanksgiving, winter and spring. There is a summer program for which extra tuition is charged; there is a two week break prior to the start of the summer program and a four week break after the summer program ends. [NT 137-138, 140-142, 159-160, 162]

¹² See the BCBA's comments at NT 378 regarding her concerns about language development in a learning environment such as the Private Placement with no constantly available typical peers; on NT 382 about social skills acquisition in the same type of environment; and on NT 387-388 about learning to follow functional two-step directions in the same type of environment. See also the IU speech therapist's comments about the need for typical peers to model complex language at NT 506 and 518.

72. The Private Program is not offering the Child a one-to-one aide, which the Parent acknowledges is not the best situation. The Parent's independent evaluator recommended one-on-one support in preschool to increase the Child's involvement in small groups to assist with any distress. [NT 169, 222, 225]
73. All the preschoolers in the Private Program receive the same amount of related services: two 30-minute individual speech sessions, three 20-minute speech groups, and one hour of occupational therapy services split between 30 minutes individual and 30 minutes group, which is a sensory motor based session. [NT 138, 166-167]
74. The Parent asserts that the Child has anxiety and therefore needs to be in a small group learning environment. However the Parent did not inform the Private Placement of this concern when applying for the Child's admission. [NT 77, 98-99, 173]
75. On the Connors Early Childhood Scale the Parent's endorsements resulted in an average range score in the area of anxiety. The private ABA therapist did not make any mention to the BCBA about the Child being anxious. In her observations the BCBA did not note that the Child exhibited anxiety¹³. [NT 357-358, 439-440, 673-675; S-20]
76. In requesting placement in the Private Program, the Parent relies in part on the fact that when the Child was 26 months of age a developmental physician from a hospital for children opined that the Child would need ABA therapy at that time and into preschool. [NT 116-118; P-28]
77. The length of time that children require ABA services is "totally variable" and "extremely variable" based upon the child's response to treatment. [NT 135]

Current Placement

78. Towards the end of July the Parent applied for the Child's admission to a language-based small classroom setting (Classroom) for two days a week, for 2.5 to 3 hours per day. The classroom has eight children and is staffed by a special education teacher, a speech therapist and interns from a local college. [NT 196, 198-199]
79. The Child started at the Classroom on September 14, 2016. The Parent chose this placement pending the outcome of the hearing and pending a slot opening up at the Private Program. [NT 198-200]

¹³ In addition to being a BCBA the behavior analyst has training as a school psychologist and is Pennsylvania and nationally certified in that specialty; I accept her observation about the Child's not displaying anxiety as a professional opinion. [NT 337-338]

IEE¹⁴

80. The independent evaluator did not speak with any of the IU staff or the IEP team during the course of conducting her evaluation. [NT 567]
81. The Parent received a draft of the IEE in August 2016, and after reviewing it had a conversation with the evaluator during which the Parent asked the evaluator to change some wording in the report, including in the recommendations. The evaluator finalized the report and provided it to the Parent on or about September 1, 2016. [NT 564-565; P-52]

Discussion and Conclusions of Law

General Legal Principles

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 outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. 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 therefore the Parents asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

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); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014). I found the Parent to be a stalwart advocate for her child. I found no major credibility issues with any witness, although the private evaluator was at times rather vague as to the underpinnings of her recommendations. The current private ABA therapist's candor was commendable as she

¹⁴ The independent evaluator was scheduled to testify by telephone at a set time but could not be reached. When alternate arrangements were made and she was reached by phone, the independent evaluator noted that she had only a 15-20 minute window of time; it is unclear whether the Parent had been informed of this limitation beforehand. Although the independent evaluator stated that she would be open to testifying on another day if needed neither party requested that she do so. Accordingly her testimony was quite narrow in scope.

largely resisted the Parent's tendency to try to elicit specific answers to support the Parent's position.

FREE APPROPRIATE PUBLIC EDUCATION [FAPE]: 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). Local Educational Agencies [LEAs] including Intermediate Units 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. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009).

MEANINGFUL BENEFIT: "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). Meaningful educational benefit must relate to the child's potential. *Ridgewood; S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). 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*. The appropriateness of an IEP must be determined as of the time at which it was made, and the reasonableness of the program should be judged only based on 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 (3rd Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

An LEA is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988); *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3rd Cir. 2012). An IEP is not required to incorporate every program, aid, or service that parents desire for their child. Rather, an IEP must provide a "basic floor of opportunity" for the child. *Mary Courtney T. v. School District of Philadelphia*. In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "...the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “*de minimus*” benefit is required. *See Polk; Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) Thus, 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).

LEAST RESTRICTIVE ENVIRONMENT [LRE]: There is a strong and specific preference in the IDEA that, (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2). The IDEA regulations also recognize, however, that there are circumstances where “the nature and severity” of an eligible student’s disability makes education in a regular school setting unsatisfactory. For those situations, the IDEA regulations require an LEA to provide “a continuum of alternative placements,” such as “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals.

In *Oberti*, the Third Circuit set forth a two-part test to determine whether an LEA is complying with the mainstreaming requirement. First, a “court must determine whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.” *Id.* (quotation omitted). Second, if placement outside the regular classroom is necessary, then a “court must decide whether the school has mainstreamed the child to the maximum extent appropriate.” *Id.*

PARENTAL PARTICIPATION: A placement decision is a determination of where a student’s IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116. The IEP team, including parents, makes placement decisions. Like the formulation of an IEP, a placement decision is not a unilateral matter for LEA determination. 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA merely mandates parental participation in the placement decision, 34 CFR 300.116(a)(1), but does not suggest the degree of weight parental preference should be given.

Numerous court decisions have noted that although Parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it. *See, e.g. Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) [noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives”]; *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) [“[P]arents who seek public funding for their child's special education possess no automatic veto over a school board's decision”]; *Rouse v. Wilson*, 675 F.Supp. 1012 (W.D.Va.1987); 34 C.F.R. Pt. 300 App. A, at 105 9 “The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive [a free appropriate public education]” and *A.G. v. Wissahickon School District*, 374 Fed. Appx. 330 (3d Cir. 2010)[[Did the district consider the] “whole range of supplemental aids and services,” including “efforts to modify the regular education program to accommodate” student.

TUITION REIMBURSEMENT: Parents who believe that an LEA’s proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA’s implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency enroll the child in a private...school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment...”

Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” *Burlington*, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

Then, in 1997, a dozen years after Burlington, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i)In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if

that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

INDEPENDENT EDUCATIONAL EVALUATION: Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

Discussion

The Child who is the subject of this hearing is described by the Parent, by the private providers and by the IU evaluators as a youngster who is functioning very well overall, albeit with deficits primarily in language and social skills consistent with occupying a place on the autism spectrum. The evidence supports the finding that in order to receive FAPE the Child requires delivery of the general education preschool curriculum in a highly supported classroom setting with maximum exposure to typical peers.

IEP: The Parent spent a great deal of time at the hearing building her case that the Child has made considerable progress, particularly in language and cognitive skills, such that the July 2016 IEP goals are now inappropriate and were inappropriate at the time the final IEP was drafted. Given her participation in four reportedly lengthy IEP meetings it is difficult to understand how the IEP was inappropriate as soon as the ink was dry. However, it is not difficult to understand that in subsequent months the Child has made progress such that the IEP may have to be revised once preschool begins. Two of the witnesses called by the Parent are private providers who credibly testified that in fact the Child has made progress on, but has not yet mastered, the goals on the IEP within their areas of expertise, and that given that the Child had no group educational experience it was not inappropriate to begin at levels where the Child was comfortable. An IEP can only be judged as of the time it was issued, the question being whether or not it was reasonably calculated to enable the Child to make meaningful educational progress. Based on the documents and the testimony in the record before me I find that the July 2016 IEP was appropriate. I also recognize that whether it was implemented at the IU Placement or the Private Program there is a likelihood that after a settling-in period and progress monitoring revisions would be called for. Revising the IEP need not be a difficult process given cooperation between the parties.

Placement: In contrast to her position that the Child is higher functioning than the IEP would reflect, the Parent also takes the somewhat contradictory position that the Child requires placement in a program exclusively dedicated to educating disabled children.

Primary reasons for this position are her concerns about class size and her desire for the Child to be in a program that is based on ABA practices. Although the Parent's preferred program seems to be a good program that can well serve some children on the autism spectrum, I do not find that it is necessary or appropriate for this Child.

In deciding this case I am not charged with weighing two proposed programs and discerning which is better. The IU must afford the Child with an appropriate program, not the better of two programs or the best program. Once the responsible educational agency has offered an appropriate program, other potential programs are not under consideration. However, for the benefit of the Parent who put a great deal of commendable effort into preparing and presenting her case I will briefly provide two reasons why I find the Private Program inappropriate. First of all, the law requires that to the maximum extent possible children with disabilities must be educated in the least restrictive environment that is appropriate to serve their individual needs. The IU has provided ample support for the position that the particular pattern of strengths and needs makes this Child eminently suitable for participation in a preschool program with daily and constant exposure to the language of typical peers and to play parallel to, and eventually with, typical peers. Second, given the Child's need for an educational setting enriched by the language of typical peers, I am concerned that the group of children in the Child's Private Program classroom would consist of one child with apraxia and the rest "beginning talkers, if not very verbal" according to the program director.

The Child's best chance of being in a "typical classroom with support" in accord with the Parent's stated and reasonable wish is most likely to be the reverse mainstreaming placement the IU is offering. The classroom has virtually the same number of children that the Private Program classroom has, except that 50% of the children are typically developing peers. The IEP provides the Child with a full time ABA-trained one-to-one aide supervised by a behavior specialist consultant who also supports the classroom team. The IEP provides 6 hours of individual ABA therapy. The IEP calls for related pull out and push-in services in the areas of speech/language, occupational therapy and physical therapy. Most importantly the reverse mainstreaming classroom provides a setting where the Child is a fellow-student along with typical peers who are modeling complex language and being potential playmates.

Current Classroom: The Parent provided a scant description of the current classroom in which she unilaterally placed the Child. However, even if it had been described in detailed testimony, and even if it were found to be appropriate for the Child, tuition reimbursement would be denied. Once the IU offered an appropriate placement for the Child, it bore no further responsibility for funding a private program of the Parent's choice. Therefore I cannot order that the Parent be reimbursed for the tuition spent on the current Classroom.

IEE: The Parent has asked for reimbursement for the independent educational evaluation obtained privately. The IU's evaluation was comprehensive and appropriate to develop the Child's IEP and to inform the placement decision. The report provided by the private evaluator did not add substantial new information such that reimbursement might be

considered. Further, the limited time the evaluator allotted for examination did not permit detailed enough of an explanation of the nature of and the reasons for the revisions made at the Parent's request. I cannot find a basis for reimbursing the Parent for the cost of the private evaluation.

Dicta: The Child about whom this hearing was held is fortunate in many respects. First and foremost because of clearly loving and invested parents, second because of a pattern of strengths that strongly augur well for successful school-age inclusion in typical classroom settings with support, third because of a team of highly skilled IU evaluators and service providers who presented as sincerely and deeply invested in designing an excellent educational program, and lastly because of the availability of the exceedingly appropriate reverse mainstreaming program within the IU's boundaries. The parties have spent a great deal of time, effort, and resources litigating this matter. Given the Child's tender age, and the many years until high school graduation, it is hoped that they can now put aside their differences and work together to make this Child's anticipated success a reason to celebrate together.

Order

It is hereby ordered that:

1. The IEP the IU offered to the Child via a NOREP on July 27, 2016 is appropriate.
2. The reverse mainstreaming placement the IU offered to the Child is appropriate.
3. The IU does not owe reimbursement to the Parents for the tuition they paid for the current Classroom.
4. The IU is not required to reimburse the Parents for the Independent Educational Evaluation they obtained for the Child.

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

November 19, 2016

Date

Linda M. Valentini, Psy.D., CHO

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